

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **HOLDEN IN GEORGE TOWN, GRAND CAYMAN**

3 **IND. NO. 5 OF 2012**

4
5 **REGINA**

6 **V.**

7 **HELLEN MOIRCA EBANKS**

8
9 **Appearances:** **Mr. Michael Snape of the Office**
10 **of the Director of Public Prosecutions for the Crown**
11
12 **Mr. Guy Dilliway-Parry of Priestleys for the Defendant**

13
14
15 **Before:** **Hon. Justice Henderson**

16
17 **Heard:** **February 21, 2013**



18
19 **JUDGMENT**

20 **REASONS FOR SENTENCE**

21
22 1. Ms. Ebanks was employed at the material time by a local law firm (operated by Mr.
23 Samuel Jackson) as the office manager and as a legal assistant. Included in her duties was
24 the receipt of cash from clients and the deposit of that cash into the law firm bank
25 accounts while making appropriate accounting entries in the books and records. She was
26 therefore in a position of trust. She worked in that capacity from November 2004 until
27 February 2010.

1
2 2. On February 18, 2010 Ms. Ebanks was away on holiday. Mr. Jackson happened to look
3 in her desk drawer and found his online banking password there. He also saw a bundle of
4 yellow receipts clipped together. He recognised their content as evidencing payments to
5 the law firm from clients. They represented cash which Ms. Ebanks had received from
6 clients from January 2007 until November 2009. Mr. Jackson examined the law firm's
7 bank deposit books and did not find the entries he should have found. On February 22nd,
8 he confronted Ms. Ebanks with the receipts. Initially, she denied any wrongdoing but
9 then admitted to taking some of the money. She was dismissed and an audit was
10 conducted.

11
12 3. The audit showed, in brief, that something in the order of CI \$64,000 had been taken by
13 Ms. Ebanks unlawfully from the business. Over that same period of time (2007 until
14 November 2009) Ms. Ebanks repaid part of that. There is some doubt about the exact
15 amount of the repayment but it was near \$24,000. There were in addition two cash
16 deposits which Ms. Ebanks took for herself without authority but I am told by defence
17 counsel (and this is outlined in the basis of plea) that most of that money would have
18 been payable to her in any event.

19
20 4. Sentencing in a breach of trust case, as in any other case, is not meant to be a
21 mathematical exercise. There are so many internal theft cases in the Cayman Islands that
22 I think we are all in danger (counsel and sentencing judges) of falling into the habit of
23 approaching the exercise, in a certain sense, mechanically. I will attempt to avoid that.

1
2 5. Our Court of Appeal in *Scott and Fyne* has accepted the applicability in the Cayman
3 Islands of *Barrick* and *Clarke*, both of which contain very helpful guidelines for
4 sentencing. *Clarke* suggested that in cases of internal theft involving between £17,500
5 and £100,000 a term of imprisonment of between two and three years would be justified.
6 *Clarke* was a 1998 decision. Mr. Dilliway-Parry says I must take inflation since *Clarke*
7 into account because *Clarke* itself took inflation since *Barrick* (for a period of 13 years)
8 into account. I am prepared to do that but only in a very general way. I have been
9 provided with no figures showing the rate of inflation since 1998. I am aware that it is
10 inflation in England and Wales rather than inflation in the Cayman Islands which would
11 be of particular relevance. In any event, as I have said, I must avoid treating this as a
12 mere mathematical exercise.

13
14 6. The sum of \$42,500 would likely fall within the range I have mentioned even with
15 inflation fully accounted for. If I am wrong in that, I am nevertheless of the view that the
16 theft from a law firm by an office manager of a significant sum of money over a
17 significant period of time would ordinarily merit a starting point of between two and
18 three years of imprisonment. As Mr. Dilliway-Parry says, this amount of money falls
19 very close to the bottom end of the range in *Clarke*. The amount stolen here (once one
20 takes the repayments into account) would be close to the sum of \$17,500 in today's
21 money when the appropriate conversion is done.

22

1 7. There are no mitigating factors in this case other than the plea of guilty. A social inquiry
2 report has been prepared. It speaks positively about Ms. Ebanks so it may seem surprising
3 that I say there are no mitigating factors. However, the principle of sentencing which has
4 been emphasised again and again in internal theft cases is this. Roughly half of the
5 economy of the Cayman Islands depends upon the honest provision of financial services
6 to investors. Every act of theft and every act of dishonesty or fraud in a business or
7 enterprise which is, in some way, connected to the financial services industry here has the
8 potential to degrade the reputation of the Cayman Islands. That is an important
9 sentencing factor which has been recognised by our Court of Appeal in *Scott and Fyne*.
10 For the most part, the principle of sentencing which must receive emphasis is general
11 deterrence - that is, deterrence of other like-minded persons employed in positions of
12 trust in these islands.

13
14 8. The social inquiry report focuses, of course, on the personal background and
15 circumstances of the offender. It notes that Ms. Ebanks apparently led an honest,
16 productive and law-abiding life prior to stealing this money commencing in 2007. That is
17 a fact which is almost invariably present in cases of white collar sentencing. It is rare to
18 find someone placed in a position of trust and given authority over significant sums of
19 money when they, at the time of hiring, have prior convictions.

20
21 9. Under "Financial Circumstances" the author of the social inquiry report comments that
22 Ms. Ebanks has described her present financial situation as extremely challenging. That is
23 not surprising as her employment was terminated by Mr. Jackson.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

10. Ms. Ebanks disclosed to the probation officer that in 2006 she was diagnosed with hypertension and diabetes. She also said that those conditions do not adversely affect her daily functioning. There is no suggestion that they had any causal link with her decision to steal from her employer.

