

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

**CRI-2013-004-1722  
[2014] NZHC 1579**

**THE QUEEN**

v

**HUGH EDWARD STAPLES HAMILTON**

Charge: Theft by a person in a special relationship (14)  
Plea: Not guilty  
Counsel: NR Williams, KC Chang, AJH Senior for Crown  
DG Young and JM McNamara for defendant  
Sentenced: 4 July 2014

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**SENTENCING NOTES OF FAIRE J**

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Solicitors: Meredith Connell, Auckland  
Hauraki Gulf Law, Auckland

## **Introduction**

[1] Hugh Hamilton you appear for sentence on 14 charges under s 220 of the Crimes Act 1961 relating to theft by a person in a special relationship. I found you guilty of these charges on the 16 May 2014. Those offences carry a maximum sentence of 7 years imprisonment.

## **Background**

[2] The offending occurred over a period of three years, between July 2005 and May 2008. They related to related party lending by Belgrave Finance Ltd. Belgrave carried on business as a finance company until the 28 May 2008 when it was placed into receivership. Its primary business was the advance of commercial loans for property investment and development from funds raised by the public through the offering of first ranked debenture stock. Belgrave had a Debenture Trust Deed that explicitly established that Belgrave was prevented from entering, without the Trustee's consent, any related party transactions. The Trust Deed offered a measure of protection to investors.

[3] You were a partner of Davidson Armstrong Campbell (DAC Legal) at the time of the offending, and were the partner responsible for the firm's trust account. Mr Schofield was a long term client of DAC Legal. During the time you were Mr Schofield's solicitor.

[4] Mr Schofield approached the directors of Belgrave with the intention of purchasing the shares in 2005. His purpose was to obtain access to funds in order to finance his own initiatives and ventures. Following the negotiations you were instructed to create a clean trust with discretionary beneficiaries with no reference to Mr Schofield. This trust was to be the ultimate owner of Belgrave via ownership in a company IEL who would hold 100 per cent of the shares in Belgrave. The new trust was settled by Mr Schofield's mother in law, Mrs Hughes. The beneficiaries included the husband of each of Mrs Hughes children, which included Mr Schofield. The shares were purchased and Messrs Smith and Buckley were made directors of Belgrave and of IEL. Over the course of the next three years Mr Schofield, exercised a controlling influence over the directors and organised 14 loans to Schofield related entities. You assisted in these loans by preparing the relevant

documentation, backdating documents, and by receiving a portion of the funds into DAC Legal's Trust Account.

[5] Belgrave was placed into receivership on 28 May 2008. The total distributions made to investors represent 9.8 cents per dollar invested by the debenture investors. The total loss attributable to the Schofield loans which you assisted in is \$12,583,146.80, although the receiver of Belgrave, as I mentioned, has put the figure at \$14,461,393. Mr Schofield, and the two Belgrave directors, Messrs Buckley and Smith were charged with theft by a special relationship, making a false statement by a promoter, making a false statement to a trustee and making an untrue statement in an advertisement. Mr Schofield was granted a conditional stay of proceedings as he was suffering from terminal cancer. Messrs Buckley and Smith pleaded guilty and were sentenced. I will return to their sentences shortly.

### **Crown Submissions**

[6] In determining the starting point the Crown refers to a number of aggravating features. The first is the extent of the loss, damage and harm including harm to investors, harm to the market, harm to the legal profession. Counsel then refers to the abuse of a position of trust or authority, the particular vulnerability of the victim, pre-meditation and the duration of the offending. Based on these factors counsel suggests a starting point of six to six and a half years' imprisonment.

[7] Counsel submits that no discount for good character is appropriate based on the prolonged nature of the offending and the fact that you were struck off the roll of barristers and solicitors. Further counsel argues that a lack of personal benefit should not be seen as a mitigating factor as the fee revenue that would have resulted from the offending could not have been insignificant.

[8] This leads to a final sentence of six to six and a half years' imprisonment.

### **Defence Submissions**

[9] The defence submits that you were the least culpable of those who have been charged in relation to Belgrave Finance. Counsel states that there are numerous factors which act to mitigate your offending, namely:

- a. No involvement in the loan approval process;
- b. No control of investor funds;
- c. Lack of proximity;
- d. No knowledge of the financial position of the company;
- e. No mutual understanding or involvement in the common plan, between the other co-offenders;
- f. Vague instructions from the directors;
- g. Absence of material gain;
- h. Derivative liability as a party.

