

T H E Q U E E N

v

ANDREW JOHN GUMMER

Dates of Judge Alone Trial: 19,20 and 21 September 2005

Date of Verdict (and Reasons): 26 September 2005

Appearances: R Squire QC and J L Mullineux for the Crown
M Levett and J Mathers for the Accused

VERDICT AND REASONS OF JUDGE RODERICK JOYCE QC

[1] Mr Gummer has faced 24 counts that with intent to defraud he used documents capable of being used to obtain a pecuniary advantage, or else a benefit or pecuniary advantage, for himself or Hillcrest Marketing Limited, trading as United Car Sales. The date range is March to September 1996.

[2] The essential ingredients of the charges laid under s 229 of the Crimes Act (as it then stood) are such as to require, in each case, the Crown to establish four elements against him.

[3] The first is that he used a document. That word carries its ordinary meaning of employing something for a particular purpose. Thus, to 'use' a document means simply to knowingly employ it as a means to achieve a desired purpose and a document is anything that contains or conveys information. The items here in issue are just that.

[4] Secondly, the Crown must show that the document was capable of being used to obtain a benefit or financial advantage, as the case in the particular count may be. [Here, depending on the count, the Crown ultimately identifies one or other of a profitable sale or the registration of a vehicle to enable sale in New Zealand, or a disposition to enable repayment of indebtedness to a Japanese agency].

[5] Thirdly, the Crown must show that Mr Gummer actually used the document in question for the purpose of obtaining such advantages.

[6] Use may be personal or involve the direction of a transaction that the accused knows will require the document to be created to carry out a transaction. That is the clear thrust of the discussion of the topic in **R v Adams & Ors** T 240/91, the verdict and reasons of Tompkins J in the Equiticorp prosecution at page 23.

[7] It is an approach noted by His Honour to accord with the law relating to the commission of a crime through an innocent agent. As His Honour said, "a person uses a document with intent to defraud if he, with that intent, has another innocent person use the document to achieve that object".

[8] It will encompass an accused giving a document to an agent who is to make use of it himself, or to convey it to another who may rely on it. See **R v Fowlds** 13/12/00, CA 222/00, and **R v McGrouther** 22/3/04, CA 349/03. No particular direction is necessary if the handling of it is a normal and incidental part of the carrying out of a transaction – **R v Gunthorp** 9/6/93, CA 46/93.

[9] Fourthly, and lastly, the Crown must show that the using of the document was that with 'intent to defraud'. You defraud someone if, acting yourself or through another, you get something from them by deliberately and dishonestly leading them to believe something you know to be untrue.

[10] You act dishonestly if you act in breach of a legal obligation – act in a way you have no right to act – and without an honest belief that you are entitled to act in that way.

[11] So, if you deliberately and dishonestly thus lead a person to believe something which you know is untrue, so as to get from them something you would not have got if the truth had been known, you are acting with intent to defraud.

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[12] Mr Gummer was a director and dealer principal of Hillcrest Marketing Limited trading as United Cars. This is the company which, in each case, features in the indictment. It was a licensed motor vehicle dealer.

[13] The Crown case is that he had a Japanese corporate entity, Nikki Corporation, "clock" – that is to say rewind – the odometers of vehicles he purchased in Japan for export to New Zealand. And that, knowing that to have been achieved, he himself, or through others, variously dealt with the vehicles in question by way of sale for profit or to defray debt – or at least to ensure their registration and thus ability to be sold in New Zealand; each and all of the cars being a Japanese import.

[14] Basically, the 24 counts break down into two categories. One is where attention is on vehicle sale and purchase agreements made in New Zealand where United Cars was vendor. The other is where the documents in issue are Japanese auto appraisal certificates (colloquially known as JAAI's).

[15] At the time, these were part of the documentation necessary to gain a VIN number for a vehicle in New Zealand, and thus registration following arrival here, if not to secure export to New Zealand.

[16] Both the sale agreements (which were in standard MVDI form) and the certificates – the JAAI's – stipulated the recorded on the odometer mileage of each vehicle.

[17] In the first category are counts 1, 3, 4, 5, 6, 12, 13, 14, 18, 19, 20 and 23, although there was something a little different about the documentation in count 19 and I shall duly come to that.

[18] In the second category are counts 2, 7, 8, 9, 10, 11, 15, 16, 17, 21, 22 and 24.

[19] As to category 1, the Crown says that the agreements recorded a false mileage to gain a better price.

[20] As to category 2, the Crown said at the outset that the JAAI was a *sine qua non* of the kind already explained and, of course, the vehicles were being brought here for sale – something that required the ability to gain registration. When all the evidence was done, it appeared that many of, if not all, these vehicles had in any event been sold or secured to gain the benefit of overdue debt defrayed.

