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IN THE CAYMAN ISLANDS COURT OF APPEAL

CRIMINAL APPEAL 16/2016
IND 69/16
C04346/2013

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and

Robert Aspinall

Respondent

BEFORE:

The Rt Hon Bernard Rix, Justice of Appeal
The Hon Sir George Newman, Justice of Appeal
The Rt Hon Sir Alan Moses, Justice of Appeal

Appearances: Simon Russell Flint QC instructed by Greg Walcolm for the DPP. Charles Miskin QC instructed by James Austin-Smith of Campbells for the Respondent.

JUDGMENT

Revised from transcript of oral judgment given on 7 November, 2016 and Approved
Released 6 December, 2016

Sir Bernard Rix, JA

1. This is the application of the Crown for leave to appeal against the sentence handed down on 1 August 2016 by the Hon. Mr. Justice Timothy Owen QC on the Respondent, Robert Aspinall. The application is made pursuant to section 30 of the Court of Appeal Law (2011 revision) which permits the Crown to seek to challenge a sentence on the ground that it is "unduly lenient".

2. The Respondent was sentenced to 3½ years imprisonment on six counts to which he pleaded guilty out of a 14 count indictment. The remaining 8 counts were left to lie on the file. Of the six counts to which the Respondent pleaded guilty, two were counts of theft, two were of forgery, and two were of

converting criminal property. These pleas were acceptable to the Crown, as was the basis of plea.

3. The six counts reflected different aspects of offending against two essential victims, each a corporate fund whose voluntary liquidation was being conducted by the Respondent in his role as a liquidator. In each case there was theft, forgery and the conversion of criminal property.

4. The sentences handed down were as follows: on counts 1 and 3 (theft), 2 and 3½ years respectively; on counts 2 and 4 (forgery), 1½ years respectively; and on counts 7 and 10 (converting criminal property), 3 and 2 years respectively. All sentences were ordered to run concurrently, so that the total sentence was 3½years.

5. The Judge arrived at this sentence in the following way: he adopted a starting point of 3½ years, raised that to 5½ years on a consideration of all aggravating and mitigating factors, and then reduced that back to 3½ years by reason of a full one-third discount for the plea of guilty at the first available opportunity plus an additional two months discount ascribed to exceptional mitigation.

The factual background

6. The sentencing was conducted on the basis of an agreed set of facts, which are set out verbatim at paras 5-32 of the Judge's sentencing remarks, and which we can describe as follows, as supplemented by additional information which is also common ground. Much of these facts was derived from the Respondent's own prepared statement which he made upon arrest and interview in May 2016.

7. In 2009 the Respondent, a chartered accountant, was employed by Deloitte as a senior manager. On 1 October 2012 he was promoted to director, financial advisory. His offending took place over a period of some 10 months in 2012/2013. He was then about 34/35 years old, and a man of previous good character. He was 38 at the time of sentence.

8. At that time the Respondent had been appointed Joint Voluntary Liquidator, together with a senior colleague, managing partner Stuart Sybersma, of two connected funds registered in the Cayman Islands, which we can refer to as the Level Funds and as one of the Respondent's victims. CI$445,000 was stolen from the Level Funds (count 3) over a six months period between March and August 2013.

9. The other, and first, victim was a different fund, also registered in the Cayman Islands, which we can refer to as the Aslan Capital Fund. CI$50,314.20 was stolen from that fund in November 2012 (count 1). It was again one of two connected funds (the Aslan Funds), in the liquidation of which the respondent was involved.

10. The theft from Aslan Capital Fund arose in the following way. Deloitte had employed a consultancy company by the name of Freestyle Fund Service LLC ("FFS") to review the Aslan Capital Fund's illiquid assets and realise their value. Towards the end of the liquidation, an unexpected recovery of US$1 million was received, in which FFS was not involved. Even so, under the terms of their engagement, FFS was entitled to 5% of that recovery. The Respondent was instructed that if FFS submitted an invoice, they would be paid, but he was not to notify them of the recovery. FFS did not make any request for payment. The Respondent saw an opportunity to divert the 5% fee to his own advantage. He realised that if he set up an entity with a virtually identical name to FFS, then it would be straightforward to make the 5% payment to that entity on the basis that FFS had belatedly submitted its invoice for the 5%.

