IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

CRI 2009-441-000024

BETWEEN	WARREN DAVID PICKETT Appellant
AND	SERIOUS FRAUD OFFICE Respondent

Hearing: 20 October 2009

Counsel: J G Krebs for the Appellant
B M Stanaway and A M Killeen for the Respondent

Judgment: 5 November 2009

JUDGMENT OF WILD J

Introduction

[1] This appeal was originally against two aspects of the sentence imposed on Mr Pickett by Judge Mackintosh in the District Court at Napier on 29 May. Mr Pickett now accepts the Judge's sentencing starting point, and challenges only the minimum period of imprisonment (MPI) she imposed. This MPI was 3 years and 4 months: two-thirds of the effective end sentence of 5 years imprisonment.

Background facts

[2] Over a period of some 20 years, Mr Pickett defrauded 212 people of approximately $3.77 million. Most of these people lived in or around the central Hawke's Bay township of Waipawa.

[3] Mr Pickett was a pillar of the Waipawa community. He was a Justice of the Peace, a marriage celebrant, and prominent in a large number of local community and sporting organisations, sometimes as honorary auditor.

[4] Mr Pickett was a chartered accountant practising in Waipawa, although the offending was not directly connected with his accountancy practice. Instead, the 212 victims of Mr Pickett's fraud were people who deposited money in two finance companies operated by Mr Pickett; Waipawa Finance Company Limited and Waipawa Holdings Limited. The depositors were clients of Mr Pickett's practice, friends, or people who knew Mr Pickett by reputation.

[5] The size, scope and duration of Mr Pickett's frauds are explicable by the trust – the absolute trust – these people placed in Mr Pickett. His reputation and standing in his community preceded him.

[6] About 22 years ago, Mr Pickett used monies deposited with the two finance companies to fund two risky business ventures. These ventures were undertaken by two other companies operated by Mr Pickett, High Street Investments and Homewood Developments. When these ventures turned sour, Mr Pickett began using monies deposited with the two finance companies to try and prop up his failing business ventures. He did this by debiting the balance of the interest due to depositors to his own advance accounts with the finance companies. He used deceptive accounting practices to conceal the fact that he was taking increasingly large amounts of money from the finance companies.

[7] Mr Pickett did that to buy time. Upon sentencing, Mr Pickett asserted a belief that he could eventually right the situation, from new, profitable investments. If Mr Pickett ever really honestly held that belief, I assess that it was never a realistic one.

[8] When the recent recession began to bite, Mr Pickett was forced to use fresh deposits (which he had attracted to the two finance companies by offering increased interest rates), to meet interest payments to, and withdrawals by, existing depositors.

[9] Despite the economic downturn, Mr Pickett assured depositors that the two finance companies were in a sound financial position, and implied that depositors' funds were safe. He did this in circular letters and, in the case of at least one depositor who inquired, orally. Due to their trust in Mr Pickett, depositors accepted what he wrote or told them.

[10] Quite apart from this fraud, Mr Pickett stole approximately $470,000 of depositors' money, applying that for his own and family's benefit. It appears he spent it on purchasing properties, on property renovations, to buy vehicles, and on general living expenses. I revert to this point in [35]-[36].

[11] In August 2008 Mr Pickett could conceal this fraud no longer. He went to the Serious Fraud Office (SFO) and confessed what he had been doing. The two finance companies he controlled were placed in liquidation on 7 August 2008. Mr Pickett cooperated fully with the SFO, and with the liquidators.