[21] Conscious as I am that each count must be given individual attention and be determined only on the basis of the evidence applicable to it, the fact here has been that the evidence on the ultimately crucial issue of intent to defraud has ranged across all the counts. There has been a general uniformity or conformity of evidence on the other elements too (though that has been subject to the just mentioned categorisation elements) but I will identify those cases (two of them) where the general pattern is broken and deal with that appropriately.

[22] In the course of the trial I was asked to admit the preliminary hearing deposition of Seiji Abe and the documents identified by him; also the statement of Masino Amino admitted by consent at that hearing and subsequently ruled admissible by Judge Hubble on 27 November 2001.

[23] That application was supported by an affidavit from the second Secretary at the New Zealand Embassy in Tokyo made on

15 September 2005 to the effect that neither individual was available to come to New Zealand.

[24] It was not suggested there was any reason for me to revisit the ruling of Judge Hubble and, though not consenting, defence counsel raised no particular reasons to resist these aspects of the applications, the grant of which I now confirm.

[25] I should perhaps briefly explain that Abe's evidence is largely formal – describing the auction process and proving business records showing the original odometer readings of the vehicles, the subject of the charges, but not itself linking the accused to the alleged offending.

[26] Amino's evidence is in a similar category. It describes the auction process in Japan and identifies business records of relevant odometer readings.

[27] This is perhaps the point at which to note that Mr Gummer accepted under cross examination that all of the vehicles in question must have been rewound after purchase by him at auction and before their export from Japan.

[28] I also confirm the admission of the written statement (admitted by consent at depositions) of Mr Bartlett, the Serious Fraud Office officer now resident in the United Kingdom, whose involvement in the case as the officer executing a search warrant at the United Cars premises in December 1996 was not in issue.

[29] That leaves the evidence of Mr Akaho which, if accepted as of real weight and worth despite the double hearsay nature of it and the absence of any cross examination opportunity in respect of it, would be damaging to Mr Gummer.

[30] Judge Hubble had held that admissible too, but not before a jury. When Mr Gummer sought and was granted trial by Judge alone, the Crown

sought to have that exclusion removed as redundant and the evidence consequentially held admissible. I so declared in my 15 July 2005 ruling. I was not asked or given any reason, however, to revisit Judge Hubble's substantive admissibility finding.

[31] In the course of that ruling I found it necessary to categorise the opposition to it as a collateral assault on the consequences of a judgment of the Court of Appeal of 1 December 2004 dismissing once and for all Mr Gummer's endeavours to stop the present prosecution in its tracks.

[32] There will be no more mention of Mr Akaho's evidence until I have traversed and recorded my considered reactions to that of pertinence otherwise adduced on both sides of the case.

[33] The essence of the, established by substantially uncontested evidence, factual narrative is this – over the period in question, numbers of New Zealand motor dealers were attending auction house sales in Japan where, during the period in question and with the numbers growing over time, as many as a thousand or two vehicles might be displayed for sale on any one occasion.

[34] Only auction house members could deal with any auction house and bid – so New Zealanders had to engage a qualified in this respect agent. || For Mr Gummer and his company that was Nikki Corporation. This was also the case for a Mr King, another licensed motor vehicle dealer called by the Crown to whose evidence I shall in due course turn.

[35] In the hours before the auction, the vehicles would be parked in series rows, tidily and logically corresponding with their listing in previously made available auction lists or catalogues. These, and individual sheets of vehicle details that sat obviously in each car (a copy of which your agent would obtain on sale) showed in each case the odometer readings.

[36] It was Mr Gummer's own evidence that, at least in respect of cars (as opposed to, say, four wheel drives) he particularly wanted readings of no

more than 40,000 to 60,000 kilometres. It was for cars of this kind that he considered he had a good market in New Zealand.

[37] Familiarity with the process, which I judge Mr Gummer would have quickly gained, would teach you that these sheets, as with the auction lists, were very accurately compiled and gave a comprehensive and instructive paper picture of the vehicle.

[38] Sales would be conducted using a button controlled electronic process in some kind of arena or amphitheatre. Cars would be driven past (seen perhaps through glass) with the sheet details being flashed up electronically as this occurred. You would work with the agent from your assigned place to place your bids and achieve purchase confirmations. All odometer details were recorded, written and displayed during the auction itself in familiar to any New Zealander numerals.

[39] At this point I turn to the evidence of Mr King. He was an extremely reluctant, but in my clear view highly reliable and credible witness. He was and is a motor vehicle dealer who had bought cars in Japan at like auctions to those patronised by Mr Gummer.

[40] It was clear from his evidence just how informative both the auction lists (or catalogues) and the sheets found individually in the vehicles were. Also how easy it was to locate and match cars to the lists.

