IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CRI-2009-404-000226

LAWRENCE DAVID EADE
Appellant

v

NEW ZEALAND POLICE
Respondent

Hearing: 8 September 2009

Appearances: M Dixon for Appellant
M Schwalger and K Wendt for Respondent

Judgment: 10 September 2009 at 12.30 p.m.

JUDGMENT OF VENNING J

This judgment was delivered by me on 10 September 2009 at 12.30 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

Solicitors: Crown Solicitor, Auckland
Copy to: M Dixon, Auckland

Introduction

[1] The appellant pleaded guilty to 14 charges laid by the Inland Revenue Department under the Tax Administration Act 1994 of evading or attempting to evade the assessment or payment of tax and four charges of fraud under the Crimes Act 1961. He was sentenced by Judge McElrea to imprisonment for two and a half years on the tax evasion charges and one year cumulative on the fraud charges, in total a sentence of three and a half years. The Judge also made an order for reparation in relation to the fraud charges of $153,419. The appellant appeals against the sentence of imprisonment and the order for reparation.

Background

[2] The appellant had a background in accounting but decided to become involved in property development. He was the sole director of a number of properties including About Properties Limited (APLS) and About Property Limited (APL). His business venture was unsuccessful. On 23 March 2003 he was adjudicated bankrupt. The appellant was discharged from that bankruptcy three years later in March 2006. Between April 2003 and August 2007, and on Mr Eade's instructions, the accountant for APL filed nil GST income tax and PAYE returns. However, between May 2004 and March 2006 Mr Eade had used APL as a cover to continue trading in his personal capacity whilst bankrupt. He issued invoices to clients in the name of APL using either APL or APLS' GST number. The clients made payment directly to Mr Eade's bank account. Mr Eade had no intention of paying the GST. The amount of core tax offending was $239,443. With interest and penalties the total amount was, as at 15 June 2009, in excess of $484,000.

[3] The fraud charges arose out of the appellant's employment as property manager for Maranui Estate Limited, a property development company. Between 8 June 2007 and 1 July 2008 the appellant fraudulently deposited 29 cheques for his own benefit, drawn on the account of Maranui. In some cases he forged one or both of the directors' signatures and deposited the amounts into Kiwibank accounts which

he had created. One of the forged cheques was used to pay his personal tax. These fraudulent payments totalled approximately $80,000.

[4] In other cases Mr Eade took cheques signed by the directors, but deposited them into Kiwibank accounts that he had opened in names similar to contractors or creditors of the company. He used the funds himself. In total the amount defrauded was $153,419.

[5] The appellant readily co-operated with the authorities when spoken to about his offending and entered guilty pleas at the earliest opportunity.

The District Court decision

[6] In sentencing the appellant, the Judge reviewed the facts, then referred to the case of *Clemm v Commissioner of Inland Revenue* (2005) 22 NZTC 19,495. The Judge considered that cumulative sentences were required. He took a total sentence of three and a half years' imprisonment in respect of the Inland Revenue Department offending and one and a half years' imprisonment for the fraud, in total a start point of five years. He then gave credit for the appellant's guilty pleas, previous good character and co-operation which reduced the sentence to two and a half years' imprisonment on the Inland Revenue Department charges and one year cumulative on the Crimes Act matters. The Judge declined to impose reparation in relation to the Inland Revenue Department offending but made an order for reparation in relation to the fraud charges in the sum of $153,419.

The appeal

[7] In support of the appeal Mr Dixon submitted that the sentence was manifestly excessive. He submitted:

- the start point for the sentence, particularly the Inland Revenue Department offending, was too high;

- the Judge erred in imposing cumulative sentences in this case;

- the end sentence of three and a half years was manifestly excessive when regard was had to the totality of the offending;

- the order for reparation was unrealistic and oppressive.

Reparation

[8] I agree with Mr Dixon's submission that an order for reparation was not appropriate in this case. There was no reparation report before the Court but the information before the Court from the pre-sentence report and other background information made it clear that Mr Eade's personal financial position was hopeless. Further, as counsel noted, the Judge did not strictly follow the requirements of s 36 and provide how the reparation was to be paid. More relevantly, however, the appellant's personal circumstances and the fact he had only relatively recently been discharged from bankruptcy should have confirmed reparation was unrealistic. As the Judge acknowledged when considering reparation in relation to the taxation offending:

> I am going to impose the costs sought by the Commissioner of Inland Revenue but the reparation in my view is unrealistic.

Despite that he then went on to impose reparation of $153,419 in relation to the fraud charges, albeit observing that recovery of the sum may be "a long shot".

[9] The loss in relation to the fraud charges is now borne by the bank as it has credited the company with the amounts fraudulently taken by Mr Eade. The bank will have its own remedies against Mr Eade if it perceives that to be worthwhile.

Start point

[10] At sentencing, counsel for the Inland Revenue Department sought a start point of two and a half years imprisonment for the offending. Mr Dixon submitted that the Judge's starting point of three and a half years for the Inland Revenue

Department offending was manifestly excessive in the circumstances. He submitted the Judge was wrong to place reliance on the decision of *Clemm*.