[12] After investigating, the SFO laid eight charges against Mr Pickett. In summary these charges, and the sentences the Judge imposed in respect of each (mentioned further in [14]-[15]), are:

Charge	**Section in Crimes or Securities Act**	**Maximum penalty**	**Sentence imposed**
As a promoter, Making false statement with intent to deceive or cause loss (three counts)	Section 242 Crimes Act 1961	10 years' imprisonment	5 years' imprisonment on each (each concurrent)
Theft by person required to account (two counts)	Section 222 Crimes Act (now repealed)	7 years' imprisonment	5 years' imprisonment on each (concurrent)
Theft by person in a special relationship	Section 220 Crimes Act	7 years' imprisonment	5 years' imprisonment (concurrent)
Offering and allotting securities to the public in contravention of Securities Act 1978 (2 counts)	Section 59 Securities Act	$300,000 fine, $10,000 per day as a continuing offence	Convicted and discharged

[13] The Securities Act charges result from the fact that Mr Pickett operated the two finance companies in almost total breach of the requirements of the Securities Act. There was no prospectus. There was no investment statement. There was no trust deed. In short, there were none of the basic protections for depositors. In saying that, I do not overlook that those protections have proved inadequate, in recent years, to protect investors in "mainstream" finance companies.

The sentences imposed

[14] Judge Mackintosh sentenced Mr Pickett to an effective sentence of 5 years imprisonment. The Judge's sentencing starting point was 9½ years imprisonment. She allowed an initial discount of one-third (38 months) for Mr Pickett's early guilty pleas, and a further 16 months reduction for his cooperation with the SFO and other mitigating factors. Perhaps the chief mitigating factor was that Mr Pickett had never before appeared in a Court, and was never likely to again. In the Judge's words, this was a "radical fall from grace" for Mr Pickett. Thus, the total discount was 54 months or 47%.

[15] Judge Mackintosh imposed a MPI of two-thirds of the 5 year sentence. Mr Pickett will thus not be released from prison for at least 3 years 4 months. But for that, he would have been eligible for release on parole after 1 year and 8 months.

Points no longer pursued

[16] In his notice of appeal dated 22 June, Mr Pickett framed his appeal in this way:

> The sentence imposed by Her Honour was manifestly excessive in that:
>
> 1. The starting point was too high.
>
> 2. It was not necessary to impose a period of non parole greater than 1/3 of my sentence.

In his submissions filed for the hearing, Mr Krebs advised that Mr Pickett pursued only ground 2.

[17] Before dealing with that ground, I clear away several points. First, it is not suggested that the Judge's summary of facts ([2]-[8] of her sentencing notes) was inadequate or incorrect. The Judge's description of the facts was more comprehensive than my brief overview.

[18] Secondly, there is no submission that the Judge's summaries of the aggravating and mitigating features ([14]-[15]) were deficient.

[19] Thirdly, it is no longer asserted the Judge's summary ([18]) of the relevant sentencing principles was inadequate in any way.

[20] Fourthly, the Judge referred to relevant sentencing authorities (at [19]-[22]). Again, the appellant no longer contends that the Judge overlooked any case offering her real assistance. It is, of course, possible to refer to other sentencing decisions almost ad infinitum. That is neither helpful nor necessary.

Minimum period of imprisonment

[21] Judge Mackintosh dealt with this in the following part of her sentencing remarks:

> [26] I turn now to decide whether or not it is appropriate to impose a minimum non-parole period. I need to consider whether the normal parole eligibility would not be enough to punish, deter and denounce the offending. I have no doubt in this particular case that a minimum period of imprisonment is required in this situation to achieve that. This offending occurred over 25 years. There was a gross breach of trust. As I have already referred there were many victims. The effect on the victims is significant and there are vast sums of money involved.
>
> [27] As to the length given these factors I take the view that I am satisfied that a minimum period of imprisonment of two thirds of the sentence is warranted and that anything short of that in this particular case would be an affront to the victims and to the community at large.

[22] The following summarises Mr Krebs' submissions for Mr Pickett:

- The Judge erred in deciding that a MPI was required.

- Alternatively, if one was, then the MPI ought to have been no greater than one-half of the sentence i.e. 2½ years imprisonment.

- In determining whether an MPI was appropriate, and its length, the Judge placed too much emphasis on the aggravating features of Mr Pickett's offending, and insufficient weight on the mitigating factors. In particular, the Judge placed no weight on the fact that Mr Pickett – unlike the offender in other serious fraud cases – had not used misappropriated funds to support a lavish lifestyle. Mr Pickett injected the funds he stole to try and prop up the ever increasing losses being incurred by his two investment companies.

