CICA (Crim) 20/2013
CACR020/2013
Ind 30/13 C#02185/2013

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE GRAND COURT

BEFORE

Hon. Elliott Mottley, Justice of Appeal

Rt. Hon. Sir Anthony Campbell, Justice of Appeal

Hon John Martin, Justice of Appeal

BETWEEN

HER MAJESTY THE QUEEN

Respondent

and

MICHAEL SEAN LEVITT

Appellant

Richard Barton appeared for the Appellant

Alexander Upton, Crown Counsel, instructed by the Director of Public Prosecutions, appeared for the Crown

Hearing 4 April 2014

Judgment delivered 16 April 2014

Reasons released 9 May 2014

REASONS FOR JUDGMENT

MARTIN J.A.

1. On 6 September 2013 the appellant, Michael Sean Levitt, appeared before Justice Swift and pleaded guilty to an indictment containing four counts of theft, two counts of obtaining a money transfer by

deception, and one count of possession of criminal property. He was sentenced to terms of imprisonment of 7 1/2 years on each count, the sentences to run concurrently. He now applies to this court for leave to appeal against those sentences, on the grounds that the judge failed to give credit for all mitigating factors and that the sentences are manifestly excessive.

2. The offences covered by the indictment spanned a period of almost three years from 24 December 2009 to 20 December 2012, and involved a sum which was agreed for sentencing purposes at US$846,260 or £542,658.70.

3. All the counts related to misappropriations from Solomon Harris, a Cayman Islands law firm. The appellant was employed by that firm as Financial Controller from October 2008 to the end of 2012. In that capacity, he was able to authorise cheques to be signed by one of the partners, had access to the firm's bank accounts, prepared financial statements and carried out bank account reconciliations. He was able to steal from the firm by obtaining signatures on cheques using false authorisation forms and by initiating wire transfers from the firm's account to his own accounts.

4. The maximum penalty for theft and for obtaining a money transfer by deception is 10 years' imprisonment. The maximum penalty for possessing criminal property is 14 years' imprisonment.

5. The judge arrived at the sentences he imposed by taking a starting point of eight years and increasing it, on the basis of aggravating features, to 10 years. He then gave a 25% discount for the guilty plea. He recognised that the count of possession of criminal property attracted a higher maximum sentence, but imposed the same sentence in order properly to reflect the totality of the criminal behaviour. As we have mentioned, he ordered all sentences to run concurrently.

6. The appellant's first contention is that the starting point is too high.

7. The judge derived his starting point primarily by reference to the English Court of Appeal decision in *R v Clark* [1998] 2 Cr App R 137. That case set out guidelines for sentencing in cases of theft involving breach of trust, as the present case does. Although the present English guidelines are to be found in the Sentencing Guidelines Council Definitive Guideline on Theft and Burglary in a building other than a dwelling ("the SGC Theft Guideline"), they do not differ in substance from those set out in *Clark.* The guidelines in *Clark* suggested that cases involving between £250,000 and £1 million would merit between five and nine years' imprisonment.

8. In the course of his sentencing remarks, the judge said this:

> *On the authorities, the now well-known case, but still 15 year-old case of* Clar*k, suggests a starting bracket of 5 to 9 years for cases involving thefts in breach of trust cases between £250,000 and £1 million sterling. Those sums have to be reduced for inflation, but the total stolen here is well within the* Clark *guidelines adjusted in general terms for inflation. … I have to remind myself that the maximum sentence for theft in this jurisdiction is 10 years. The* Clark *bracket places this case firmly within a bracket of 5 to 9 years. It is difficult, in my view, to envisage a more serious case within this bracket of offending, save for the amount of money appropriated. I have to look, I remind myself not just at the sentences for each individual count on the indictment, but at the totality of the sentence which is appropriate in this case.*

The judge's references to inflation reflected the fact that the *Clark* guidelines were stated by reference to values prevailing in1997/1998. In the present case, it had been agreed between the appellant and the Crown that the inflation-adjusted amount he was to be treated as having stolen for sentencing purposes was £360,000.

