

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

Criminal Appeal No. 27 of 2012  
(Ind 43/12  
C0813/2012)

BEFORE

The Hon Elliott Motley, Justice of Appeal  
The Hon Abdulai Conteh, Justice of Appeal  
The Hon Sir Richard Ground, Justice of Appeal

BETWEEN

ROBERT SCHULTZ

Appellant

- and -

THE QUEEN

Respondent

**Ben Tonner** of Samson & McGrath for the appellant; and  
**Michael Snape** of the Office of the DPP for the respondent.

Hearing date: 18 April 2013  
Judgment delivered: 24 April 2013

**JUDGMENT**

1. This appeal is against a sentence of five years immediate imprisonment for the theft of US\$289,660.12 imposed by Quin J on 4<sup>th</sup> December 2012. The appellant had been the administrator of the Chamber of Commerce Pension Scheme. This is a Government approved scheme which can be used by local businesses to provide pensions schemes for their employees. The scheme is overseen by seven trustees, and the signature of any two of them is required for payments out. During the period covered by the indictment, 17 April 2009 to 25 June 2011, the

appellant made a series of unauthorised withdrawals from the fund by forging the signatures of two trustees. The indictment originally contained 28 separate counts of forgery and uttering to cover 14 individual transactions, but in the event they were allowed to lie on the file when the appellant pleaded guilty to the rolled-up count of theft of the total sum contained in count 1.

2. The plea was entered on 20 November 2012. The learned judge took time to consider sentence and gave careful written reasons for his decision. The challenge to them is that he adopted the wrong starting point for his consideration. Sentencing for offences of theft involving breaches of trust is governed by non-statutory guidelines, which derive from the English Court of Appeal decision in *R v John Barrick* (1985) 81 Cr. App. R. 78 CA. These guidelines have been applied in Cayman, and were affirmed by the Court of Appeal in *R v Scott, Fyne v R* 2007 CILR 175. Zacca P, in delivering the judgment of the Court, said:

“12. This court reaffirms its adoption of the guidelines on sentencing in *Barrick*, and the cases which followed *Barrick*, in cases of theft involving a breach of trust. Even for a first offence, the appropriate sentence is one of immediate imprisonment unless exceptional circumstances are shown. The length of imprisonment will vary in each case depending on the mitigating and aggravating factors. In light of the economy of the Cayman Islands, the sentence imposed by the court in cases of theft involving breach of trust should be one which would act as an effective deterrent.”

3. The judgment in *Barrick* promulgated sentencing ranges by reference to monetary bands. Being an English case, those bands were denominated in pounds sterling. The two main issues in this case are the extent to which those bands should be updated for inflation and how, if at all, they should be converted to the relevant currency. The original bands were, in summary -

<b>Amount stolen</b>	<b>Term of Imprisonment</b>
‘not small’ up to £10,000	very short up to 18 months
£10,000 - £50,000	‘about’ 2 – 3 years
£50,000+ (e.g. over £100,000)	3½ - 4½ years

It can be seen that the bands were not very precisely drawn, and they were prefaced by the observation – “The sum involved is obviously not the only factor to be considered, but it may in many cases provide a useful guide.”

4. The bands were reconsidered 12 years later in *R v Trevor Clark* [1998] 2 Cr. App. R. 137 CA, and updated for inflation. Again the Court of Appeal prefaced them by observing that many factors other than the amount may affect sentence. They also made it clear that these terms are appropriate for contested cases, and that pleas of guilty should attract an appropriate discount. The revised bands were -

<b>Amount stolen</b>	<b>Term of Imprisonment</b>
‘not small’ up to £17,500	very short up to 18 months
£17,500 - £100,000	2 – 3 years
£100,000 - £250,000	3 – 4 years
£250,000 - £1 million	5 – 9 years
£1 million or more	10 years or more

5. In this case the learned judge cited these guidelines and he placed the case in the £250,000 - £1 million range –

“55. For an offence of this very serious nature it is my view that the starting point is between six and seven years. It certainly comes within the higher tariff referred to by the learned Chief Justice in the “*Statement of Tariffs and Guidelines for Sentencing Certain Offences*” for more serious cases<sup>1</sup>. Moreover, on the basis, as explained by Lord Justice Rose in *R v Clark* I would regard this case as coming between \$250,000.00 and \$1,000,000.00 – meriting between 5 and 9 years. There is a compelling basis for treating the Cayman dollar as having parity of value with the UK pound for the purposes of sentencing, and not to engage in a currency conversion process.”

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<sup>1</sup> The Chief Justice’s guidelines on sentencing provide –

“For offences of THEFT or related offences, depending on the value of the property stolen and any other aggravating factors, particularly where there is a breach of trust in the context of a relationship of employment, an immediate term of imprisonment ranging from 1 to 4 years for a first offence, and an order of repayment, will likely be imposed. The tariff could be higher still depending on the seriousness of the offence.”