[41] As he said (at page 49) and concerning the individual sheets:

On that auction sheet would be all the information that you needed, an inspector who worked for the auction would have already inspected the car and written down things about the condition, the owner could disclose faults if he'd wanted to, it would have things like the year, the kilometres, how much shakum was left on it which was like a registration system, so how many months were left which was of interest to the Japanese market, well obviously to us too because the less shakum the easier it was for us to buy them, whether the car had had an accident or not, all the information you needed was disclosed on that auction sheet.

Question: *Would Mr Hedato accompany you when you carried out the inspection of the vehicles?*

Answer: Yes.

Question: *Were the auction sheets in the Japanese language or English language?*

Answer: *Mainly language.*

Question: *So again he would be available to translate those parts of the auction sheets that you wanted translated if necessary?*

Answer: Yes.

[42] Mr Hedato was Mr King's agent on the ground.

[43] As we shall see from his own evidence, and as one would expect, Mr Gummer was similarly supported except he said that he had different agents from day to day (Mr King said he had the same one) and that, as time went by, he placed more direct reliance on the agents – this even though they kept changing.

[44] Mr King explained that though, in those days, auctions might field up to two thousand cars, they could easily be walked beforehand.

[45] Mr Gummer's yet to be discussed in other respects evidence was of an at least initial fastidiousness in his inspections, and I remember also that the periods we are dealing with were relatively early in his Japanese association.

[46] I extract this from Mr King's evidence (pages 50-51):

In those days you could walk every car quite comfortably. You would have marked off – you would have checked the condition of the vehicles which you thought were suitable and you would – when the auction would start they would start the first car and work through and you would bid. In those days it was just the beginning of the computerised bidding system where you would have a button that you would push and every time you pushed it you would push the price up 3000 yen and the car would be behind a glass – would be driven through behind a glass panel on the other side of a glass panel with everybody sitting in a stadium on the inside. Or at that stage they were

just starting to possibly take a – have taken a digital photo of the car and have that on a computer or on a screen up on the wall, instead of driving them through. It's just at the changeover period and you would push the button until you got up to a price that you were comfortable paying that you knew would work for the New Zealand market and you could possibly own it then, or the bidding may keep going because the Japanese market could often afford to pay a lot more than we could so you missed it. Or the reserve may be set higher than you were prepared to pay, so you wouldn't be able to buy it on that account.

Question *If the vehicle was driven into the stadium-like amphitheatre that you were talking about, or the vehicle was shown on a screen, if it wasn't driven in, was there any other information conveyed either by screen or otherwise to prospective purchasers of the vehicle when it actually came into the auction?*

Answer: *Yes it would – you would have a computer generated – in those days only one car went through at once so there was no confusion, now you have up to six cars going through at once with six buttons, but in those days there was one car, one button and you would have the car behind the screen, you would have the number that was out of your – which is out of the auction list which I've described beforehand which you were working through, so you knew that that car was definitely the one that you were possibly interested in. You would also have this auction sheet would be displayed on a wall by – in those days, either computer generated or possibly on one of those old things that have gone, that we used to have at school that displays –*

Question: *Throws up the image on a screen?*

Answer: *On the wall, yeah, so there was no misunderstanding as to – car was off the auction list and the spreadsheet was there – the auction list was there.*

Question: *When the image of the auction sheet was thrown up in the fashion that you've told His Honour about was it available for everybody who was at the auction to see?*

Answer: *Yeah, everybody could see it, every seat was set up so you had a view.*

Question: *When you were actually bidding for the vehicle did you have Mr Hedato with you?*

Answer: *Yes.*

Question: *Did he actually press the button as it were, or did you, or did he on your instructions, or how did it work?*

Answer: *Usually you would tell him how much you're prepared to pay and usually he would push up to your price, or try them below your price.*

And then, not much further on, this question of Mr King:

You've told His Honour the process by which you actually purchased the vehicle, after that process had been gone through was there anything else that you needed to do in relation to your agent to formalise or complete the purchase of the vehicle?

Answer: *At the end of the day they would fill in a confirmation sheet and get you to sign it.*

[47] Predictably, Mr King had a policy too, related to his profitability in New Zealand plans, as to the kilometre range within which he would purchase.

[48] The agent was always there – in his case the same Nikki, or associated corporation, one. Nothing less would be expected when, if you bought say 20 cars in a day, the fixed commissions would fetch the agency, on Mr King's evidence, say, \$20,000NZ so the agent was, as Mr King said, there to look after you every step of the way.

[49] Significantly too, he told defence counsel in cross examination that (transportation costs perhaps left aside) you were never charged anything extra for anything extra they had to do because they never had to do anything to secure export.