11. The Respondent therefore set up his own company in the BVI, of which he was the sole shareholder and director, called Freestyle Financial Services Ltd ("Freestyle Financial"), and he also opened an account for that company with HSBC in the Cayman Islands. He was able to persuade HSBC to give to Freestyle Financial's account name the differently styled name of Freestyle Fund Services Ltd, on the basis that BVI regulations prevented him using the word "Fund" in the company name. Freestyle Financial was registered on 25 October 2012. On 6 November 2012 HSBC confirmed the setting up of an account for that company in the name of Freestyle Fund Services Ltd. The Judge called it a "fictitious company" on the basis that it was set up purely for the purposes of the Respondent's offending, but it was a real company for all that.

12. On 6 November 2012, the same day as HSBC confirmed the setting up of Freestyle Financial's account in the name of Freestyle Fund Services Ltd, the Respondent arranged for the payment of US$50,314.20 to be paid from the liquidation account of Aslan Capital to his new company's account at HSBC. For this purpose he included all the necessary paperwork, relying on the $1 million recovery, FFS's right to a 5% "investment advisory fee" under its contract with the Aslan Funds, fake updated banking details for FFS, ie the account details of the Respondent's company's account at HSBC, and a payment request sheet showing a senior administrator at Deloitte, Elaine Willis

as the preparer, a Deloitte manager, Robert Rintoul, as the reviewer, and himself as the approver. He had authority to approve payments up to $100,000. He had deceived his colleagues at Deloitte, Ms Willis and Mr Rentoul, by pretending to them that he had spoken to FFS's manager, Adrian Mackay, and had obtained the new banking details from him. To assist the deceit, the Respondent manipulated the real contract between FFS and the Aslan Funds and scanned the signature of his colleague at Deloitte, managing partner Mr Stuart Sybersma, onto it.

13. It was in this way that the Respondent stole $50,314.20 from Aslan Capital, and to effect his deceit, had forged the signature of Mr Sybersma: counts 1 and 2.

14. A few months later, the Respondent used his BVI Company to effect a series of thefts from the Level Funds, totalling US$445,000 (count 3). There were 8 such thefts, beginning with one of US$90,000 on 1 March 2012 and ending with one of US$30,000 on 21 August 2012. They were all below the US$100,000 limit for which the Respondent had authority at Deloitte. These thefts were facilitated by the Respondent's role as a joint liquidator (together with Mr. Sybersma) of the Level Funds. As such he was able to make decisions in the administration of the Level Funds' assets including the authorisation of payments to third party creditors and investors. The 8 thefts were effected with the use of the BVI company. The basis of these thefts was that the Level Funds had received US$845,000 more cash in its reserves than had been expected. The Respondent then created a story that his BVI Company was an investor which had not been issued with Class R shares and that it should have been entitled to an interest in the Reserve. He then created a payment plan that would ensure that the amount to which the BVI company was purportedly entitled would be paid in instalments falling below the $100,000 limit.

15. There was a ninth payment made from the liquidation of the Level Funds achieved through the purchase by the BVI Company of the shares of two small investors. The Respondent wrote to investors as joint liquidator to enquire whether any of them wanted to sell their shares in a secondary market transaction. Two did, and their shares were bought, by the BVI company, for US$495.64. Those were transactions at then market prices. Thus the BVI Company became a shareholder in the Level Funds. For these purposes the named director of the BVI Company was given as "Andrew Chan", a fictitious name used of course to disguise the Respondent's own name. On 28 June 2013, the BVI company was paid out US$8,519.50 by the Level Funds in the liquidation. It appears that the Respondent had used his inside information about

the level of reserves in the Level Funds to purchase shares at a market value below their real value; and to facilitate these transactions with the use of deceit. That deceit was charged as forgery, namely the execution of a share agreement purported to be executed on behalf of the BVI company by Andrew Chan (count 4).

16. The counts of converting criminal property (counts 7 and 10) concerned the use of the stolen funds put by the Respondent to the purchase of a property (US$200,000) and a BMW car (US$50,536.58).