[10] Based on the above factors your counsel submits that a starting point in the range of three years' imprisonment is appropriate. Counsel acknowledges that your conduct has resulted in you being struck off the roll of barristers and solicitors and is an aggravating feature, but refers to your cooperation with the authorities, a lack of personal gain, no motive, good character and low risk of reoffending as mitigating features. Counsel suggests a discount of one year to reflect these features. Having reached the two year threshold counsel submits that a sentence of home detention be imposed coupled with community service.

## **Analysis**

### *Purposes and Principles of Sentencing*

[11] I have considered the purposes and principles set out in ss 7 and 8 of the Sentencing Act 2002.

[12] In particular in determining the appropriate sentence to be imposed, I am required to consider the need to hold you accountable for your offending; to promote a sense of responsibility for the offending; to denounce this type of offending; and to deter you and others from offending of this kind. I acknowledge that as you are no longer practising as a lawyer you are no longer in a position to reoffend and as such

present a minimal risk of reoffending. Irrespective of this, case law acknowledges that deterrence is a primary factor in offending of this kind.<sup>1</sup>

[13] In determining your sentence I must consider the gravity of your offending and your culpability and must impose the least restrictive outcome that is appropriate in the circumstances.

[14] The Sentencing Act also requires that I have regard to the desirability of consistency between offenders in similar offending. As a result I consider the sentences of the two co-offenders although acknowledge that Messrs Smith and Buckley were sentenced on a wider variety of charges and had a different role in the offending.

#### *Circumstances of Offending*

[15] *R v Varjan* clearly establishes the factors to be taken into account in respect of culpability in fraud-related offending. The Court of Appeal stated:<sup>2</sup>

Culpability is to be assessed by reference to the circumstances and such factors as the nature of the offending, its magnitude and sophistication; the type, circumstances and number of the victims; the motivation for the offending; the amounts involved; the losses; the period over which the offending occurred; the seriousness of breaches of trust involved; and the impact on victims.

[16] The offending occurred over three years. It caused significant loss in the community affecting 1,268 investors. Mr Graham, the receiver for Belgrave, noted that the majority of the investors that suffered loss were retired people on fixed incomes, many of whom had placed their life savings in Belgrave, and the deprivation of these funds has caused both physical and emotional suffering. Some were nearing retirement and now have been forced to continue work. Others face financial insecurity for the remainder of their lives. The offending has also caused harm to the legal profession.

[17] The fraud was very well concealed partly due to false statements made to the public and to the trustees, in which you had no part, but also due to the elaborate structure which hid Mr Schofield's interests. In forming this, you were instrumental.

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<sup>1</sup> *R v Douglas* [2012] NZHC 2271 at [89].

<sup>2</sup> *R v Varjan* CA97/03, 26 June 2003 at [22].

This allowed for related party lending. Belgrave's policy of no related party lending reassured investors and encouraged investment, making the related party lending a particularly egregious breach.

[18] The nature of your offending was that you drafted and executed loan documents that you knew was in breach of the Debenture Trust Deed, and allowed such transactions to pass through your firm's Trust Account. You in essence, did not discharge your professional responsibilities adequately and assisted the breaches of the Debenture Trust Deed through your actions. It is clear however that you were not the principal offender and were acting on the instructions of Mr Schofield.

[19] You obtained no financial benefit beyond your legal fees. You were not involved in the loan approval process, you had no control over investor funds, had no knowledge of the financial position of Belgrave and as aforementioned were not involved in the false statements to the public and the trustees. Therefore I am satisfied that you played a smaller role than your co-offenders.

[20] Overall I am satisfied that your culpability is less than Messrs Smith and Buckley who as shareholders in Belgrave had a beneficial interest in the company and a higher level of involvement.

[21] However it cannot be overlooked that your offending arose out of your position as a legal professional. As stated in *R v Hustler*:<sup>3</sup>

... a barrister or solicitor is under a special responsibility to the public so as to conduct himself as to promote respect for the law and confidence in the integrity of the administration of justice...

[22] This must be treated as an aggravating feature of your offending.

*Circumstances of yourself*

[23] You have not had any previous appearances before the court. I have seen numerous character references that attest to your good character and your extensive community service. You were the Mayor of the Central Hawkes Bay District for two terms and clearly made significant contributions to that community, and were described as "working tirelessly for [the] community."

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<sup>3</sup> *R v Hustler* CA162/80, 6 October 1980.

[24] You have been struck of the roll of Barristers and Solicitors for conduct unrelated to the current offending. You have rebuilt your life working as a consultant, and you have the support of your family.