6. However, in applying the bands from *Clark* the Judge did not update them for inflation in the 15 years since that decision. He can hardly be blamed for this, as he was not invited to do so by counsel. On the other hand, it appears that it is usual for sentencing courts to have some regard to this factor. Thus in *R v David Edward Fisher* [2009] EWCA Crim 251 at paragraph 12, the English Court of Appeal made an unquantified allowance for inflation. Similarly, in *R v John Singh* [2007] EWCA Crim 1875 Tugendhat J, sitting in the Court of Appeal, said at paragraph 13 –

“Mr. Bridge refers to the case of *R v Clark* [1998] 2 Cr. App R(S) 137. . . . Those are figures given in 1998, some 9 years ago. Accordingly, the figures in question in the present case comes (*sic*) within that range but not as near to the top of the range when adjusted for inflation as might at first appear.”

7. Mr. Tonner says that the total rate of inflation since the *Clark* decision in December 1997 is 47%. He adduces no evidence in support of that figure. Such calculations may be subject to argument by economists and infinitely nuanced. Nevertheless we think that we can safely take notice that in the intervening 15 or so years there will have been considerable inflation and that the bands will have shifted accordingly, without the need for a mathematically precise quantification of that. If this theft had been denominated in pounds it seems to us that the effect of inflation would have been to bring it well under the upper threshold of the 3 – 4 year bracket.

8. Of course, the theft was not denominated in pounds. The indictment alleges an amount in US dollars. The Judge appears to have misread this as CI dollars, because of his assertion that there “is a compelling basis for treating the Cayman dollar as having parity of value with the UK pound for the purposes of sentencing . . .”. Even were the Judge right about parity, the fact that the sum charged is in US dollars, and not CI dollars, would still push it into the lower bracket (even without allowing for inflation) because it was always near the borderline<sup>2</sup>.

9. However, it is not clear on what basis the Judge came to his conclusion that the pound and the CI dollar should have parity for these purposes. Although he speaks of ‘compelling

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<sup>2</sup> US \$289,660 is CI \$241,383.

reasons' he does not identify them. We do understand and accept that a precise currency conversion may not be a very helpful exercise in such cases, but some sort of conversion process has to be undertaken in order to apply the *Barrick* and *Clark* guidelines. We have not had the benefit of evidence or detailed argument as to what that broad approach should be, and so we are not going to venture a rate. We simply observe that the disparity in the cost of living between Cayman and the United Kingdom argues against parity because the CI dollar does not have anything like the same buying power in Cayman as the pound sterling does in the United Kingdom. Similarly, a straightforward exchange rate conversion is not going to give a true picture for these purposes, where what matters is the value of what has been stolen in real, everyday terms.

10. However, even without a detailed currency conversion or a precise figure for inflation, it seems to us quite clear that this sum was properly within the 3 – 4 year starting range and not the higher one. Of course we accept the learned Judge's aphorism that the bands from *Barrick* and *Clark* are guidelines not tramlines. Nevertheless he began his consideration by placing the case in the 5 – 9 year bracket, and in doing so we consider that he erred in principle, and in the circumstances of this case that led to a sentence which in our view was manifestly excessive. We have, therefore, approached the sentencing exercise afresh.

11. The guideline figures are for cases after a contested trial. It is usual to apply a discount of up to one third for a plea of guilty. In this case the Judge allowed a 25% discount for the appellant's guilty plea. That seems to have been reduced from a possible discount of one third due to an attempt by the appellant to abscond while on bail, and we do not think that approach unreasonable.

12. Apart from the question of the plea, the Judge conducted a careful analysis structured according to the following passage from *Barrick*:

“The following are some of the matters to which the Court will no doubt wish to pay regard in determining what the proper level of sentence should be: (i) the quality and degree of trust reposed in the offender including his rank; (ii) the period over which the fraud or thefts have been perpetrated; (iii) the use to which the money or property taken

was put; (iv) the effect upon the victim; (v) the impact of the offences on the public and public confidence; (vi) the effect on fellow employees or partners; (vii) the effect on the offender himself; (viii) his own history; (ix) those matters of mitigation special to himself such as illness; being placed under a great strain by excessive responsibility or the like; where, as sometimes happens, there has been a long delay, say over two years, between his being confronted with his dishonesty by his professional body or the police and the start of his trial; finally, any help given by him to the police.”

13. In this case there is no doubt that the breach of trust involved in the offence was a serious one. The appellant was the manager of the fund, and as such appears to have had a free hand. He operated a systematic fraud, involving forgery, over an extended period of nearly two years. We accept, as Mr. Tonner rightly points out, that the guidelines are for cases of breach of trust, so some element for that is already incorporated in them. However, as the passage from *Barrick* set out above indicates, the degree of the breach remains a factor to which courts can and will have regard. The adverse impact on the public’s confidence in a privately operated pension fund is also a relevant factor. On the other hand, the appellant’s failure to repay any of the money is not properly regarded as an aggravating factor, but rather an absence of mitigation.

14. Apart from the plea, there are no other real mitigating factors. The fact that the appellant committed these offences to support his Cocaine addiction, itself originating in an unhappy domestic situation, may be an explanation for his conduct but it does not mitigate the penalty.

15. We think, therefore, starting in the 3 – 4 year range, allowing a 25% discount for the guilty plea, but taking into account the seriousness of the breach of trust and the sustained nature of the appellant’s conduct, that a sentence of four years’ imprisonment is appropriate in this case. We therefore allow the appeal, quash the sentence of five years’ imprisonment imposed by the learned Judge and substitute in its place one of four years, with time served to be taken into account.

Mottley JA

Conteh JA

Ground JA