17. The Respondent was a man at the time of his convictions and sentence of no previous convictions and (previous) positive, indeed exemplary, good character. There were many glowing testimonials to that character. All referees described his offending as completely out of character. He was described as hard-working and successful, dedicated to his family, and a valued member of the community. He had stayed behind after the devastation of Hurricane Ivan to help in rebuilding, when the majority of his firm was evacuated. He was a gifted sportsman who had captained the Cayman Islands at rugby. He had remained active in fundraising for the local youth rugby charity thereafter. He has two young daughters of 2 and 4. He is a loving and highly involved father. He and his family have made their home in the Cayman Islands for the last 13 years, but, when he has served his sentence, they will have to leave. He has destroyed his professional career and will never be able to work in the financial services industry again. He is suffering from anxiety and depression for which he is taking medication. He has from the beginning of his detection expressed his shame and embarrassment.

18. However, his detection only happened by accident, and only after more than two years. The liquidation of the Level Funds was finalised in August 2013. On 30 August 2013, less than ten days after his final theft, he resigned his position at Deloitte. In January 2016 the US courts ruled that the SEC (Securities and Exchange Commission) had been wrong to demand a settlement from the Level Funds of US$21.5 million for the alleged insider trading of its former investment manager. It was as a result of that settlement that the Level Funds had been put into voluntary liquidation in 2012. Now, in 2016, the settlement sum of US$21.5 was to be returned and the liquidation of the Level Funds had to be reopened. Deloitte contacted investors to offer their assistance in securing, collecting and distributing the US$21.5 million. It was as a result that, in March 2016, in the course of a review of the file at Deloitte that a number of discrepancies were identified which ultimately led to the discovery of the Respondent's criminality. It is common ground that, had the US courts not

reversed the settlement agreement, then the Respondent's criminality would almost certainly have gone undetected.

19. On 6 April 2016 Deloitte contacted the Respondent to request a meeting. At the meeting, it was suggested to him that he was the beneficial owner of the BVI company's HSBC account. During the meeting, the Respondent made full admissions concerning the thefts from the Level Funds and said that he was "embarrassed and ashamed". Asked whether there was any other matter that he wished to bring to the attention of Deloitte, he said "No". He also promised to repay the money and said he would provide a repayment proposal by 12 April 2016.

20. The Respondent thereafter contacted his attorney. On 9 April 2016, Deloitte sought confirmation from the Respondent's attorney that there was nothing else amiss on the part of the Respondent. On the same day, the attorney went back to Deloitte to tell them about the Aslan Funds theft. It is submitted that, but for that disclosure, the Aslan Funds theft would not have been discovered. That is not certain, for the existence of the rogue BVI company and its HSBC account was now out in the open; but the information was volunteered.

21. On 11 April 2016, Deloitte made a formal complaint to the FCU. The Respondent was arrested on 6 May 2016, and he was interviewed on 12 May 2016. It was at that interview that he read the prepared statement we have referred to above. He also provided a document purporting to show how the stolen monies had been spent. He answered all questions asked of him. He had already cooperated fully with the police prior to his arrest: by the provision of documents and passwords. He continued his cooperation after arrest.

22. From the HSBC account, various payments had been made, two of which were for the purchase of the property and the car (the subject-matter of counts 7 and 10), and there were other payments to an account in a daughter's name, for the payment of stamp duty (presumably on the property), and for an investment. There was also the transfer of £40,000 to a personal account, also referred to above.

23. Between arrest and sentence, while on bail, the Respondent liquidated assets to ensure his ability to compensate Deloitte. It appears that Deloitte undertook responsibility to the real victims of the thefts, and that it was in turn regarded by the Appellant (and by the sentencing judge) as the sole victim. In fact there were numerous victims, in the first place the various Funds, and their investors. Ultimately, we accept, Deloitte ensured that no one was out of pocket.

24. At the time of sentence the Respondent had agreed a draft Restitution and Settlement Agreement with Deloitte in the sum of US$ 623,144.99, to cover the monies stolen, plus interest, plus a contribution to Deloitte's costs. The Respondent's frozen accounts contained enough to discharge this settlement. The Judge made a Compensation Order in the underlying amount of US$495,414.20 and discharged the Restraint Order against the Respondent's assets, so as to permit him to pay the balance of the agreed sum by way of restitution.