9. The judge additionally referred to *Fyne v R* [2007] CILR176, in which this Court stated that -

> *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.*

10. Three other cases were referred to by the judge, each of them being an instance of sentencing in cases of theft involving breach of trust. They were *Schultz v R* CICA 27/12*; R v Self,* a decision of Henderson J in December 2012*;* and *R v Turner*, a 2013 English case. None of them was a guideline case, and, as the judge pointed out, there were differences from the present facts.

11. As we have said, the appellant contended that the starting point of eight years adopted by the judge was too high. It was suggested that this was not the most serious case of its kind. The sole point relied on in this respect was that the offences lacked sophistication. It was said that the appellant's modus operandi was simple, and that – as the judge remarked – detection was inevitable.

12. There is nothing in this point. The appellant succeeded in disguising his misappropriations from the partners in the firm for a period of three years. He used different methods – cheques and wire transfers – to abstract money; the amounts stolen on any occasion were typically small; he disposed of incriminating documents and tried to cover his tracks. As the judge said, the stealing was systematic and prolonged. We accept the Crown's submission that this was a carefully planned and sophisticated operation by a man who was in a position of significant responsibility. The starting point of eight years was entirely justified.

13. The appellant's second contention was that some of the aggravating factors taken into account by the judge as justifying an increase in the provisional sentence to ten years were wrongly taken into account.

14. To put this contention in context, it is necessary to quote again from the judge's sentencing remarks.

> *This case involves a severe breach of trust. Over a period of three years you stole US $846,260 which equates to £542,658.70. … You were not in dire circumstances. You had no sudden financial demands on your income. The way you put it in your interviews was I got caught up in the Cayman dream; in other words, greed and you decided to use your employer's money to finance your lifestyle.*
>
> *Now, I have to consider a number of matters. As financial controller you were in a position of trust. It is difficult to think of a position in which greater trust could be reposed. You had the security token and the PIN allowing you to transfer funds with impunity. You placed cheques and requisition forms before the partners in the firm, who had put their trust in you, in order to obtain their signatures without them realising that they were signing large sums in the end over to you. I am satisfied that you disposed of incriminating documents. You tried to cover your tracks. You initiated wire transfers to yourself. You carried this on for just under three years. Stealing was systematic and prolonged. There were in all say the prosecution some 80 transactions involved, all small sums clearly designed to distract your employers from their attention to the whole amount that you were taking. You caused chaos to your employer who had to trace sums travelling by circuitous routes. Trying to trace and consolidate the deficiencies caused them further unquantifiable loss and expense. This sort of conduct places intolerable burdens on your fellow employees who worked alongside you and then have to sort out the mess which you create. Not only that, the potential for damage to the high reputation of one of Cayman's leading law firms was enormous and it is none of your doing that their reputation has*

not in fact been irreparably damaged. You took that risk without a care for your employer or for your fellow workers.

I have heard something about you and I have read something about your involvement in Rotary but I am not convinced that your involvement in Rotary was entirely philanthropic. I am satisfied that your involvement in Rotary demonstrates that you are also guilty of some degree of hypocrisy because it was, in my view, used by you as a tool for obtaining employment in which you were capable of stealing.

The impact on client and public confidence in the financial services sector, which is the lifeblood of this island community, cannot be understated. … You have a background in similar criminality. I cannot ignore your past history which involves previous lengthy imprisonment for fraud. I do not accept that your convictions stem from efforts by you to expose deficiencies in the Canadian witness support programmes, or that you were apprehended in South Africa before you had successfully redirected funds to their proper destinations. I think that you are a person who makes up excuses for your criminal conduct.

You obtained employment with this complainant firm without declaring your past and must have deceived the immigration authorities. You received a substantial severance package it appears from the victim impact statement before these matters came to light and you covered your tracks when you left by destroying evidence it seems to me. Those are factors which seriously aggravate these offences.

15. Of the factors identified by the judge, the appellant accepts that he was entitled to take into account the destruction by the appellant of incriminating evidence; the number of transactions and the period over which the offending took place; the damage caused to the financial industry in the Cayman Islands; and the appellant's history of similar offending.

