

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 CRIMINAL SIDE
3

4 INDICTMENT NO: 0078/10
5

6 THE QUEEN
7

8 V
9

10 DERRICK ANTHONY THOMAS
11



12
13 **Appearances:**

Mr. Michael Snape for the Crown

14
15 Mr. John Furniss for the Defendant
16

17 **Before:**

The Hon. Mr. Justice Charles Quin

18 **Submissions heard:**

13th March 2013

19 *[Defendant was scheduled for surgery*
20 *on the 22nd March 2013 and therefore*
21 *the date for handing down this Ruling*
22 *was set to allow the Defendant time for*
23 *recuperation.]*

24
25 **SENTENCE RULING**
26

27 1. On the 17th December 2012 the Defendant pleaded guilty to Counts 1, 3, 7,
28 11, and 14 of this 16-count Indictment dated the 12th January 2011.

29 2. The charges are as follows:

30 (a) Count 1: Obtaining Services By Deception, contrary to s.250 of
31 the Penal Code (2007 Revision). The particulars of the offence
32 are that the Defendant, between the 3rd April 2009 and the 6th
33 April 2009, within the jurisdiction of the Cayman Islands,
34 dishonestly obtained services by deception, namely, commercial

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advertising with the Cayman Free Press, by falsely representing that Fidelity Bank cheque #144 and cheque #146 [were] good and valid [orders] for payment.

(b) Counts 3, 7, 11 and 14: Theft, contrary to s.241 of the Penal Code (2007 Revision):

a) Count 3: That the Defendant, between the **19th day of June 2009 and the 4th July 2009**, within the jurisdiction of the Cayman Islands, stole **CIS13,330.00**, the property of Dr. Jyotin Pandit.

b) Count 7: That the Defendant, between the **28th day of August 2009 and the 14th day of September 2009**, within the jurisdiction of the Cayman Islands, stole **CIS29,275.00** the property of Marcia Milgate.

c) Count 11: That the Defendant, between the **12th day of September 2009 and the 20th day of January 2010**, within the jurisdiction of the Cayman Islands, stole **CIS29,153.00** the property of Cayman Expanded Polystyrene Products Ltd.

d) Count 14: That the Defendant, between the **16th day of December 2009 and the 8th day of January 2010**, within the jurisdiction of the Cayman Islands stole **CIS27,842.60**, the property of Island Pro Builders.



SUMMARY OF FACTS

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3. In 2008 the Defendant started a Company – Geocomfort Grand Cayman (“the Company”). The Defendant was the sole director of the Company and the Company did not employ any other staff.

4. The product offered by the Company was geothermal air conditioning units. These air conditioning units worked by using the cooler temperatures in the ground to circulate cooler air. By doing this, less power is required to cool a building. The customer pays, up front, for the geothermal unit and its installation. In the long run, the purchaser is supposed to benefit from cheaper power bills.

5. The Company did not manufacture the air conditioning units itself. The units were imported from a manufacturer in the United States called Eneritech Companies, in Greenville, Illinois.

6. On several occasions the Defendant took money from customers but did not complete the work he had promised. In addition, the evidence demonstrates that the Company did not pay its bills.



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Count 1

7. Since 2008 the Defendant had been placing advertisements in the Cayman Free Press for the Company. On the 3rd April 2009 the Defendant gave Cayman Free Press a personal cheque for CI\$640.00. On the 6th April 2009 the Defendant gave Cayman Free Press another cheque for CI\$2,332.00. Having received the cheques, and expecting to receive payment when the cheques cleared at the bank, Cayman Free Press ran the advertisements in advance of the cheques being cleared. Later that month, both cheques were dishonoured and Cayman Free Press was never paid for these advertisements.

Count 3

8. Dr Jyotin Pandit ("Dr. Pandit") approached the Defendant in May 2009 expressing an interest in the Company's product. On the 24th May 2009 the Defendant provided Dr. Pandit with a quote for the purchase and installation of the system for CI\$22,660.00. Dr. Pandit accepted the quote and on the 19th June 2009 paid the sum of CI\$11,330.00 to the Defendant – representing a 50% deposit.

9. The contract stipulated that a geothermal system was to be imported within 30 days, with all parts and accessories necessary for the installation. The Defendant gave Dr. Pandit a purchase order from Enertech, which purported to show that over CI\$10,000 of equipment had been ordered. The purchase order was false. The Defendant had never ordered or paid for any of the equipment.



1 Polystyrene that the deposit had been paid. Although, in this case, the
2 Defendant repaid Expanded Polystyrene some of the money, CI\$17,653.60
3 remains outstanding.

4 *Count 14*

5 15. This was another customer who signed an agreement and paid a deposit. The
6 work was never completed nor was the equipment ordered.