The Judge's sentencing remarks

25. In his sentencing remarks, the Judge dealt with aggravating and mitigating factors in the following way. As for aggravation, he numbered three features: (i) as a fiduciary of the Funds, the Respondent was significantly in breach of trust and responsibility; (ii) his actions were sophisticated and carefully planned; (iii) his thefts were persisted in over a period of some 10 months, and were not the subject of a "moment of madness". As for mitigation, he described this as "exceptional and compelling" and summarised it in seven headings: (i) full cooperation with the police, beginning before arrest; (ii) on counts 1 and 2, there was confession before Deloitte or the police were aware of these offences; (iii) he had used his time on bail to put together the means to repay Deloitte (see above); (iv) he had expressed genuine remorse, supported by his actions since his first meeting with Deloitte; (v) he was a man of previous positive good character (which we have described above); (vi) his personal, family and professional downfall was very great; and (vii) he was suffering from severe anxiety, insomnia and depression.

26. The Judge next turned to what he described as relevant sentencing guidelines and case law.

27. First, he eliminated both the forgery and money laundering (converting criminal property) counts as "frankly unnecessary as a means of reflecting the proper basis for sentence" (at para 36 of his sentencing remarks). He did so on the basis of what Lord Toulson had said in *R v. GH* [2015] UKSC 24, [2015] 1 WLR 2126 at paras [47]-[48] concerning money laundering counts of possessing, using, concealing, transferring criminal property, in particular that –

> "it would be bad practice for the prosecution to add additional counts of that kind unless there is a proper public purpose in doing so…[for example] because the thief's conduct involved some added criminality

> not just as a matter of legal definition but sufficiently distinct from the offence that the public interest would merit being charged separately...The courts should be willing to use their powers to discourage inappropriate use of the provisions of POCA to prosecute conduct which is sufficiently covered by substantive offences, as they have done in relation to handling stolen property..."

Thus he reduced the criminality which he had to consider to the two counts of theft by themselves.

28. Secondly, he accordingly decided to consider solely "the Guidelines and relevant case law relating to theft in breach of trust" (at para 37 of his sentencing remarks), viz the Chief Justice's 2002 Guidelines, the Cayman Islands Sentencing Guidelines of 2015, and the UK SGC Definitive Guideline for Theft Offences effective February 2016, and the jurisprudence cited to him and especially *Clark* [1998] 2 Cr App R 137, *Fyne* [2007] CILR 176, *Schultz* (Criminal Appeals No 27 of 2012), *Levitt* (CICA (Crim) 20/2013), *Glasgow* (Indictment 21/2013) and two recent first instance decisions in *Bouchard* (Indictment 5/2014) and *Self* (Henderson J, 2012) (see para 38 of his sentencing remarks).

29. Thirdly, he referred to the Crown's submission that he should apply the UK Guidelines of 2016 as relating to thefts in breach of trust and to adopt therefrom a starting point of 3½ years and a range of 2½ to 6 years on the basis that this case demonstrated a high level of culpability (category A) and of harm (category 1). He agreed, given that there was "a gross breach of trust/responsibility in the context of sophisticated planning" and the value of the thefts exceeded £100,000 (para 39 of his sentencing remarks).

30. Fourthly, he rejected any other guidance, such as from UK or Cayman Islands case law as being of limited assistance compared to those very recent Guidelines, especially as he regarded those Guidelines as having incorporated even leading cases such as *Barrick* and *Clark* into those Guidelines themselves. He also rejected any suggestion that "sentencing for theft in the Cayman Islands should be subject to a general uplift above the UK Guidelines because of the difference in the maximum sentence between the two jurisdictions or because breach of trust cases in the Cayman Islands should be punished more harshly than such offences when committed in the City of London" on the ground that no such submission was made to him by the Crown (at para 40).

31. Fifthly, he came to his conclusion as follows (at para 41 of his sentencing remarks):

> "In all the circumstances, I agree that this is a case which merits a starting point of 3½ years with a category range of 2½ years to 6 years in custody. Taking into account the aggravating and mitigating factors to which I have referred in paragraphs 5 and 6 of this Ruling, I consider that the totality of your offending as represented by Counts 1 and 3 [the theft counts] merits a sentence of 5 and a half years. In light of your plea of guilty and the truly exceptional nature of your co-operation with the police investigation and your efforts to ensure complete restitution of the money stolen, the sentence of the court is therefore as follows..."

and he thereupon set out the sentences referred to at the outset of this judgment.

32. Finally (at para 43 of his sentencing remarks), he rejected any idea of consecutive sentences, purporting to apply the principles set out in the 2015 Cayman Islands Sentencing Guidelines, on the basis that –

> "although the offences of theft did not constitute a single act, they represent a single course of conduct against a single victim."