[50] I should make clear here that Mr King, through 1996, was dealing, like Mr Gummer, solely through Nikki Corporation or a member of its group.

[51] I count it significant – as will emerge – that except where Mr Gummer sought to distance himself from events of significance on the knowledge issue, he related very much, if not in truth entirely, the same auction process

as Mr King. And I note again that, as was obviously Mr King, Mr Gummer was on his own evidence a careful and attentive buyer.

[52] That brings me to Mr Gummer's evidence. His visits to Japan (those under focus) were between 10 and 20 February and 16 and 23 March 1996, during which periods he attended auctions pretty well every day.

[53] Cross examined by reference to Nikki business records of those times, he accepted that the lists included the 24 vehicles to which the counts relate – vehicles he bought when in Japan during those periods.

[54] As already noted, he accepted that each had been clocked, though he did not say – and it is not suggested – that he had seen the lists themselves at or around the time.

[55] It became common ground during the trial that, where there was an entry in a column in those lists headed "Oil", this denoted a rewinding or clocking of the vehicle in question. And where in that column the entry was a figure "50" standing for 5,000 yen (something over \$60NZ Mr Gummer said) this was a fee for that.

[56] Where, in the far right column, there was "OK" and a single set of figures, that was an unclocked vehicle. But where, instead, there were two sets of figures, one was the original and the other the clocked mileage. Each count-connected vehicle showed as clocked.

[57] I should explain right now – I should reiterate – that it was Mr Gummer's case that he was oblivious to all this at the time – these were things he said he only discovered much later.

[58] Mr Levett opened on the basis that the defence was that Mr Gummer himself had been the unwitting victim of Nikki's fraud on him. If that is right – or at least a reasonable possibility – it involves it being the case that the fraudster was charging the victim a fee for its unwanted services.

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[59] Still on this general topic, I note that the agency commissions (paid by the dealer like everything else to Nikki itself, and not to the different each, or virtually each, day individuals Mr Gummer said accompanied him on Nikki's behalf when he went to the auctions) were fixed in amount. In other words, for each vehicle bought there was a fixed fee payable and nothing particular to the vehicle would affect that.

[60] I acknowledge here that, although the Crown sought to have Mr Gummer acknowledge contemporaneous (at least related to when he got back to New Zealand) knowledge of invoice breakdowns of the totals payable for each vehicle, he would only accept sighting much more generalised one lump sum per multiple vehicle consignment documents which he said came first. His evidence suggested that the other material would only have been sighted, and that in due course, by his staff.

[61] So he was saying that, when he got home, any personal to him comparison of purchase price noted at the time of purchase with a short form multiple vehicle invoice would be by reference to fee or commission inclusive totals. He asserted here that minor discrepancies (such as 5,000 yen might be counted to be) would not have caught his attention. He would attribute those to the likes of minor repairs to the vehicle by the agent.

[62] All this was within the context of Mr Gummer, on his evidence, working within an informal credit facility from Nikki of 20 million yen, and with him being expected to buy individual vehicles that were in the 150 to 200 thousand yen price range. He said that he set out to secure 40 cars each month, to be sold at the rate of 10 a week, and with Nikki to be repaid accordingly.

[63] Mr Gummer accepted that the catalogues and the sheets with information found in the cars themselves all showed the presale odometer readings, and that lower readings had definite sale price, and thus return, advantages.

[64] He also said that as he got used to the process and (with Nikki effectively complaining that he was wearing their agents out with his Dawn Parade physical inspection requirements) he came to be more reliant on the auction list and (not mentioned by me before now) the gradings that the auction house inspectors had given the vehicles.

[65] Bearing in mind that, on his own say so, he was looking for 40 to 60 thousand kilometre range vehicles (upwards of that perhaps for utility type vehicles) it follows that he must have taken a keen interest in odometer reading details – could well have been expected to look for them first and foremost – and they were plain enough to find and see, and expressed in numerals all too familiar. In fact, he himself said “I believe I was understanding the correct mileage, yes”. ||

[66] That shortly led to this cross examination exchange (and a fresh tack by Mr Gummer) at page 125:

Question: *Well that being the case you would have been surprised when you had these vehicles arrive in New Zealand to find that their odometers were considerably rewound from what they were when you purchased the vehicles at auction in Japan?*

Answer: *No, they were the same as what they were telling me, when they were reading the cars out they were quoting me mileages and when the cars arrived in New Zealand they were the same mileage.* ||

[67] I interpolate here that this response indicates that he did make some sort of check when he got home and once the vehicles had arrived, so he must have had a record from his trips to make the check against.

The questioning continued:

Oh, I see, you're telling His Honour are you that these Japanese people who were your agents were misrepresenting the mileages to you at the time?