*Position of co-offenders*

[25] Mr Buckley was sentenced in the District Court on the 30 August 2012.<sup>4</sup> Judge Fraser referred to the extent of the loss, abuse of position of trust and authority, vulnerability of the victims, premeditation and duration as aggravating features of the offending. There were no mitigating features of the offending. A starting point of six years' imprisonment was adopted on the theft charges. Relevant to the offender, Judge Fraser considered that mitigating factors were remorse, cooperation with the authorities and a guilty plea. Although Mr Buckley had no prior convictions, as a mitigating factor this was neutralised by the duration of the offending. Thus discount was given for remorse, co-operation, rehabilitation, lapse of time and a guilty plea. Under the *Hessell* decision, a global discount was taken of 50%, which resulted in a final sentence of three years' imprisonment.<sup>5</sup> The other charges were given concurrent sentences.

[26] Mr Smith was sentenced in the High Court.<sup>6</sup> It was considered that premeditation, the extent of loss suffered by victims, the gross abuse of position and trust, the covering up of the breaches and the vulnerability of the victims all aggravated the seriousness of the offending. The Judge took a six year starting point, in line with Mr Buckley's sentence, but noted that he thought this to be a lenient starting point. The Judge made a small allowance for previous good character but noted that the serious offending over a lengthy period negated the benefits normally obtained through an unblemished past. An allowance was also made for remorse. Overall a discount of 12 months' imprisonment was given for these factors. A further discount of 12 months' was given for the guilty plea which came months after Mr Buckley's plea. This resulted in a one-third discount from the overall starting point and a final sentence of 4 years' imprisonment.

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<sup>4</sup> *R v Buckley* DC Auckland CRI-2011-004-017116, 30 August 2012.

<sup>5</sup> *Hessell v R* [2011] 1 NZLR 607; (2010) 24 CRNZ 966.

<sup>6</sup> *R v Smith* [2013] NZHC 1341.

### *Case Law*

[27] In determining an appropriate starting point it is necessary to consider similar case law. There is no tariff case for this type of offending. In determining the starting point for Mr Buckley's offending Judge Fraser referred to the Court of Appeal decision in *R v Varjan*.<sup>7</sup> This involved a mobile bank manager who entered into two arrangements with two mortgage brokers to process and approve fraudulent loan applications. The offending occurred over a period of time and the loss to the financial institutions was over \$546,000. The innocent borrowers were vulnerable. The appellant's personal benefit was minimal, around \$5,000, compared with the co-accused whose benefit exceeded a \$1 million. A starting point of three years was held to be appropriate and a final sentence of two years' imprisonment was imposed concurrently on the conspiracy to defraud and the use of a document with intention to defraud. The Court noted that he had received little benefit and had lost his standing as an honest and respected bank officer. Again the number of charges and the amount involved is significantly less than in the present case.

[28] Counsel for the Crown referred to me *R v Douglas* which involved a director and lending committee member.<sup>8</sup> Considering the different roles played and the different level of involvement in the finance company, I do not see this as a comparable case.

### *Sentence*

[29] Having regard to above authority and in light of the two co-offenders sentences, I am of the view that a starting point of five years' imprisonment is appropriate. This reflects that the offending was less serious than your co-offenders', yet significantly more serious than *Varjan* due to the higher number of charges and the significant loss.

[30] Your extensive community involvement and previous good character does in my opinion warrant a discount, as was given in *R v Douglas*. However the extent of this discount is mitigated by the fact that you were censured by the New Zealand Law Society for unrelated misuse of client funds, and were struck off the roll of

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<sup>7</sup> *R v Varjan* CA97/03, 26 June 2003.

<sup>8</sup> *R v Douglas* [2012] NZHC 2271.

barristers and solicitors for breach of your professional obligations. It is also mitigated by the prolonged nature of the offending, which can diminish the benefit of an unblemished past. Therefore I consider that a discount of five per cent is appropriate.

[31] Unlike your co-offenders there is no scope for a guilty plea discount or a discount for cooperation with the authorities. I note that you provided the authorities with two voluntary interviews. However as submitted by the Crown in the first interview you attempted to use the documents to create an inaccurate picture of what had occurred. Therefore I do not consider that a discount for assistance to the authorities is appropriate.

[32] This result is a final sentence of four years' and nine months' imprisonment.

[33] I acknowledge that there has been a plea from your family and from members of the Hawkes Bay community that a community based sentence be imposed. However due to the length of the final sentence, this alternative is not available to me today.

[34] Mr Hamilton please stand. I sentence you on counts 4-16 and 19 to a term of imprisonment of four years' and nine months'. This will be served concurrently.

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JA Faire J