Therefore all sentences were made concurrent, even the theft sentences, and the ultimate sentence was one of 3½ years.

The submissions in this court

33. Now on this application, the Crown submits as follows in support of its case that the Judge's sentence of 3½ years was unduly lenient. First, it emphasised the aggravating circumstances of the determination and persistence of the thefts, aided by forgeries. Next, it stressed the importance of the financial services industry to the Cayman Islands. Thirdly, it itemised the sophisticated and meticulous planning of the Respondent's offences. Fourthly, it pointed out that two victims were involved. Fifthly, the Respondent acted out of pure greed. Sixthly, the Respondent would never have admitted his offences, had he not been confronted with them and the overwhelming nature of the evidence that was about to be discovered. Seventhly, at any rate initially, he had sought to deny anything beyond the thefts from the Level Funds. In sum, the Judge had paid insufficient regard to the many aggravating features of the Respondent's offending.

34. The Crown further submitted that insufficient regard had been paid to the harm caused to the community in the form of damage to the Cayman Islands' financial services industry; to the need for deterrence as a consequence of the

need to protect that industry; and to the difference between the maximum penalty in England and Wales (7 years) and in the Cayman Islands (10 years).

35. Finally, as to the facts, the Crown submitted that undue weight had been accorded to the Respondent's mitigation.

36. Turning to the Guidelines, the Crown again identified the SGC's category A/category 1 starting point of 3½ years and range of 2½ to 6 years as relevant, while submitting that both starting-point and range should be adapted upwards to take account of the higher statutory maximum penalty imposed in the Cayman islands and that the use of consecutive sentences was expressly justified. As for case law, the Crown agreed with the Judge that older English authorities such as *Barrick* and *Clark* had been incorporated into the Guidelines, but submitted that more recent Cayman Islands authorities supported a higher range of sentencing in breach of trust cases than adopted by the Judge: such as *Schultz* (theft of US$289,660.12, 4 years allowing for a 25% discount for a guilty plea) and *Self* (theft of some CI$1 million, 5 years on a guilty plea). In *Schultz* the Court of Appeal emphasised the need for an effective deterrent: "in light of the economy of the Cayman Islands the sentence imposed by the court in cases involving breach of trust should be one which would act as an effective deterrent".

37. In sum, Mr. Russell-Flint QC for the Crown submitted that the Judge's sentence of 3½ years was below the range of appropriate sentences for the Respondent's offending. The Judge, he said, should have started at 7 years, and finished, after taking account of the Respondent's guilty plea, at between 5 and 6 years.

38. On behalf of the Respondent, Mr. Charles Miskin QC emphasised that a sentence should only be regarded as "unduly lenient" if it fell below the lowest sentence which could reasonably have been passed by a judge properly directing himself in the circumstances of the case (*DPP v. Range* [2012] (1) CILR Note 9); or as was said in *Attorney General's Reference No 4 of 1989* [1990] 90 Cr App R 366 at 371: "where it falls outside the range of sentences which the judge, applying his mind to all relevant factors, could reasonably consider appropriate".

As for the circumstances of this case, Mr. Miskin endorsed the Judge's approach in emphasising what he submitted was the exceptional nature of the Respondent's mitigation; while as to aggravating factors, he submitted that the Judge had erred in listing breach of trust and sophisticated planning among such

features (see para **25** above), since such was already included in the categorisation to be found in the SGC Guidelines.

39. As to the law, Mr. Miskin placed his greatest reliance on the earlier authorities of *Barrick* and *Clark*, adapted for inflation. There was, he pointed out, expert evidence before the Judge that the total amount stolen (at just under CI$500,000), when adjusted for inflation and currency exchange, fell within, even if towards the top of, the bracket of only £100,000 to £250,000 in the 1997 case of *Clark*. That authority, dealing specifically with the category of theft in breach of trust, recommended a sentencing range of only 3 to 4 years for that level of theft (rising to 5 to 9 years for the higher level of £250,000 to £1 million). Mr. Miskin preferred to approach sentence on this basis than on the basis of the SGC Guidelines: but as to the latter, he supported the Judge's approach and conclusions.

40. As to Cayman Islands jurisprudence, Mr. Miskin reviewed the recent cases to which the Judge had referred, a review which he described in his written submissions as "important", but even so he did not seem to derive any particular guidance from them.