16. The first factor that the appellant says was wrongly taken into account by the judge is that the offending was motivated by greed. The appellant points to the following statement from the SGC Theft Guideline:

> *The starting points and sentencing ranges in this guideline are based on the assumption that the offender was motivated by greed or a desire to live beyond his or her means. To avoid double counting, such a motivation should not be treated as a factor that increases culpability.*

Whilst we accept that the judge would have been wrong to take into account greed as an aggravating factor, we do not think that he did so. The reference to greed appears just before the reference to a number of matters that the judge has to consider; and, in our view, it is only matters appearing after that reference that the judge treated as aggravating factors. The reference to greed is merely part of the judge's narrative of the circumstances of the offences.

17. The second factor of which the appellant complains is the difficulties caused to the complainant firm in investigating the appellant's wrongdoing. In this connection, the appellant relies upon the fact that within a week of the discovery of irregularities Solomon Harris had enough information to cause the appellant to be interviewed by the police about the wire transfers. It is accordingly said that there were no real difficulties. It seems to us, however, that the fact that the firm was able to make a complaint to the police within a relatively short time is no real indication of the difficulties they encountered. A more reliable indication is to be found in the Victim Impact Statement, in which the firm's managing partner said that –

> *In addition to the direct financial impact, the Firm has suffered significant indirect financial impact as a result of hundreds of hours spent by partners and various staff members on countless matters arising from Levitt's actions.*

We consider that the judge was entitled to take this factor into account as an aggravating circumstance.

18. The third factor objected to by the appellant is the unrealised potential for reputational damage to Solomon Harris. The judge recognised that the firm's reputation had not been irreparably damaged, and it is not clear that at this point in his remarks he was doing more than commenting. If, however, he did take this into account as a factor justifying an increase in sentence, then in our view he was entitled to do so. We have already mentioned the judge's reference to *Fyne v R*; and the potential for reputational damage appears to us to be the sort of consideration capable of affecting the economy of the Cayman Islands that would justify increasing the sentence so as to provide an effective deterrent.

19. The fourth factor about which the appellant complains is the abuse of the appellant's position within Rotary. The complaint is that the appellant had undertaken a substantial amount of charitable work before starting his employment with Solomon Harris, and that he occupied his position as Financial Controller for a period of 14 months before the first offence. It is said that the judge therefore had no basis on which he could conclude that the appellant had used his position within Rotary to obtain employment, and that in reality the appellant's connection with Rotary should have been regarded as a mitigating factor. This is, however, to fail to have full regard to what the judge said. He said that he was not convinced that the appellant's involvement in Rotary was entirely philanthropic, and that the appellant had been guilty of some degree of hypocrisy. The emphasised words indicate that the judge in part accepted that the appellant had acted genuinely in relation to Rotary. Moreover, there was material in the Victim Impact Statement which indicated that it was the appellant's energy, drive and hard work on Rotary business that had caused him to be considered as a possible candidate for

employment by Solomon Harris. It was a legitimate inference for the judge to draw that the appellant had taken advantage of his position within Rotary to that effect; and the fact that he did not commit any offence immediately after starting his employment with the firm does not demonstrate that the inference is wrong.

20. The final factor to which the appellant objects is the non-disclosure of the appellant's previous offending to Solomon Harris and the immigration authorities. As we have indicated, the appellant accepts that the judge was entitled to take into account the offending itself; but he says that to take its non-disclosure into account involves double counting. The appellant's previous convictions were both for fraud. In 1998 the appellant was sentenced to 7 years' imprisonment in South Africa for fraud; and in 2002 in Canada he was fined $20,000 in addition to time served of 14 months for an offence of fraud involving an amount over $5000. It seems to us plain that that these previous offences were something which it would have been relevant for Solomon Harris to know before employing the appellant, and something that it would have been relevant for the immigration authorities to know before admitting the appellant to the Cayman Islands. In our view, the judge was entitled to take this into account as an aggravating feature in a pattern of criminality involving deceit. The failure to disclose is separate from the offences themselves: no double counting is involved.

21. The appellant's third main contention was that he was given insufficient credit for personal mitigation and for his guilty plea.