Answer: *That's correct.*

Question: *And so it just happens as a matter of coincidence that the figures that they misrepresented the mileages to you at the auction happened to be exactly the same as the figures in the Nikki list that we have and which are confirmed by the relevant auction sheets as compared with the JAAI certificates, is that the case?*

Answer: *You mean the mileages they were telling me are the same as what they were rewound back to?*

Question: *Mmm.*

Answer: *I don't think that's a coincidence.*

Question: *Don't you?*

Answer: *No.*

Question: *I see.*

Answer: *I'm sure they would have kept a note of the mileages they were telling me.*

Question: *Did you see them take a note?*

Answer: *They were writing something on the auction list yes.*

[68] All this left me puzzled as to why the agent (by which I essentially mean Nikki as there is nothing to suggest individual advantage to the different personnel Mr Gummer says he met with from day to day) would want to wind the odometers back on its own account; and that to a figure conjured up by the agent at the auction itself. || 12

[69] Mr Gummer himself said that the supposed fraud would – needs must – involve the agent's man falsely informing him of odometer details. Yet there they were, variously recorded in writing and readily accessible to him as a man concerned about them – not to forget at all flashed up on the screen with other details at the time of individual vehicle presentation. It would have taken a very brave or foolish agent (and remember Mr Gummer said he had different ones on different days) to take the risks obvious here. || 12

[70] As to the "why" – what might be in it for them – there was this at page 126: | 12

Question: *What's puzzling me is why or to what advantage might they do that, what could as you understand the whole process have been in it for them?*

Answer: *So that they would sell more vehicles. What was in it for Nikki Corp, he was anxious to export more vehicles, the agents were paid on a commission basis I understand so that the more vehicles they could get me to purchase the more money they could charge me for.*

Question: *So are you suggesting for example that at these auctions there might not have been enough vehicles suitable for your purpose, which I recall included their being in the 40 to 60,000K range, so that they would up the figures by telling you that other vehicles which did not match your criteria in fact did?*

Answer: *Yes it would certainly make it easier for them to get the purchase numbers up.*

[71] I note here that there had not before been any suggestion by Mr Gummer of any shortage of vehicles in his preferred range; but I recognise that the suggestion came from the question and that his answer does not, in all fairness, go so far as to in any unreserved way agree with that idea.

[72] Mr Gummer dealt with the matter of the details flashed on the screen in this way – I refer to questions by Mr Squire and the responses at page 127:

Question: *I think you agreed or you told your counsel yesterday that when the auctions were being conducted in addition to the cars passing through, the auction sheets were thrown up or portrayed electronically on a screen or on a wall, remember telling him that yesterday?*

Answer: *Yes there were pages like this, they were going up on the wall.*

Question: *So if your evidence is correct and these agents were in fact telling you the incorrect odometer reading, that surely would have been obvious to you wouldn't it by looking at what was thrown up on the screen because the odometer reading we know is shown in these auctions sheets?*

Answer: *Yes that's correct, I mean if you sit here and study these documents you can glean certain information, in the auction process you've got cars going through fairly rapidly, your eye is taken to the car, you're looking at the*

bidding numbers going up, that there I wouldn't have had any interest in looking at, just exactly the same as the reason why unlike Andrew King I couldn't see any point in going to the car and taking out initially when I was in Japan and taking out the inspection sheet and spending that minute or so trying to glean information from that, it was much easier just to give the Japanese agent, he would pick it up and tell me the information on it as I was looking at the cars.

Question: *But you would agree nonetheless that the situation is that if that is correct in each of the 24 or more vehicles, certainly the 24 we're concerned with in this case but the others which according to this sheet have been rewound, in each case they must have given you an incorrect odometer reading as you've told us, which was able to be checked and could be checked against what was thrown up on the wall from the auction sheet and in each instance you failed to detect that there was any difference, is that right?*

Answer: *That's correct, if you look at the way the numbers of vehicles have been wound back there's a few in the beginning and they got increasingly more towards the end.*

Question: *Yes and this is in respect of a particular issue that you've agreed with me is a pretty important factor in determining what you'll pay for a vehicle because as we agreed a vehicle with a lesser mileage is likely to be more attractive to a buyer than the same vehicle with a greater mileage, is that right?*

Answer: *Yes they had a parameter of between 40,000 and 60,000 kilometres, if it was a nice colour it could be slightly more, if it was a four wheel drive as Mr King said they could be more than that, but they certainly had a good understanding of what I required and what most of the New Zealand dealers were requiring when they were up there.*

Question: *And is it your evidence that you were never given nor were you ever shown auction sheets in respect of the vehicles which you purchased and which we now know had their odometers rewound?*