41. More significantly, Mr. Miskin submitted (i) that the Crown had accepted that the mitigation involved in cooperation had been exceptional, and that the Judge had been right to describe the case as involving only a single victim, whom he identified as Deloitte; (ii) that the Crown had accepted before the Judge that the criminality was covered by the two theft counts alone; and (iii) that the Crown had similarly accepted that the SGC Guidelines for category A/1 should apply, without contending for an uplift due to the Cayman Islands' higher maximum of 10 years.

42. As regards these submissions, the transcript of the sentencing submissions made before the Judge on 29 July 2016 reveals the following.

(i) The Crown accepted that "it's hard to imagine a case in which somebody has been more open and co-operative [on] having been apprehended" (page 29); and spoke of Deloitte as being the victim, who might have, but had not, provided a victim impact statement (pages 33/34).

(ii) The Crown accepted the Judge's proposition (albeit put in the context of additional counts of money laundering, rather than as also applying in the context of the counts of forgery) that "in truth the criminality is covered by the two substantive counts here" (at page 15).

(iii) The Crown did advocate and press on the Judge the applicability of the SGC Guidelines for category A culpability and category 1 harm, and did so without in terms submitting that the resulting starting point of 3½ years and range of 2½ to 6 years should be uplifted to take into account the higher maximum for theft in the Cayman Islands (pages 30-32). That said, the Crown's skeleton argument before the Judge had stated the ten year maximum for theft in the Cayman Islands (at para 3), and had also stated that the reduction in maximum sentence for theft to 7 years in the UK "which was not mirrored in this jurisdiction" must be kept in mind (at para 52). Nevertheless, the way in which the Crown concentrated on the SGC Guidelines left the Judge to say in his sentencing remarks that "no such submission [that breach of trust cases should be punished more harshly in the Cayman Islands] was made to me" (see at para **30** above). In the circumstances, it is difficult for us to criticise the Judge for saying that.

Analysis and decision

43. Having set out in full these materials, we can proceed relatively quickly to our conclusions.

44. In our judgment, the Judge made four errors, although in the light of the way things went before him, we do not necessarily criticise him for them. His first and most important error, for which, as we have just said, it would be hard to criticise the Judge, was to accept that the SGC Guidelines can be applied in the Cayman Islands without taking into account the higher maximum sentence for theft in this jurisdiction of 10 years, nearly half as much again as in the UK. In our view this higher maximum has to be taken into account. Guidelines are not law in the way that statute is, and a fortiori the SGC Guidelines applicable in England and Wales are not directly applicable in the Cayman Islands in the way they are in England and Wales, even if they are regularly, and rightly, taken into account in this jurisdiction. The higher maximum in the Cayman Islands is an explicit statutory direction as to how seriously theft is regarded in this jurisdiction.

45. The Judge's next error was to say that the totality of the Respondent's criminality was to be found solely in the two substantive counts of theft. We agree that, in the light of *R v. GH*, the two money laundering counts do not add to that criminality. Those two counts were only concerned with the spending of

the stolen money, quite unlike the money laundering counts in *Bouchard* where they were concerned with deliberate, subsequent, attempts, largely successful, to retain stolen funds by removing them entirely from the jurisdiction, a campaign of transferring and concealing funds which was carried out in the face of what was feared to be imminent detection. However we do not agree that the two forgery counts added nothing to the criminality. Theft accompanied and facilitated by forgery is still more serious than theft without forgery. Especially, in the context of the professional world of accountants and of the financial services industry, the destruction of trust in documents which forgery creates is a serious matter. Moreover, count 4, which concerned the forgery which allowed the Respondent to purchase the shares of investors in the Level Funds so that he could benefit from the unexpected reserves in those Funds, lay entirely outside the criminality covered by the theft counts. For these reasons, we consider that the Judge was wrong, subject of course to considerations of totality, not to consider consecutive sentences for the two forgeries. As in *Bouchard*, we consider that a consecutive sentence of at least 1 year should have been part of the overall sentence, even if at the end of the day, such a sentence was to be made concurrent on principles of totality.

