

**IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY**

CRI-2008-019-007254

THE QUEEN

v

BARRY RAYMOND WHITELOW

Hearing: 1 December 2009

Appearances: J Foster for the Crown
M Talbot for the prisoner

Judgment: 1 December 2009

SENTENCING REMARKS OF STEVENS J

Solicitors/Counsel:
Crown Solicitor, PO Box 19173, Hamilton 3244
M Talbot, PO Box 24232, Abels, Hamilton 3253

Introduction

[1] Barry Whitelaw, you appear for sentencing today after pleading guilty to one charge of failing without reasonable cause to comply with the provisions of s 62 of the Insolvency Act 1967 in that you directly or indirectly entered into, carried on or took part in the management or control of a business without the consent of the Official Assignee between 3 July 2005 and 3 July 2008. This is an offence for which the maximum penalty is two years' imprisonment.

[2] For the purposes of your sentencing today, I have been assisted by written and oral submissions from the Crown, written submissions from your previous counsel Mr Robb, as amplified in court today by Mr Talbot. Then there is the pre-sentence report dated 6 November 2009 and a further report dated 1 December 2009, which indicates that a sentence of home detention by electronic monitoring is now considered to be one which the Court could consider.

Factual background

[3] You have been adjudicated bankrupt four times since 1979. You were most recently adjudicated bankrupt on 4 July 2005 in the High Court at Hamilton on a creditor's petition. On 29 July 2005, you were served with a notice clearly informing you of the restrictions that would apply during the course of your bankruptcy. Even without that notice, because it was your fourth bankruptcy, you would have known well what your obligations were. On 18 August 2005, you attended an interview with the Official Assignee and completed a statement of affairs. In that statement you initially did not disclose that you had been in business at any time in the previous two years. The insolvency officer challenged you and you indicated that you did not consider yourself to be in business because you were just doing a few jobs. You were advised that if you had been working on your own account and been paid then you were trading and operating a business.

[4] You then advised the insolvency officer that you had traded as B & W Builders and estimated that the business would have completed approximately ten

jobs involving payment of some \$4,500 to \$5,000. You stated that you started the business in approximately February or March 2004 and that the last job had been completed in June 2005. At no stage did you advise that you had any ongoing business obligations concerning B & W Builders. At the conclusion of the interview, the insolvency officer reiterated your obligations as a bankrupt including the restrictions on self-employment, being involved in the management of any business and obtaining credit over \$100.

B & W Builders

[5] In the period following your adjudication, but before the meeting with the insolvency officer on 18 August 2005, you undertook building work for Ms Dear at her residential address in Hamilton. For that work you rendered an invoice for \$261.55.

[6] At the time of your adjudication, you were also engaged to complete building work for Mr Jessen in respect of properties in Sunnyhills Avenue, Hamilton. Prior to your adjudication, you had given Mr Jessen a quote in the region of \$20,000 to \$30,000 to complete the work. Having begun the work, you then engaged Lobell Construction Ltd as a subcontractor to complete some of the structural work. Over the period 24 June 2005 to 16 September 2005, you forwarded Mr Jessen nine invoices totalling \$45,293.90, all of which were duly paid.

[7] Over the same period, Lobell Construction provided invoices to you totalling \$71,155.19. Of that amount you paid \$25,072.42. The managing director of Lobell Construction telephoned you repeatedly in relation to the unpaid invoices. You said that a family member would forward the money, but no further payments were made.

Building Workz

[8] In late 2005, you met Mr Elliott, a self-employed builder and managing director of Roger Elliott Builders Ltd. You told him that you were a builder and ran your own building company called Building Workz. Mr Elliot engaged you as a labour only subcontractor to assist with retail shop fit-outs. Over the period

22 October 2005 and 21 May 2006, you rendered invoices to Roger Elliott Builders Ltd under the name of Building Workz totalling \$8,249.05. These amounts were paid to you.

B & S Builders

[9] Between August and September 2006, you were engaged by a Mr Stesel to carry out building work on his property at Primrose Street, Hamilton. The work was extensive and included building code compliance applications and engaging subcontractors. In September 2006, you forwarded an invoice for \$29,211.75 on B & S Builders letterhead. The invoice recorded payments made to you by way of deposit, progress payments and identified the balance to be paid. This was subsequently paid.

B & S Whitelaw

[10] In mid 2005, you met Mr Dobbs and represented that you ran a maintenance/building business trading as B & S Whitelaw. Between mid 2005 and November 2006, Mr Dobbs engaged you to undertake a number of jobs. Initially these included fencing at an investment property and maintenance at another property.

[11] You were later engaged to complete building works at Coventry Street and Caistor Street, Hamilton. Your responsibilities at these properties included ensuring Council permits and code compliance certificates were obtained. You failed to do this. You also engaged Alistair Mackie Ltd to undertake plumbing work at Caistor Street and never paid an invoice of \$7,753.