Answer: *They were available for me if I wanted them yes, they were on the table.*

Question: *Yes my question was were you ever given them or did you ever inspect them?*

Answer: *I would have inspected them cursorily, the first time I went there I'm sure I looked at the auction sheets.*

Question: *No, no, I'm talking about the two periods?*

Answer: *In the February and March periods?*

Question: *Yes.*

Answer: *I never looked at them to the point that I could see that there was any discrepancy between what they were telling me and what was on those auction sheets. I don't recall that I was looking down through the auction sheet gleaning information from the auction list, no.*

[73] I return in that vein to the matter of the clocking fee and the following inquiry I made in the course of cross examination; one which I pursued for the then explained reason. I am now at page 128 of the notes:

THE COURT: *There's another matter that puzzles me and I might as well clear it with you too, to the extent that you might be able to help me, because there's nothing worse in a case like this than leaving the courtroom with questions unanswered in your mind. It's this. If these agents were misleading you in the way we discussed a little earlier, then it does seem to me extraordinary that they would go so far as to charge you a fee for the follow up of their fraud on you, charge you 5,000 yen, add it to the price, have you any comment on that?*

Answer: *Yes, I've thought about that and I believe that they were doing these without the knowledge of the company knowing that they were doing it without my knowledge and that if these cars were being rewound then there had to be a fee charged for it through the company and – because they couldn't do it for free, and I think they were defrauding even their own companies by saying that, oh he's asked us to do this, there's the fee for it, put that on the end of his – on the end of his invoice amount and that would appear to the company that this was all part of some arrangement. That's the only thing I can think of.*

[74] I was unable by reference to this or to anything else in the evidence, or in any other way, to make any kind of possibly useful sense of that response.

I accept it was not volunteered, but my question was only asked because of what had been left distinctly hanging and unexplained by the witness's earlier evidence.

[75] In fact, Mr Levett chose to take the matter further with Mr Gummer at the end of his re-examination, picking up there on a later given (after a lunch break as I recall) indication by Mr Gummer that there was something more that he wanted to add.

[76] The passage is this:

Question: *And finally, you indicated to His Honour that you wanted to expand on an answer that you'd given him which I believe was concerning the proposition that the agent might defraud you and at the same time charge you for the pleasure?*

Answer: *Yes I thought about that long and hard and the only explanation I can come up with is that when we arrived there the first time Akaho made it quite clear not to ask about other people's business and not to ask him to wind back cars. I assumed therefore that they weren't in the practice of doing that. Now, going along the assumption that I've been duped if you like, the agents themselves, if Nikki Corp – if they were to say to Nikki Corp, we've wound these cars back without his knowledge, that would be an offence in Japan anyway, so I can only assume that the agents have commissioned me to accept these extra little bits, variances in the price of the cars from what I thought we were paying for them, but then to have to go through the procedures of actually putting a paper trail through so that it appeared that they were doing it on my instruction.*

[77] So what, after further reflection and at that later stage of his evidence, indeed last, Mr Gummer seems to suggest as at least a reasonable possibility is that Nikki or Nikki's men had not only clocked the vehicles off their own bat but also arranged matters so as to have it seem that that was actually on Mr Gummer's instruction.

[78] But amongst the obvious difficulties here for Mr Gummer's postulation, and more fundamentally for the issue of reasonable possibility, is that on

neither side of the case is there any indication that the individuals concerned – or for that matter Nikki itself – had anything of palpable significance to gain by doing so.

[79] For example, I do not find anything in the evidence to justify even the suggestion of the reasonable possibility that there could have been any need (in order to have Mr Gummer purchase a sufficiency of cars) to do it.

[80] I recognise in all this that Mr Gummer has carried no onus – that resting and remaining on the Crown throughout – but, in considering whether or not the Crown has discharged that onus, I must be vigilant for signs of any reasonably possible innocent explanation.

[81] Other aspects of Mr Gummer's evidence are important. The already identified counts where sale and purchase agreements figured involved (except for count 4) sale documents either admittedly executed by Mr Gummer himself or, as he admitted, by sales people acting on behalf of him and his company – people expected to perform and account for their performance accordingly.

[82] The vehicles in question of course came to be on the lot at his behest and for him and them to sell for United Cars. Each sale or other disposition would require to be preceded by, or include, registration. This would be achieved on the basis of the now acknowledged to have been false (but with, of course, the denial of a contemporary awareness of that) JAAI papers. The benefits of advantages variously arising here were referred to when I identified the essential elements of the charges and the Crown's approach to them in the context of this case.

[83] On the totality of the evidence in this trial, I have no difficulty in finding beyond any reasonable doubt the necessary elements – individually to be made plain by evidence bearing on each count - of "capability", "use" and "purpose". Indeed those elements were not really put in issue.