46. The Judge's third error was not to consider that the overall criminality was aggravated by the presence of more than one victim, and by the harm caused to the Cayman Islands as a whole. Again, we consider it hard to criticise him for this error in the light of the way in which matters were dealt with before him. But in truth Deloitte was not the only victim (as the Crown's skeleton argument before the Judge submitted by referring to "More than one victim" (at paras 42 and 49), nor even the primary victim. Deloitte chose, quite properly, to hold itself responsible for making good the defaults of its employee, the respondent: but the primary victims were the Funds, the Level Funds and the Aslan Capital Fund, together with all their investors. The Respondent was not stealing from Deloitte, but from the Funds and their investors. We consider that the presence of multiple victims of those thefts seriously aggravates the thefts in a way which the Judge did not take into account. On the contrary, he expressly referred to "a single course of conduct against a single victim" (at para 43 of his sentencing remarks). On any view, this was incorrect. The initial theft from the Aslan Capital Fund was quite distinct from the later thefts from the Level Funds, even if the BVI company was used (albeit in different ways) in both.

47. As for the second part of this error, the failure to take account of the harm caused to the Cayman Islands as a whole, this was a point relied on by the Crown before him (see para 37 of the Crown's skeleton argument: "these offences cause harm to the Cayman Island financial industry…"). The judge

however did not expressly advert to this factor at any stage where he is referring to the aggravating features of the offending, and expressly rejected the idea that breach of trust theft should be punished more severely in the Cayman Islands than in the City of London. However, in saying this he failed to take account of what the Cayman Islands Sentencing Guidelines of 2015 said (at section 2.2) about "**Harm…To the Community**", viz –

> "Some offences cause harm to the community at large (instead of or as well as to an individual victim)…This may be particularly relevant where the offence has a potential impact on the tourist or financial industries of the islands…"

Moreover, these Guidelines mention "Offence is likely to negatively impact confidence in the finance industry" as a specific factor which can aggravate harm.

48. This point is quite separate from a concern about prevalence, as to which the 2016 SGC Guidelines state that supporting evidence from an external source is needed before exceptional local circumstances can give rise to an influence on sentencing levels. This point concerning potential harm to a critical Cayman Islands industry has long been a concern in sentencing in this jurisdiction (and is also reflected in *Barrick* where "the impact of the offences on…public confidence" is cited as an aggravating factor: see *Clark* at 140). As for Cayman Islands jurisprudence, we can refer to *Levitt* where this court (at para 9) cited with obvious approval the trial judge's own citation of what this court had previously said in *Fyne*, namely –

> "In the 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."

This is not a reference to deterrent sentencing as sometimes understood (a particular sentence over the normal tariff), but a reference to the need to pay attention to the importance of the financial services industry in the Cayman Islands as part of the tariff for economic offences.

49. The Judge's fourth error is connected with his third, and that was to ignore the possibility of consecutive sentences. We have already referred to this factor in connection with the counts of forgery. But in truth it has to be remembered that guidelines such as the 2015 Cayman Islands Guidelines recognise that consecutive sentences may be appropriate where, even though offences are of the same or similar kind, overall criminality will not be sufficiently reflected by concurrent sentences as where "offences are committed against different

victims" (at section 6.2). And of course all the guidelines are based on a single offence of theft, and appropriate escalation is required to deal with a campaign of multiple thefts even where concurrent sentences are imposed.

50. In our judgment, therefore, we consider that the Judge's sentence misapplied the SGC Guidelines and seriously underestimated the aggravating features of the Respondent's offending. That offending was within the category of high culpability because of not one, but two factors, both "breach of a high degree of trust or responsibility" and "Sophisticated nature of offence/significant planning". Moreover, the breach of trust was itself significant, prolonged over a significant period, committed against funds which were within the Respondent's care and, in the case of the Level Funds, within his care as a joint liquidator with a fiduciary duty to investors and a duty to the court itself, and his breach of trust was also against his employer and the community of these islands as a whole. Moreover, the thefts were committed not only with sophistication and significant planning, but also with the use of forgery, and the deception of HSBC and the Respondent's own colleagues in Deloitte.

51. As for mitigation, it is true that his co-operation after detection was everything (or almost everything: we have in mind his false statement for a short while that there was no other misappropriation) that could be expected, and included his successful efforts to repay the losses caused by his conduct. However, bearing in mind the full one third discount and more which he received for accepting responsibility from the first opportunity, there is a danger, which we think the Judge did not avoid, of using that mitigation, impressive as it was, in a duplicative way.