22. We quote again from the sentencing remarks.

> *In your favour it can be said as follows; once you had seen a lawyer, no doubt following good advice, you confessed. However, the complainant firm says that your co-operation with them has been desultory. You have pleaded guilty, although not at the first*

opportunity. There has been some delay in bringing this case to trial, to this stage of the trial, and not all of it is to be laid at your door, some is to be laid at the door for others. And so in all those circumstances I assess the credit to be given to you in terms of reduction from the overall sentence which I am going to impose at 25 percent.

You have also assigned assets valued at, according to the complainant firm, CI $157,000, according to the prosecution $216,959. I am going to take into account the fact that you have assigned assets, but the value is irrelevant for the purposes of sentence today. There is no other mitigation that I can see, although I take into account as I say the references which come from a variety of sources and speak highly of you from the point of view of the writers.

23. So far as concerns personal mitigation, the appellant contends that, despite having said that he would take into account the fact that the appellant had assigned assets, the judge failed to make any reduction in the sentence; and he complains also that the judge failed to take into account his charitable works. As to the first of those, the Crown accepts that the judge made no reduction for the return of assets; but it says that the sentence was nevertheless justified. We return to this point at the conclusion of this judgment. As to the second point, we have indicated above that the judge by implication accepted in part that the appellant had acted genuinely in relation to Rotary; but it is clear that overall he considered that the balance came down in favour of treating it as an aggravating, not a mitigating, factor. We consider that he was entitled to come to that conclusion.

24. So far as concerns the guilty plea, the appellant contends that he should have been given the full one-third discount.

25. It is clear from the judge's remarks dealing with the 25% discount that he considered that the guilty plea was not made at the first opportunity.

26. As the Sentencing Guidelines Council Definitive Guideline on Reduction in Sentence for a Guilty Plea indicates (at paragraph 4.2),

> *The level of the reduction will be gauged on a sliding scale ranging from a recommended one third (where the guilty plea was entered at the first reasonable opportunity in relation to the offence for which sentence is being imposed), reducing to a recommended one quarter (where a trial date has been set) and to a recommended one tenth (for a guilty plea entered at the 'door of the court' or after the trial has begun).*

The identification of the first reasonable opportunity is a matter for the sentencing court.

27. The appellant did not in fact plead guilty until the day on which he was sentenced. He did not do so on any of the five occasions when the matter was in the Summary Court, including the occasion on which he was committed to the Grand Court. On the second of the five occasions when the matter was in the Grand Court, there was an indication that he was likely to plead guilty on some charges. The appellant nevertheless says that it was clear throughout the proceedings that he was going to plead guilty, and that the only obstacle to his doing so earlier was his inability to agree with the Crown the amounts in relation to which he was to be sentenced.

28. In *Caley v R* [2012] EWCA Crim 2821 the English Court of Appeal gave general guidance on some aspects of the discount to be given for a guilty plea. One such aspect was the first reasonable opportunity to enter a guilty plea. At paragraph18, the Court stated that the first reasonable opportunity was normally either at the Magistrates' Court

or immediately on arrival in the Crown Court. The equivalents in this jurisdiction are the Summary Court and the Grand Court.

29. On that basis, the appellant did not plead guilty at the first reasonable opportunity. That was the conclusion the judge reached, and he was plainly entitled to do so. The fact that the appellant could not reach agreement with the Crown on the figures to be used for sentencing was not an obstacle to his entering a guilty plea: he could have done so on the basis of the figures he proposed, leaving it to the Crown either to accept them or to call for a *Newton* hearing to have the figures determined. In the circumstances, the judge was justified in giving only a 25% discount for the guilty plea.

30. It remains to consider whether or not the sentence can be said to have been manifestly excessive. In this context, it is necessary to take into account the judge's failure to give credit for the return of assets to Solomon Harris.

31. In the opinion of the Court, even taking that matter into account, the sentence was entirely justified. This was by any standard a very bad case. It involved substantial sums of money and a severe breach of trust by a perennial fraudster. With the sole exception of the failure to give credit for the return of assets, the judge's approach to the sentencing exercise appears to us to be impeccable; and the sentence he imposed is in our judgment an appropriate response to the appellant's criminality. We dismiss the application for leave to appeal.

Mottley JA

Campbell JA

Martin JA