[84] In the case of count 4 there was an unsigned, containing computer generated details, sale agreement. Though so unsigned, the police book entry showed a sale to the nominated purchaser but my reservation in respect of this count will figure later. All of the agreements included what purported to be the odometer reading.

[85] With count 19 there was an informal, unsigned sale agreement with mileage details but Mr Gummer himself had achieved this sale and he confirmed it.

[86] In his evidence in chief Mr Gummer said that the vehicles in counts 2, 6, 8, 10, 11, 16, 17, 22 and 24 had been taken from the yard and "complied" by Phillip Nottingham after there had been a Nottingham (for Nikki) insistence on "security" for the line of credit when Mr Gummer had fallen behind in his – i.e. his company's payments – to Nikki.

[87] A document had supposedly been signed (it was not produced in evidence) conveying title in the then stock to the Nottinghams trading as Far East Imports.

[88] According to him the Nottinghams later breached that agreement by failing to account to Nikki for payments he made to Far East.

[89] Also according to him, and before this, there had been an interim arrangement by which they took away vehicles individually for sale, saying most if not all of the time that they had a buyer.

[90] In re-examination (and after, I took it some out of court dialogue between counsel – because there had been some initial dispute on the point) Mr Gummer produced a schedule of vehicles said to have been parted with to the Nottinghams pursuant to such agreements between him and them and some correspondence which (given its face value) was consistent enough with his evidence in this respect.

[91] Whatever the precise circumstances, it was Mr Gummer's evidence that under each arrangement the Nottinghams were to, to the extent it might not then have been accomplished, go and "comply" the vehicles.

[92] Assuming, as I shall, that his evidence here was accurate, Mr Gummer's obvious expectation was that the Nottinghams would repatriate the sales proceeds to Nikki in reduction of his or his company's indebtedness to it.

[93] That stage could not have been reached without once again the vehicles being "complied" on the strength of the odometer detail. This was quite specifically included in each and every of the here important JAAI certificates.

[94] So those certificates were plainly used by Mr Gummer in his dealings with the Nottinghams with – obviously enough – the recorded mileage levels holding for him and his company potentially quite real benefits in terms of better debt reduction.

[95] So all in all it comes back to the vital and common ground issue of whether Mr Gummer, in the various thus identified uses of documentation in which he was directly involved – or at least in the sense I have described instrumental – acted with intent to defraud.

[96] And I must ask and answer these question bearing very much in mind the need to give the requisite (that is to say in the end necessary) individual attention to each count.

[97] First, did he act himself or through the instrumentality of another (in the sense much earlier explained) to get or endeavour to get something from someone else (not otherwise to be got) by deliberately and dishonestly creating in them (per medium of the relevant documentation) or known by him to be untrue belief?

[98] In answering that question, and with the element of the "deliberate" not being in doubt, I must have it distinctly in mind that "dishonestly" here connotes acting in breach of a legal obligation – acting in a way you have no right to act – and without an honest belief that you are entitled to act in that way.

[99] And this to lead someone else to believe something which you know is untrue so as to get something from them not otherwise to be got.

[100] And at a fundamental level too I must keep reminding myself that proof – if proof there be – of intent to defraud must be established, as with any essential element of any crime, and after due regard to all of the relevant in each case evidence, beyond reasonable doubt. In short, and in respect of this, like every other essential element of any charge, I must find myself sure, or else acquit.

[101] Though I have considered all of the evidence (except to go back for this trial determination to that of Mr Akaho as conveyed by Mr Roigard, then of the Serious Fraud Office) I find it unnecessary to spell out more of it now than I already have.

[102] Mr Levett said in closing that there were two options on the evidence: either Mr Gummer knew the odometer readings at the time of purchase, or he was defrauded by the agents.

[103] Of course, my task is not simply to make that kind of choice: my task is to determine whether or not, on the whole of the evidence, the Crown has, in the end, carried the day on the element now under consideration – that which was agreed to be the real issue in this case – the allegation of intent to defraud.

[104] Although at times loosely called a commission (including by me) it is common ground that the fee paid per purchase was set beforehand. In fact,

and in the case of both Mr Gummer and Mr King, it had been set at the outset in New Zealand.

[105] There is nothing at all in the evidence to support the idea that clocking was of benefit to Nikki or its employees, unless you count in the paltry 5,000 yen (\$60NZ or so) fee recorded as charged each time.

[106] It is extraordinary – unbelievable – to think that a fraudster, acting on his own, would not only charge a fee for his fraud, but also – showing even more gall – would make a very specific note of it in his own records – a note of the precise nature of it, right down to the original and clocked mileage. This has to be the case, if a fraud on Mr Gummer is a reasonable possibility.