[12] Mr Dobbs engaged you to paint and reline a shed at Karkamea Road, Whatawhata - \$8,000 was paid in advance. You also engaged Mr Keiser to undertake the building project on the shed. You told him that he would be paid directly by Mr Dobbs. At the completion of the job, Mr Keiser invoiced Mr Dobbs and was advised that he had already paid for the job. Mr Keiser then invoiced you

and you failed to pay. Mr Keiser obtained judgment from the Disputes Tribunal for \$7,020, of which only \$1,000 has been paid. The balance remains outstanding.

[13] Between December 2006 and August 2007, you accepted various labour only building contracts from GW Roofing Ltd. You rendered seven invoices totalling just under \$5,000, which were all paid.

S & B Builders

[14] In late July 2007, you were engaged by Mr Hall to build a shed at his residential address. A deposit of \$1,000 was paid. At the completion of the job, you rendered an invoice with \$1,430 outstanding. This was paid by Mr Hall.

B & T Builders

[15] In February 2008, you went to Top Town Tyres Ltd in Hamilton. You purchased four wheels and tyres to the value of \$3,890. You asked for the invoice to be made out to B & T Builders. The invoice was never paid. After five months you returned the wheels and tyres.

[16] You made no application to the Official Assignee to be employed, nor did you ever account to the Official Assignee for the funds received. You advised the Official Assignee that the only income you received during the relevant period was a benefit. It seems that you just continued throughout the entire period of the three year bankruptcy blatantly and flagrantly to ignore your obligations.

[17] I am satisfied that this outline of the facts shows a systematic misrepresentation of your position, not only to the Official Assignee, but also to those with whom you dealt in your building business. In short, you obtained all the benefits of the bankruptcy and incurred none of the responsibility of the obligations which are designed to assist your creditors. In fact, your dealings led to further harm to creditors who, because you have no assets, were left completely without redress.

Personal circumstances and pre-sentence report

[18] You are 52 years of age. You were recently separated from your wife of 17 years for a period of two years, but have recently reconciled. I note that your wife is present in court today and has indicated her support to you. You have been in the building trade for around 30 years.

[19] You have a number of health concerns, including heart problems, cancer, which has recently returned and a number of kidney stones. You take medication for your heart problems and pain medication for other ailments. In 1993, you were the victim of an attack, which led you to suffer injury. You suffer from hearing and vision damage following that attack.

[20] In relation to the current offending, you said that you did not think that the prohibition applied to you because you were contracting your labour only and therefore working for yourself rather than for your own business. I do not accept that. That is just another example of your dishonest approach to the running of your affairs. You acknowledge that you understand that what you did was wrong, but claim that there were no victims. Let me assure you that the creditors who did not get any benefit while you were gaining the protection of the bankruptcy would not see it that way – and neither do I.

[21] You have constantly tried to justify, defend and minimise your actions. You are rightly described by the probation officer as a recidivist dishonesty offender whose demeanour at the interview suggested that you were unlikely to change your behaviour.

Psychiatric report

[22] When you pleaded guilty, the Court called for a report under s 38(2) of the Criminal Procedure (Mentally Impaired Persons) Act 2003. Dr Tapsell provided a helpful report for the Court. He noted that you had, at the interview, for the first time acknowledged that you had broken the law. Relevant to today, Dr Tapsell concluded that you do not suffer from any formal mental illness. Dr Tapsell stated

that you describe having a number of narcissistic personality traits, but that you do not meet the threshold for the diagnosis of a disorder.

Previous convictions

[23] You have a long history of dishonesty offending, stretching back to 1980. You have many convictions for obtaining by false pretences and several theft convictions. There are other convictions for assault and a conviction for arson in 1993. Your most recent offending was five criminal harassment convictions and obstructing the course of justice. You also have over \$700 in outstanding fines.

Crown submissions

[24] The Crown submitted that there were a number of aggravating factors in this case, including breach of trust, considerable planning and premeditation, the extent of loss, the continuation of the offending whilst on bail and your previous convictions, 70 of which were for dishonesty-related offending. The Crown submitted that your guilty plea was entered very late and that you should not receive a discount of more than ten percent.

[25] The Crown referred to the decision of the Court of Appeal in *R v Holt* [2006] DCR 669 at [68]-[69] and also referred to the decision of *R v Burchell* HC AK CRI 2005-044-7058 4 December 2007. The Crown submitted that a starting point in the range of nine to twelve months' imprisonment is appropriate, with an uplift to reflect your previous convictions.

Defence Submissions

[26] Mr Talbot has said everything that could possibly be said on your behalf. He adopted the written submissions previously prepared by Mr Robb and submitted that the offending had come about as a result of you finding it difficult to say no to people and that you could not get by financially without working. Mr Talbot also

submitted that you are entitled to a discount for your guilty plea, albeit higher than that suggested by the Crown.

[27] Mr Talbot confirmed that you did now accept the facts that lay behind your guilty plea to this charge.

[28] So far as the letter of 31 August 2009 is concerned, it seems you were sending an invoice to a Mr Scott seeking payment for work done in October 2008, I note that both in October 2008 and in August 2009 you were still the subject of bankruptcy. I simply do not accept your claim that you thought that the bankruptcy was automatically discharged after three years.