- The Judge triple-counted the serious aggravating factors: once in deciding to impose cumulative sentences; a second time in fixing her "very stern" starting point of 9½ years imprisonment; and a third time when assessing the MPI.

- On the other hand, the Judge did not take the mitigating factors into account in relation to the MPI. Those factors included:

  (a) Mr Pickett's unblemished record;

  (b) His community service over many years;

  (c) The fact that he made the maximum reparation he could, to the extent that he will be penniless upon his release from prison; and

  (d) The fact that his offending was restricted to the two finance companies. In particular it did not taint his accountancy practice.

- Nor did the Judge consider relevant factors relating to Mr Pickett personally, in particular:

(a) His age (he was 64 on 10 October 2009);

(b) He is in poor health (depression, and a heart condition); and

(c) The fact that the previous two factors will make imprisonment a harsh punishment for him.

- The MPI imposed by the Judge doubled what would otherwise have been the effective term of imprisonment (increasing it from 1 year 8 months to 3 years 4 months).

- An effective sentence of 1 year 8 months imprisonment would sufficiently have achieved relevant sentencing purposes: to hold Mr Pickett accountable for, and to denounce, what he did. Here, there was no need to impose a sentence that deterred Mr Pickett from future such offending, or a sentence designed to protect the community from Mr Pickett. That is because there is no prospect at all of Mr Pickett ever again being in a position to defraud people who entrust money to him.

- The MPI imposed "is crushing to a man in Mr Pickett's circumstances and is unjustified".

SFO's submissions in response

[23] As I intend dismissing this appeal, I will not separately summarise Mr Stanaway's submissions for the SFO. I will, however, refer to them at various points in the next section of this judgment.

Decision

[24] With one exception, Mr Krebs did not submit that the Judge had erred in principle when dealing with the MPI. The approach the Judge needed to take is spelt out in s 86 Sentencing Act 2002. That section was amended in 2004 to remove

requirements that a sentencing judge be satisfied that the offending is sufficiently serious to justify a MPI, or is out of the ordinary range of offending. Now, s 86(1) confers a discretion on a sentencing judge to impose a MPI. In *R v Hokai* HC AK S4/03, 2 May 2003, Priestley J at [33] described the discretion as "a broad and coherent" one "which ought not to be excessively trammelled". *Hall's Sentencing* regarded that description as worthy of citing, at SA86.4.

[25] As Mr Stanaway pointed out, the four factors referred to in s 86(2) correspond with four of the purposes of sentencing, those set out in s 7(1)(a), (e), (f) and (g) respectively.

[26] The Judge referred to these purposes in fairly general terms:

> [26] ... I need to consider whether the normal parole eligibility would not be enough to punish, deter and denounce the offending ...

[27] Mr Stanaway accepted Mr Krebs' submission that the s 86(2)(c) and (d) purposes of deterring Mr Pickett from similar offending in future, and protecting the community from him, were not relevant. That is because, given Mr Pickett's age and poor health, and his "radical" and very public fall from grace, he is never again likely to be in a position to defraud the public. Significantly, the Judge did not refer to a need to protect the public from Mr Pickett, or to deter him specifically.

[28] In considering whether to impose a MPI, Judge Mackintosh referred to some of the aggravating features:

> [26] ... This offending occurred occurred over 25 years. There was a gross breach of trust. As I have already referred there were many victims. The effect on the victims is significant and there are vast sums of money involved.

[29] I do not accept that the mention of these factors involved the sort of triple counting contended for by Mr Krebs. The Judge followed the three-step process outlined by the Court of Appeal in *R v Taueki* [2005] 3 NZLR 372 at [53]-[54]. Mr Stanaway also drew attention to the Court of Appeal's most recent consideration of s 86 in *R v Nguyen* [2009] NZCA 239. The Court said this:

> [33] In determining whether an order should be made under s 86, the Court must focus on the four specified purposes in s 86(2). Both the principles in s 8 and the aggravating and mitigating factors in s 9 are applicable to the extent they are relevant to one or more of the four purposes: *R v Walsh* (2005) 21 CRNZ 946 at 951 (CA). For example, a guilty plea and co-operation with the authorities are relevant when considering whether a minimum period of imprisonment under s 86 is necessary to satisfy the purposes of denunciation and deterrence in relation to the offender personally, if the guilty plea and the co-operation demonstrate the offender's insight into the nature and seriousness of his or her offending.