[107] There is no evidence that there was any shortage of vehicles actually in the range Mr Gummer sought – 40 to 60 thousand kilometres; no evidence of anything that would drive, or even encourage, agents to rewind on a unilateral basis.

[108] I do not accept that Mr Gummer fell into some trap of becoming overly reliant on the agents so that, at the very auction itself, they could have him believe that he was bidding for a car in his mileage range when the true mileage would have been up on the screen for all, including him, to see.

[109] That suggestion would belie the self-created picture of a careful, if not fastidious, buyer who had a clear position from the beginning of the mileage range that he would look for and at. It would also belie the instructive, entirely credible evidence of Mr King.

[110] There are some 24 or so purchases in issue here. It beggars belief that Mr Gummer could have been safely (from the agent's point of view) misled so many times. The rewinds were substantial. Vehicles, in truth, well beyond Mr Gummer's acceptable mileage range were pulled back into range.

[111] Mileage was a very important – if not the crucial – element as regards saleability. Mr Gummer had quickly learned that the auction gradings relating to the overall condition of each vehicle were remarkably accurate.

[112] My clear conclusion is that when a tidy vehicle, with no flaw but an excessive to Mr Gummer's likes mileage was in view, the temptation to make that fit was irresistible to him. Somebody had to make a rewind judgment and, in my view, that could only have been Mr Gummer. No other explanation makes the slightest sense.

[113] In the end, I am left convinced – persuaded, even on the Crown case alone, beyond reasonable doubt and so sure – that Mr Gummer most certainly knew of the rewinds; convinced, indeed, that the only fair, logical and reasonable inference is that he instructed that they be done. And indeed, as I believe I have shown, Mr Gummer's own evidence inadvertently added to the Crown's case against him in this respect.

[114] And so he returned to New Zealand knowing full well that the false readings would go into sale documents and for every car – as well as inevitably being entered up in the course of the registration process.

[115] And there is no contest but that, however precisely benefiting, the lower the mileage the better the actual or potential sale price or return or debt repayment to be achieved.

[116] So, in now turning to speak of Mr Roigard's evidence, I am doing no more than adding a postscript.

[117] I first of all note that Mr Roigard's experience of attending auctions in Japan in 1997 accorded with Mr King's and Mr Gummer's own evidence of the process the year before.

[118] I thus turn to the matter of Mr Akaho. Mr Roigard was present when Mr Akaho was interviewed on two separate occasions by the Tokyo public

prosecutor. At the first interview in 1997, and indeed at the second in 1999, the public prosecutor himself conducted the interview.

[119] On each occasion, Mr Roigard listened to the interview through an interpreter. He was not able to make any recording (beyond his own notes) of what transpired. It was relayed to him that Mr Akaho admitted that many dealers in New Zealand – Mr Gummer specifically amongst them – wanted and got rewinds. Whatever they wanted, he would do for them. It took about 10 minutes and he charged 5,000 yen.

[120] He identified the rewindings in contention here by reference to the already otherwise identified and introduced stock sheets or records of Nikki. The significance of such as the "oil" and far right hand columns has already been discussed. Because it was otherwise introduced into evidence, I will not rehearse it.

[121] Though I should perhaps mention here that amongst the evidence that I have not specifically referred to was that of a Japanese translator called by the Crown who took us carefully through the Japanese symbols on each of the pertinent documents.

[122] The second 1999 interview was a reiteration of the first, including the specific identification of Mr Gummer as a requester of rewinds.

[123] This evidence, as was long ago recognised by Judge Hubble, could only come to this court third, if you count the interpreter, hand. And Mr Roigard had to jog his memory from contemporaneous notes of a limited kind, now a number of years old.

[124] There had been no recording of the interviews – at least none available to him – and, of course, Mr Akaho – resisting any idea of coming to New Zealand – has not been available for cross examination. Had this been any kind of crucial evidence, I would most certainly not have convicted on it. But, as it has turned out, it is not.

[125] It remains only to say that Mr Akaho's references to Mr Gummer's conduct are at least consistent with what I have determined to be the case by reference to other evidence in the case.

[126] Having considered the evidence of actual weight and worth; including Mr Gummer's inadvertent contributions to the Crown case, but quite ignoring the reported say so of Mr Akaho, I am left sure (for the reasons already discussed) that the rewinds were on Mr Gummer's instructions and that, in every case, intent to defraud is made out beyond reasonable doubt.

[127] Thus, with the exception of count 4, where there is a doubt as to whether there was actually a sale, and thus pertinent use of a document (so that I acquit on that count), I find Mr Gummer guilty on all counts.

Roderick Joyce QC
District Court Judge