7 16. In total, the amount stolen from these customers is CI\$99,600.60.

8 17. The Defendant entered into discussions with Enertech. Enertech's President,
9 Steven Scott Smith, visited Cayman and he gave the Defendant permission to
10 use the Geocomfort name. Mr. Smith returned to Cayman on another
11 occasion and provided training for independent cooling contractors and,
12 again, discussed the projects with the Defendant.

13 18. Dr Pandit wrote to Mr. Smith and complained about the Defendant and the
14 lack of service and other customers followed suit. Eventually Mr. Smith had
15 to place an advertisement in the newspapers to dissociate his company,
16 Enertech, from the Defendant.



SUBMISSIONS BY THE DEFENCE

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19. Counsel for the Defendant said that the Defendant is pleading guilty and expresses deep remorse for his actions.
20. Counsel submits that the Defendant is a man of very bright ideas, but when it comes to the nuts and bolts of running a company he is absolutely appalling.
21. Mr. Furniss states that the Defendant had intended to run a proper business and started out by underbidding the competition. However, the Defendant demonstrated a complete lack of knowledge of the business and even the wells that he did drill did not go deep enough to obtain any water – thus causing many of the customers to have to undergo further work to complete the job.
22. Mr. Furniss points out that the Defendant has admitted his full responsibility.
23. In addition Mr. Furniss points to the helpful Social Inquiry Report (SIR) prepared by Probation Officer, Sophia Wilson-Leslie on the 7th February 2013.
24. The Defendant has been married 8 years and has four children between the ages of 7 years of age and 2 years of age.
25. The Defendant, upon leaving High School in Grand Cayman attended the International College of the Cayman Islands where he obtained a diploma in Restaurant Management. He worked in the hotel industry for many years. He was a chef at the Hyatt for 6 years and at the Hog Sty Bay Café, the Lazy



1 Lizard and the Lone Star Bar over a further 8-year period. Next, the
2 Defendant left the hotel industry and went into construction.

3 26. The Defence and the Probation Officer submit that when the Defendant
4 started out doing business with Enertech, it was never his intention to deceive
5 his customers. It was only after he began he realised that he did not have the
6 skill, nor did the subcontractors understand the technical work required. Due
7 to mistakes and errors in judgment in relation to the business the Defendant
8 became completely in over his head in debt and ultimately failed to honour
9 his contractual commitments with his customers. The Probation Officer also
10 points out that the Defendant has some brilliant ideas but he lacks effective
11 business management skills.



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1 **THE LAW**

2 27. The leading case for offences where there has been a breach of trust is still
3 the English Court of Appeal decision of **R v. John Barrick** (1985) 81 Cr.
4 App. R. 78 and the Judgment of the then Lord Chief Justice Lord Lane.

5 28. Lord Lane stated at page 81 of **R v. Barrick**:

6 *“The type of case with which we are concerned is whether a person in a*
7 *position of trust, for example, an accountant, solicitor, bank employee or*
8 *postman has used that privileged and trusted position to defraud his*
9 *partners or clients or employers or the general public of sizeable sums of*
10 *money. He will usually, as in this case, be a person of hitherto*
11 *impeccable character. It is practically certain, again as in this case, that*
12 *he will never offend again and in the nature of things, he will never*
13 *again in his life be able to secure a similar employment, with all that that*
14 *means in the shape of disgrace for himself and hardship for himself and*
15 *also his family.”*

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17 29. The Cayman Islands Court of Appeal in **R v. Scott. Fyne v. R** [2007] CILR
18 176 applied the guidelines set out by Lord Lane in **R v. Barrick** and, in
19 particular the following factors which I now take into account:

20 *“The Court.....should have regard to the following matters. (1) the*
21 *quality and degree of trust reposed in the offender including his rank; (2)*
22 *the period over which the fraud or thefts have been perpetrated; (3) the*
23 *use to which the money or property dishonestly taken was put; (4) the*
24 *effect upon the victim; (5) the impact of the offences on the public and*
25 *public confidence; (6) the effect on fellow employees or partners; (7) the*
26 *effect on the offender himself; (8) his own history; (9) those matters of*
27 *mitigation special to himself such as illness; (10) being placed under*
28 *great strain by excessive responsibility or the like; (11) where, as*
29 *happens, there has been a long delay, say over two years, between his*
30 *being confronted with his dishonesty by his professional body or the*
31 *police and the start of his trial....”*



1 30. In the later English Court of Appeal decision of *R v. Clark* [1998] 2 Cr. App.
2 R. (S) 95, the Appellant was employed as the bursar of a charitable body and
3 acted as the treasurer of a local church. He stole almost £400,000.00 from his
4 employer and £29,000.00 from the church over a period of four years. There
5 was some dispute between the Prosecution and the Defence as to the precise
6 total figure which he had taken, but it was conceded by the Appellant that the
7 sum was certainly in excess of £300,000.00. Mr. Clark pleaded guilty at the
8 first opportunity and he made repayment in the sum of approximately
9 £120,000.00. At the Court of first instance he was sentenced to five years
10 imprisonment on each count to run concurrently. The Court of Appeal
11 allowed the appeal and imposed a sentence of 3 years on count 1 and one
12 year on count 2, which was ordered to run consecutively, making a total of 4
13 years.