[30] The aggravating factors identified by the Judge were unarguably relevant to her consideration of whether a MPI was appropriate, and if so its length. Mr Stanaway particularly emphasised the gross breach of trust referred to by the Judge. He categorised it as "pernicious", submitting that it was "a quite extraordinary and unusual breach of trust". He demonstrated this by reference to one of the many victim impact statements the Judge had, though pointing out that it was only one of many statements demonstrating the acute sense of breach of trust felt by Mr Pickett's victims.

[31] The exception I referred to in [24] was that the Judge did not, when considering a MPI, weigh the mitigating factors against the aggravating factors. She mentioned only the latter. Though Mr Stanaway readily accepted this, he had two points in response. The first was that lack of reference to mitigating factors is not necessarily to be equated with lack of consideration of them. As the Court of Appeal pointed out in *R v Teepa* CA79/04, 27 July 2004:

> [17] ... A Judge will have reviewed all the relevant factors when fixing the nominal sentence. It is not, in our view, necessary to refer specifically to those factors again when determining the minimum period of imprisonment, although, for the purposes of informing the prisoner and other interested parties, it is preferable to indicate the main features which have been taken into account in determining the appropriate sentence to punish, deter and denounce as well as the mitigating features. ...

[32] A similar comment was subsequently made by the Court of Appeal in *R v McKelvy* [2007] NZCA 340 at [44]. In *McKelvy* the Court rejected, as disingenuous, the sort of submission Mr Krebs advanced to me. It pointed out that the sentencing Judge had already categorised the offending as among the most serious of its type, and found that community protection was required.

[33] Here, earlier in her sentencing remarks, Judge Mackintosh had listed a number of factors which she regarded as mitigating. When she came to consider a MPI, I am sure the Judge did not lose sight of those mitigating points. I think she regarded them as overwhelmed by the aggravating features she identified.

[34] I need to deal with the point Mr Krebs raised about Mr Pickett's age and poor health, and his submission that in combination those will make imprisonment a harsh punishment for him. When she embarked on sentencing Mr Pickett, the Judge mentioned his age. Unless I have overlooked it, she did not mention his health. That was perhaps because Mr Pickett's health was addressed in some detail in the pre-sentence report the Judge had. That report stated that Mr Pickett had advised that his health was "generally pretty good". After detailing some health problems Mr Pickett did have, the report concluded:

> Departmental screening assessments showed no cause for concern.

[35] Mr Stanaway's second point responded to Mr Krebs' submission that Mr Pickett had not used the funds he misappropriated to support a lavish lifestyle. That was a point Mr Krebs had emphasised, contending that it distinguished Mr Pickett from other serious fraudsters, for example Messrs Swann and Harford, sentenced by Stevens J in Dunedin on 11 March this year (*R v Swann and Harford* HC DUN CRI 2007-012-004181, 11 March 2009).

[36] I accept that Mr Pickett did not use the funds he misappropriated "to purchase boats, cars and properties and to support other lavish lifestyle expenditure", as did Mr Swann ([5] of Stevens J's sentencing notes). But Mr Stanaway is entitled to point out that Mr Pickett did effectively use the funds he misappropriated to support his whole professional and family existence. He used them to keep his two investment companies afloat. He needed to do that in order to maintain his accountancy practice and his position in the Waipawa community. As Mr Stanaway accepted, if those companies had gone under "the whole house of cards would have come down". In that way, Mr Pickett's offending did support his lifestyle. His offending was deliberately and carefully "compartmentalised" (Mr Stanaway's word) because it needed to be.

[37] The remaining point is Mr Krebs' general submission that no MPI was necessary here or, if one was, that no more than 2½ years (50% of the end sentence) was justified.