[11] A sentencing Judge is obviously not bound by sentencing recommendations made by counsel for either the prisoner or the prosecuting authority. I note in any event that later in the submissions counsel had argued for an adjusted start point of two and a half to three years. The Judge was also entitled to take the view that *Clemm*, a decision of this Court, discussed a number of issues that were relevant to the sentencing exercise before him. Clemm was a lawyer. She was imprisoned for two and a half years on 25 charges of using documents with intent to defraud. Seven of the charges related to $46,456 she stole from clients, while 18 charges were for underpayment of income tax and ACC levies from her law practice amounting to in excess of $197,000 together with a further $74,000 for understating GST. The offending took place over a long period of time, six years. Clemm pleaded guilty and full reparation of the principal amounts taken was made through the sale of her matrimonial home. Clemm was sentenced to two and a half years' imprisonment.

[12] On appeal Williams J concluded that the sentencing Judge appeared to have selected a start point in the region of two and a half to three years before factoring in the aggravating features, which could have easily justified an increase of an extra 12 to 18 months leading to a start point of sentence in the region of four years' imprisonment. The Judge accepted that the allowance for the guilty pleas and reparation was adequate. He concluded the end sentence of two and a half years could not be challenged as manifestly excessive.

[13] While each case must be considered on its own facts, in terms of the Inland Revenue Department offending at least, the similarities are that the appellant had a background in accounting, and was well aware of the taxation system and GST requirements. Like Ms Clemm he offended for a number of years. Like Clemm, the amount of money owing by the appellant to the Inland Revenue Department is a substantial sum, $240,000 approximately but, unlike Clemm there is no prospect of reparation. There can be no criticism of a start point of three and a half years for the tax evasion offending in the circumstances of this case. Mr Dixon did not challenge the start and end points for the fraud charges.

Cumulative/concurrent

[14] Mr Dixon submitted that as the Inland Revenue Department and fraud charges were committed at about the same time and for the same reasons there was a similarity in the nature of the charges, so that the Judge should have imposed concurrent rather than cumulative sentences.

[15] However, I accept Ms Wendt's submission that the Judge was correct to categorise the offending as separate so that it should be dealt with and acknowledged separately. The cheque frauds arising from Mr Eade's position of trust as property manager of Maranui occurred between 2007 and 2008 and are quite separate to the Inland Revenue Department offending which occurred primarily between 2004 and 2006 as a consequence of Mr Eade trading by using his companies as vehicles. The only real similarity between the offending is that it was all to the same end, namely to enable Mr Eade to seek to maintain an income and lifestyle that he was unable to legitimately sustain given his straightened financial circumstances. The Judge was right to impose cumulative sentences.

[16] But, as discussed with counsel, whether the sentences were concurrent or cumulative, at the end of the day the issue is whether the end sentence ultimately imposed is appropriate: *R v Martin* CA199/04 14 February 2005.

Totality

[17] That leads to consideration of the totality principle. Where there are a number of offences and the offences are dealt with by separate and cumulative sentences, the Court is required to have regard to the totality principle. In this case s 85(2) in particular applies:

> If cumulative sentences of imprisonment are imposed, whether individually or in combination with concurrent sentences, they must not result in a total period of imprisonment wholly out of proportion to the gravity of the overall offending.

[18] The issue is whether the start point for the cumulative sentence of five years and the effective cumulative end sentence of three and a half years are wholly out of

proportion to the gravity of the overall offending. That requires the Court to review the totality of the sentences once the sentences are accumulated. It is not apparent from the Judge's notes that he carried out such a review. The only reference to totality in the course of the sentencing notes is at para [23] where the Judge was dealing with the appropriate sentence for the Inland Revenue Department offences. In discussing the sentence imposed in *Clemm* he noted that the Judge in that case observed that the start point of four years' imprisonment could not be said to be manifestly excessive and the resulting sentence of two and a half years did not manifestly exceed a proper sentence for the totality of the offending.

[19] However, what was required in this case was an assessment of whether the start point of five years overall and the end point of three and a half years was out of proportion to the totality of the offending overall. Having carried out that exercise, in my judgment it cannot be said that a start point of five years and an end sentence of three and a half years' imprisonment is out of proportion to the totality of the offending in this case. The offending involved 14 charges of tax evasion and four charges of fraud. The offending was persistent and ongoing offending over a number of years. The tax evasion offending has led to a loss to the Government, and through it, the people of New Zealand of just under a quarter of a million dollars. The offending against Mr Eade's employers was a breach of trust and involved a loss to them of approximately $153,000. While the bank may have underwritten that loss so that Mr Eade's employers are not out of pocket, the bank is out of pocket. There is no realistic prospect of recovery from Mr Eade of these sums.

[20] In those circumstances, while the end sentence of three and a half years is stern, it is within the range available to the Judge and cannot be described as manifestly excessive.

Result

[21] The appeal is allowed in part. The order for reparation is quashed. Otherwise the appeal against sentence is dismissed.

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Venning J