11. As I have said, the social inquiry report is a positive one. It assesses Ms. Ebanks at a one per cent risk of re-offending within the next 12 months. That is not surprising since with this conviction on her record she will not have any prospect of being hired in a position of trust in the future so she would therefore have little opportunity to re-offend. More generally, it is fair to say that the report considers that Ms. Ebanks is unlikely to commit other serious criminal offences. She is at a low risk or, as the author says in some portions of the report, a "very low" risk of offending generally.

12. Notwithstanding these positive factors, it is my view that the need to deter others requires a substantial term of imprisonment. The range mentioned in *Clarke* of between two and three years imprisonment is an appropriate range for a starting point in this case. I see nothing about the case which would suggest that a starting point of two years is required. I do not think there should be or is a marked correlation between the amount stolen and the term of imprisonment which is taken as a starting point within the appropriate range.

13. A starting point of two and a half years is appropriate, particularly in light of what I have said earlier about the economy of the Cayman Islands. That is a sentence of 30 months. I

1 will deduct a full one third from that in recognition of the guilty plea to bring the actual
2 sentence down to imprisonment for 20 months. It is not necessarily the case that the
3 deduction will always be one third for a guilty plea. Where the evidence is strong and it is
4 unlikely that any acquittal could be obtained, the Court is permitted to deduct less than a
5 third. I will deduct one third in this case because I am not satisfied that the evidence is so
6 strong as to make it appropriate to deduct less.

7
8 14. For these reasons I sentence the defendant to imprisonment for one year and eight
9 months.

10
11 15. I have already determined, for reasons previously given orally, that a fit sentence in the
12 case of Hellen Ebanks is one of imprisonment for one year and eight months. The
13 question before me now is whether that should be coupled with a compensation order
14 requiring her to repay the sum of money stolen by her, which is in the neighbourhood of
15 \$44,000.

16
17 16. To many it might seem obvious that such an order should be made. However, the law has
18 developed in a different direction.

19
20 17. The provision allowing for compensation orders is found in s.33 of the *Penal Code* (2010
21 Revision) and reads:

22 "Any person who is convicted of an offence may be adjudged to make
23 compensation to any person injured by his offence or by any other similar
24 offences committed by him which are taken into consideration by the court
25 in determining sentence. Any such compensation may be in addition to or in

1 substitution for any other punishment."
2

3 18. The last sentence is significant. "Any such compensation may be in addition to or in
4 substitution for any other punishment." Clearly, the intent of the draftsman and of the
5 Legislative Assembly was that a compensation order be part of the punishment imposed
6 on the offender. It is not intended to be a substitute, albeit a convenient one, for the
7 ordinary civil process.

8
9 19. Since all sentences or, if you will, "punishments" must be viewed holistically, I must take
10 into account when contemplating a compensation order the likelihood that the offender
11 can and will pay it and how the imposition of a term of imprisonment in default might
12 skew the sentencing process. Here I am told by counsel that Ms. Ebanks has spent the
13 money. She has no means to pay compensation. The Crown has not resisted that
14 proposition. It seems to be reasonable and plausible in the circumstances.

15
16 20. I am compelled to proceed on the basis that Ms. Ebanks would not be able to satisfy any
17 compensation order imposed upon her. That means that she would simply end up serving
18 the default term of imprisonment which is imposed as a component of the compensation
19 order and she would be serving it consecutively to the sentence I have found to be fitting.
20 The making of a compensation order would increase the sentence in a way which would
21 not accord with the principles of sentencing referred to in my earlier judgment.

22
23 21. The cases support this view.
24

1 22. In *R v Randall* 2002 CILR 254 the Privy Council was considering the same question and
2 said:

3 "The well established principle of sentencing" is that "a compensation
4 order should not [be] made without an inquiry into the means available
5 to [the defendant] to pay such an order."
6

7 23. The Court continued with the observation that:

8 "Where a consecutive sentence is imposed on default of payment, it is
9 intrinsically unfair to make an order which may result in the imprisonment
10 of [an] offender when he lacks the means to avoid that consequence."
11

12 24. I am satisfied that any term of imprisonment in default of payment here will likely result
13 in the further incarceration of Ms. Ebanks.

14
15 25. In *York and Others v Att. Gen.* (Grand Court, Smellie, J., August 4th, 1995), the current
16 Chief Justice said:

17 "It is wrong in principle to make an order for compensation when the offender
18 lacks the means to meet it, since such an order is intended to compel an offender
19 to restore the proceeds of his offence. It is not its purpose to operate inevitably
20 as an additional term of imprisonment which would follow in the event of
21 non-payment."
22

23 26. In summary, a compensation order must be considered as an integral part of the process
24 of imposing "punishment," that is, the process of sentencing. It follows that a
25 compensation order should only be made where there is reason to believe that the funds
26 are immediately available to satisfy the order. If there is any realistic prospect of the
27 default provision being served consecutively the authorities suggest that no compensation
28 order should be made at all. Finally, it seems to me that the civil process (which has a

1 wide variety of enforcement mechanisms available) is better attuned to the task of
2 collecting a debt from someone who cannot make immediate payment.

3
4 27. My conclusion is that no compensation order should be made here. Mr. Jackson should
5 be left to his civil remedies. Undoubtedly, the filing of originating process and a brief
6 pleading will result in a default judgment which he can then seek to enforce at some
7 future time when Ms. Ebanks is again employed in the community.

8
9 Dated the 21st day of February, 2013

10
11 Henderson, J.

12 Henderson J.
13 Judge of the Grand Court
14