[29] The main thrust of Mr Talbot's submissions was that you should be sentenced to either community detention and home detention. He relied in particular on the contents of a report from Probation Services dated 1 December 2009. This referred to the fact that it was considered that an electronically monitored sentence could feasibly be possible in your case because of the fact that Mrs Whitelaw's status had changed and that she was no longer charged as a co-offender in relation to your offending. It was also noted that your response to certain community sentences had been considered to be favourable, as compared with a previous assessment that you had not adequately complied with community-based sentences.

[30] Mr Talbot emphasised that you needed counselling and had recently voluntarily agreed to engage in counselling, which could be continued as part of a sentence of community detention or home detention. He noted that you had complied in the past with community-based sentences and submitted that it would assist in your rehabilitation. This was because finally you were showing some insight into your offending.

Relevant purposes and principles of sentencing

[31] The Sentencing Act 2002 requires that I keep in mind a number of purposes and principles when deciding on an appropriate sentence. In your case, I have specific regard to the following purposes of sentencing as set out in s 7 of the Act:

the need to hold you accountable for the harm done to the victims and to the community – and there are victims in this case; the need to promote in you a sense of responsibility for, and an acknowledgement of, that harm; the need to provide for the interests of the victims; the need to denounce your conduct and deter you and others like you from committing the same or similar offences; the need to protect the community from you; and the need to assist in your rehabilitation and reintegration.

[32] I am also required to take into account certain principles of sentencing according to s 8 of the Sentencing Act. These including taking into account the gravity of your offending and the degree of your culpability. I need to take into account the seriousness of this type of offence in comparison with other types of offences. There is the need to consider the general desirability of consistency with appropriate sentencing levels and with similar offenders. I must also bear in mind the particular circumstances of the case and you as the offender that would mean an ordinarily appropriate sentence would be disproportionately severe. Finally, I must impose the least restrictive outcome that is appropriate in your circumstances.

Aggravating and Mitigating Factors

[33] The Court of Appeal in *R v Taueki* [2005] 3 NZLR 372 sets out the orthodox approach to sentencing. This requires me to set a starting point based on the features of the offending, and then adjust the starting point according to any mitigating and aggravating features relating to you.

[34] In terms of the offending, the aggravating features in this case are that the offending continued whilst you were on bail, the extent of the loss damage and harm resulting from the offending, the fact that you abused a position of trust and that there was planning and premeditation involved.

[35] I am satisfied that you had been made aware of the restrictions of bankruptcy a number of times in the past and you deliberately lied to, and sought to mislead, the Official Assignee when you were first interviewed about the offending. Indeed, throughout the whole period of your bankruptcy you just continued offending regardless.

[36] There are no applicable mitigating factors relating to the offending.

[37] In terms of you as the offender, the aggravating factors include your extensive history of dishonesty convictions.

[38] In terms of mitigating factors, there is your late guilty plea and your health issues. I take into account s 16 of the Sentencing Act which establishes a general presumption against imprisonment.

Sentencing approach

[39] There is no tariff case for this type of offending. I have considered carefully the two cases referred to by counsel in *Holt and Burchell*. I have also looked at the case of *Goodeve v Ministry of Economic Development and NZ Police* HC ROT CRI-2009-463-48, CRI-2008-463-49 8 July 2009.

Discussion

[40] Although there is only one charge, the summary of facts reveals continual offending throughout the period of your bankruptcy. This was a sustained and deliberate breach of your obligations. You were well aware of, but unwilling to be bound by, the restrictions that apply to you under insolvency and you continued to offend even after the charge was laid against you. You deliberately lied to and misled the Official Assignee and you caused considerable loss to creditors.

[41] I am satisfied, having looked at the circumstances in *Holt and Burchell*, that it is appropriate to fix a starting point of nine months' imprisonment. Having regard to your extensive history for dishonesty-related offending, I apply an uplift of three months' imprisonment.

[42] In terms of discount for the guilty plea, I agree with the submission on behalf of the Crown that a discount of approximately ten percent is required. Therefore, if the sentence is to be one of imprisonment, the sentence is one of imprisonment of ten months and two weeks.

[43] The question is whether or not a sentence of home detention is appropriate. Your counsel Mr Talbot has argued strongly that such a sentence might be imposed because it would enable you to continue to have counselling and understand just what your offending has involved. It could assist in your rehabilitation. The difficulty with this is that this type of offending requires the Courts to ensure that the public are protected and the integrity of this protective legislation be upheld. I am required to do this and that means that I must send a message to people who are not willing to abide by their obligations and to accept that what you did over this three year period was unacceptable and ultimately not worth doing.

[44] I must take into account the question of deterrence and protection of the community. Accordingly, I do not consider that a sentence of home detention is appropriate. Therefore, having pleaded guilty to the charge to which you appear for sentence today, I sentence you to imprisonment for a period of ten months and two weeks.

[45] You may stand down.

Stevens J