52. We refer, but briefly, to English and Cayman Islands jurisprudence. As for Mr. Miskin's primary submission that the Respondent should have been sentenced within the 3-4 year range of *Clark*, we observe that there is an obvious overlap between a range of 3-4 years for thefts of a value up to what was then £250,000 and a 5 to 9 year range for thefts of a value from £250,000 upwards. In any event, such earlier jurisprudence has been overtaken by or subsumed within the SGC Guidelines. Moreover, *Clark* allows for further aggravating factors such as that the dishonesty was directed at more than one victim or group of victims. Above and beyond all that, however, is the fact that *Clark* itself is premised on the 7 year maximum applicable in the UK.

53. As for Cayman Islands jurisprudence, we consider that the most relevant of these are *Levitt* and *Bouchard* (the latter being an appeal heard at the same time as the application herein). In *Levitt*, the offender pleaded guilty to an indictment containing four counts of theft. The sums involved were US$846,260 (the

agreed equivalent of some £542,000), stolen over 3 years from a single victim, a law firm which employed the offender as its financial controller. He had similar previous convictions in other jurisdictions. A sentence of 7½ years was upheld, based on a sentence of 10 years discounted by 25% for a late plea. A starting point of 8 years was "entirely justified" as was the sentence as whole, despite the Judge's failure to take into account the return of assets amounting to about a quarter of the sums stolen. In *Bouchard*, a woman of good character stole nearly CI$2 million from an elderly and vulnerable man and was convicted after a trial. After detection, she was able to return most of the money stolen, in large part because her assets had been frozen. The trial judge sentenced her to 12 years, but this court reduced her sentence to 10 years. The totality of her sentence had to make room for counts of forgery and money laundering.

54. As is so often the case, the varying facts of different cases make their use difficult. What *Levitt* and *Bouchard* demonstrate, however, is that 10 years is not an unusual sentence in these islands, after a trial, for sentences involving the primary offence of theft in breach of trust, even if the amounts stolen in those cases was higher.

55. In sum, we think that the correct sentence for the theft offences would start at 5 years for the thefts, and would be aggravated more than they would be mitigated (as indeed the Judge concluded). A sentence for the thefts of 7½ years would have been appropriate. (In terms of the SGC Guidelines, that would represent a sentence towards the top end of a range increased from 6 years up to 8 years to reflect the higher maximum sentence applicable in the Cayman Islands.) To that a consecutive sentence of 1 year for the two forgeries would also have been appropriate, at any rate in principle. That would entail a sentence of 8½ years in total, before a full or even more than full discount for the plea of guilty would be available. The resultant sentence could therefore have been one of more than 5 years, and perhaps as a matter of overall totality limited to 5 years. On any view, therefore, we consider the sentence handed down by the Judge as having been unduly lenient, at any rate in principle.

56. But that is not the same as saying that we ought to raise the Respondent's sentence in all the circumstances. We consider that the Judge was urged by the Crown to use the SGC Guideline of a range up to 6 years, and that he was not deterred from overlooking the significance of the forgery counts or of the higher maximum sentence in the Cayman Islands. In those circumstances, we consider that it would be wrong to criticise the Judge for arriving at a sentence which was outside the range of appropriate sentences in all the circumstances. Or to put the matter another way, we have a discretion, even where we find a sentence

to have been unduly lenient, not to impose a higher sentence. Where the Crown has participated, in the way in which we have indicated in this judgment, in the errors of the Judge, we think it would be unfair to permit the Crown to seek to increase the resultant sentence on the ground that it was unduly lenient.

57. For these reasons, while we grant the Crown leave to appeal, we dismiss its appeal. The Respondent's sentence remains as it was before.

58. In a Postscript to his judgment, the Judge considered a submission on behalf of the Respondent that his sentence should be reduced on account of the 2015 report of Her Majesty's Chief Inspector of Prisons about the unsatisfactory conditions at Northward Prison where the Respondent will serve his sentence. The Judge concluded that although the report plainly raised issues of grave concern concerning the compatibility of incarceration at Northwood with minimum standards of decency and humanity, nevertheless any remedy must lie elsewhere in the form of judicial review. In circumstances, where, if any such judicial review application were to be made, it might come on appeal to this court, we feel constrained to say nothing more about the submission made before the Judge: other than that he is right to say that any remedy lies in judicial review, and that it would indeed be deplorable if it were the case that the submission of unlawful conditions at Northward were correct.