14 31. The English Court of Appeal in *R v. Clark* referred to sentencing guidelines
15 and stated:

16 *“They were by way of guidelines only and many factors other than the*
17 *amount involved might affect sentence. Where the amount is not small,*
18 *but is less than £17,500.00, terms of imprisonment from the very short up*
19 *to 21 months will be appropriate; cases involving sums of between*
20 *£17,500.00 and £100,000.00 will merit two to three years; cases*
21 *involving sums of between £100,000.00 and £250,000.00 will merit three*
22 *to four years; cases involving between £250,000.00 and £1,000,000.00*
23 *will merit between five and nine years and cases involving a million and*
24 *more will merit 10 years or more.”*

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26 The Court stated that these terms were appropriate for contested cases and
27 pleas of guilty would attract an appropriate discount.



1 32. In addition I refer to the *“Statement on Tariffs and Guidelines for*
2 *Sentencing for Certain Offences”* issued by the learned Chief Justice. The
3 Guidelines state that for offences of theft or related offences an immediate
4 term of one to four years imprisonment is appropriate, with a higher tariff
5 available for more serious cases..

6 33. In the Cayman Islands, the Legislative Assembly has retained ten (10) years
7 imprisonment as the maximum penalty for theft.

8 34. The Grand Court of the Cayman Islands and the Cayman Islands Court of
9 Appeal have applied the Guidelines set out in the English Court of Appeal
10 decisions of *R v. Barrick* and *R v. Clark*.

11 35. In *R v. Scott, Fyne v. R* the Cayman Islands Court of Appeal endorsed the
12 approach taken in *Barrick* and *Clark* and stated at paragraph 13 that in

13 *“light of the economy of the Cayman Islands the sentence imposed by the*
14 *Court in cases involving a breach of trust should be one which would act*
15 *as an effective deterrent.”*



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ANALYSIS

36. The Cayman Islands Court of Appeal in *R v. Scott, Fyne v. R* approved the culpability factors outlined in the English Court of Appeal decision of *Barrick*. In *Barrick* the following culpability factors were suggested as those to which the Court should have regard in determining what the proper level of sentence will be.

37. *The Quality and Degree of Trust Reposed in the Offender including his Rank:*

The Defendant presented himself as being able to supply and install the geothermal air conditioning units. His customers trusted him to properly use the deposit sums paid to him to obtain and install the equipment they required. They took the Defendant at his word and in some cases there is evidence of signed contracts. In his offending, the Defendant has breached the trust of his customers.

Importantly, the degree of trust reposed by customers in the offender is demonstrated in the fact that these deposits were not small sums of money. In most cases, customers had to pay the deposits by way of three installments from their hard earned cash.



1 38. The Period over which the Fraud or the Thefts have been perpetrated: In this
2 case the offending spanned six months and involved four different customers.
3 The Defendant kept receiving money from new clients whilst he continued to
4 misappropriate the deposit sums from existing clients. Furthermore, the
5 Defendant continued to deceive his customers. What is particularly
6 reprehensible is that the Defendant continued to accept further payments
7 whilst knowing that there was no likelihood whatsoever of the air
8 conditioning units being installed.

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10 39. The Use to which the money dishonestly taken was put: It appears that the
11 Defendant has used the money to either fund his own lifestyle or to keep a
12 failing business afloat. This was all at the personal expense of his customers.

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14 40. The Effect upon the Victims: It is apparent from the statements provided by
15 the victims as part of the prosecution case that, over and above the financial
16 loss the victims have incurred stress and a waste of their own time in chasing
17 up the Defendant. It appears that all the victims have had to spend large
18 amounts of money harassing the Defendant in what was ultimately a futile
19 attempt to have the promised work completed, and/or to retrieve the funds
20 they handed over to the Defendant. The victims are unable to recoup the
21 monies that they have paid to the Defendant.

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23 41. The Impact of the Offences on the public and Public Confidence: These types
24 of offences have the potential to affect public confidence in using small
25 businesses and have a prejudicial effect on the reputation of the Cayman
26 Islands.



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42. The Effect on Fellow Employees or Partners: The Defendant's conduct, as the Crown quite properly submits, ensnared the US Company, Eneritech. Having given the Defendant the authority to use the name Geocomfort in Cayman – a name associated with Eneritech – the Defendant proceeded to destroy any goodwill the name may have had on the island. The President, Mr. Smith, ended up having to deal with the disgruntled customers of the Defendant himself.