[38] I do not accept that submission. The aggravating features identified by the Judge in [26] of her sentencing remarks (those I have set out in [28] above) are exactly those that I also consider stand out in relation to Mr Pickett's offending. If no MPI were imposed, Mr Pickett would be eligible for release on parole after 1 year and 8 months imprisonment. I do not accept that that would have been a sufficient sentencing response. Nor do I consider that an MPI of 2½ years imprisonment would be sufficient. The combination of the duration, seriousness (particularly in terms of the breach of trust involved), and consequences of Mr Pickett's offending simply demanded a sterner sentencing response.

[39] Mr Stanaway pointed to a trend for MPIs to be imposed for "high end" fraud of the sort involved here. The following table demonstrates that trend:

Name of case	Sentence imposed (years)	MPI (years)	MPI as proportion (%)
R v Swann HC DUN CRI 2007-012-004181, 11 March 2009, Stevens J	9.5 [1]	4.5	47.4
R v Fitzsimmons HC NAP CRI 2008 441 37, 9 March 2009, Winkelmann J	4.5 [2]	2.5	55.6
R v McKelvy [2007] NZCA 340	8	5	62.5
R v Patterson [2008] NZCA 75	8	5	62.5

[1] Stevens J made no order for reparation, noting that civil proceedings against Mr Swann had yet to be determined, but expressing the hope that they would result "in substantial reparation" to the Otago District Health Board.

[2] Plus reparation of $250,000.

[40] I accept Mr Stanaway's submission that that table reflects a perception on the part of sentencing Judges that, short of imposing an MPI, available sentences for high end fraud are too short. I consider that perception reflects public concern about crime of this type.

[41] Similar judicial concerns are evident in relation to sentencing for recidivist burglary, receiving and similar dishonesty offending. An example is a comment made by the Court of Appeal in *R v Ngamo* [2009] NZCA 512. In that case the

Court of Appeal dismissed an appeal against an effective sentence of 5 years 3 months imprisonment, with a MPI of 3½ years. Those sentences were imposed for a raft of charges, including 10 for burglary. The judgment includes this:

> [6] We were referred to a number of decisions by the parties where the minimum non-parole periods ranged from just under 49 per cent (*R v Potae* [2007] NZCA 539) to the full 66 per cent (*R v Rohloff* CA193/03 24 September 2003 and *R v Ryder* CA514/04 20 July 2005).
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> ...
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> [8] The Crown also referred us to *R v Clayton* [2008] NZCA 348. In that case, this Court held that it was "clearly open" to a Judge to impose a minimum period of imprisonment in a case of extensive and carefully planned fraud, receiving stolen goods and document fraud. In *Clayton*, the prisoner's offending had continued over a period of time and was purely for commercial gain. It was noted by this Court that minimum periods of imprisonment in the 60 - 66 per cent range have often been imposed for cases of serious dishonesty offending, including burglary. The Court referred to *Rohloff* and *R v Frost* CA344/05 6 September 2006, where a 60 per cent minimum non-parole period was imposed.

[42] Judge Mackintosh's sentencing remarks show that she was very much alive to these concerns. She referred to *Fitzsimmons*, I think particularly because it was a comparable case that had occurred around the same time in Hawke's Bay. She categorised Mr Pickett's offending as worse than Mr Fitzsimmons'. She explained her reasons for that view.

[43] Within the confines of s 86 Sentencing Act, the decisions whether to impose a MPI and, if so, its duration, are discretionary ones. I cannot see any error on the Judge's part that might justify me in interfering with the discretionary decisions she made, and allowing this appeal. Indeed, I respectfully regard the end sentence imposed by the Judge (no longer challenged), and the MPI she imposed, as exactly on the mark.

Result

[44] The appeal is dismissed. The sentences imposed by Judge Mackintosh stand, as do the MPI the Judge imposed in respect of those sentences. Thus, an effective sentence of 5 years imprisonment. An MPI of 3 years and 4 months imprisonment.

Solicitors:
Crown Solicitor, Christchurch for the Respondent