43. The Effect on the Offender himself: The fact that the Defendant's antecedents demonstrate that the Defendant has a disturbing history before the court in relation to dishonesty, and, therefore, is a repeat offender. This inevitably leads the Court to question the sincerity of the remorse expressed by the Defendant for his actions and for the extent to which he has left these customers at a pecuniary disadvantage. The Court is concerned that the Defendant's offending has had very little effect on him.

The Defendant has expressed to the Probation Officer that his hope to reimburse the Complainants lies in the success of another business proposal. In assessing the effect of this offence on the offender in light of this statement the Court is concerned that the Defendant continues to deny the fact that it was his incapability to manage a business on his own that resulted in his demise and yet, he wants to pursue such a route yet again. It is my view that this statement demonstrates the Defendant's denial of his culpability.



1 One of the effects of the problem now facing the Defendant should be his
2 desire to seek and gain stable employment, within his profession, with an
3 established business – building his resources slowly through regular wages.
4 However, the Defendant seems focused on entrepreneurial activity which has
5 led to his criminal record in the past and today.

6 I must also note in relation to the effect of the offence on the Defendant that
7 the SIR reveals that the Defendant's mother describes him as an alcoholic,
8 and Mr. Hill, the Defendant's longstanding friend states that the Defendant
9 drinks daily, but the Defendant describes himself as a social drinker who
10 does not need to consume alcohol. It is clear that this Defendant's use of
11 alcohol assists him to hide from the reality of his weaknesses and his actions.

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13 44. The Defendant's antecedents: On the 21st April 1998 the Defendant was
14 sentenced for 6 Counts of obtaining property by deception, for which he was
15 sentenced to 6 months' imprisonment, suspended for two years.

16 On the 17th June 1999 the Defendant was again before the Courts for two
17 counts of obtaining property by deception, for which he was sentenced to a
18 total of 18 months' imprisonment.

19 On the 14th July 2004 the Defendant was found guilty of obtaining a passport
20 by false representation.

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1 45. In these proceedings the Court also notes that the Defendant first appeared
2 before the Grand Court on the 12th January 2011. There was trial set for the
3 31st October 2011 with a jury. This date was vacated and a second trial date
4 was set for the 30th April 2012. This date was also vacated. On the 4th May
5 2012 the Defendant changed his mode of trial and elected trial by Judge
6 Alone and then pleaded not guilty to all 16 counts on the 1st June 2012.

7 Finally, on the 17th December 2012 the Defendant pleaded guilty to the 5
8 Counts now before the Court.

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10 46. Both *Barrick* and *Clark* provide sentencing guidelines depending on the sum
11 of money involved. The Court of Appeal in *Clark* stated that cases involving
12 sums of between £10,000 and £50,000 will merit a term of imprisonment of
13 about 2 to 3 years. Where greater sums are involved, for example sums in
14 excess of £100,000, a term of 3 ½ to 4 ½ years would be justified. The terms
15 suggested in both *Barrick* and *Clark* are appropriate where the case is
16 contested.

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18 47. The circumstances of each case must be taken into account.

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20 48. What makes this case more serious is that the Defendant cheated four
21 separate customers and showed no regard for the loss of the significant sums
22 of money they incurred. The Court takes into account the fact that the jobs
23 the Defendant promised to do, and was paid to do, were never done.
24 Therefore the customers not only lost the money they had handed to the
25 Defendant, but they then had to pay other companies to do the job that they
26 hired and paid the Defendant to do.



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49. The offences on this Indictment took place between April 2009 and January 2010. The Court notes that none of the victims have received any compensation for their losses. The Defendant is not in any position to make any serious proposals to pay back the money he stole from his victims over 3 years ago.

50. The Defendant has shown a callous disregard for these unsuspecting victims. He made repeated false representations, knowing that the jobs would never be completed. He is the consummate conman. There are few, if any, mitigating factors in this case and many aggravating features in the 4 Counts of theft and the 1 Count of obtaining services by deception.

51. It is my view that, in light of these factors as well as the Defendant's previous convictions for similar offences, the starting point should be five years' imprisonment. In light of the Defendant's late guilty plea I will allow for a reduction of 20% and impose a sentence of imprisonment of 4 years for each of the counts of theft, to run concurrently.

52. Count 1 is an entirely separate offence from Counts 3, 7, 11 and 14 and, accordingly, I impose a sentence of 6 months for this offence, to run consecutive to the four years for Counts 3, 7, 11 and 14.

53. Time spent in custody is to be taken into consideration.

Dated this the 16th April 2013

Honourable Mr. Justice Charles Quin
Judge of the Grand Court

