

**IN THE DISTRICT COURT
AT NELSON**

**I TE KŌTI-Ā-ROHE
KI WHAKATŪ**

**CRI-2020-042-001584
[2023] NZDC 15349**

FINANCIAL MARKETS AUTHORITY
Prosecutor

v

ROWAN CHARLES KEARNS
Defendant

Date of Ruling: 20 July 2023

Appearances: S McMullan for the Prosecutor
K J Simonsen for the Defendant

Judgment: 20 July 2023

**RULING OF JUDGE J E RIELLY
[ON S 106 APPLICATION]**

[1] Mr Kearns you are for sentence today on four charges. They are as follows. The first charge is that you made a false statement in contravention of s 41(1)(b) of the Financial Reporting Act 1993 by omitting or authorising the omission of a matter from a document, knowing that the omission made the document false or misleading in a material particular related to financial statements pertaining to a loan from the Nelson Building Society to Forestlands N.Z. Limited and also financial documents related to another loan from the Nelson Building Society to the same company. It related to guarantees required by you in your position in Forestlands in respect of some of the numbered companies that you were the director of. It is a representative charge

for offending committed in 2014. It has a maximum penalty of five years' imprisonment or a \$200,000 fine.

[2] The other three charges are charges of failing to deliver financial statements laid pursuant to ss 10, 18 and 38B of the Financial Reporting Act 1993. On three separate occasions in September 2015, 2016 and 2017, you, in the position of director of a registered company, did not file financial statements as required for the companies in accordance with your duties. Each of those three charges is finable only, with a maximum fine of \$100,000.

[3] The circumstances of the offending behaviour are set out in an agreed summary of facts. From 1998 you founded Forestlands N.Z. Limited and 18 related companies incorporated with the prefix name Forestlands (number) Limited with the number being a unique identifying feature between those 18 companies of (2) to (20). The Forestlands companies continued until 2018. They were put into liquidation on 6 September 2018. At all relevant times you were the sole director of each company. The Forestlands companies collectively owned 1,934 hectares of forestland on the East Coast of the North Island and in the south-west of the South Island. Forestlands N.Z. managed the investment opportunities that they provided.

[4] The Forestlands companies provided vehicles for investment in forestry. The investment opportunity was advertised on the Forestlands N.Z. website as an opportunity for every New Zealander to participate in an affordable forestry and property investment programme. The typical share price in a Forestlands company was 1,000 New Zealand dollars per share. In return for their investment investors were to receive returns based on the sale price achieved for the forest logs and land at harvest time proportionate to their shareholding. Investors subscribed for Class B non-voting shares were entitled to dividends, if any, with other distributions upon winding up of the relevant Forestlands company, and annual correspondence updating them on the progress of their investment and/or the business of the relevant company. The Kearns Family Trust, of which you were a trustee, held the only shares with voting rights in the Forestlands company.

[5] Up until the Forestlands companies were put into liquidation on 6 September 2018 you had sole control over all aspects of their management and operation. You had administration staff to assist you with management, and more particularly the operation of the companies, over time.

[6] Each of the Forestlands companies raised up to \$2.75 million. You used the funds to purchase the forestry assets owned by the companies.

[7] In November 2013 you sought to purchase forest assets in Masterton to be owned by two of the Forestlands companies numbered (18) and (19). You approached the Nelson Building Society to obtain lending for this purpose and arranged for Forestlands N.Z. to draw down a \$1 million loan. Forestlands N.Z. then advanced \$500,000 to each of Forestlands' numbered (18) and (19) companies for the purpose of purchasing the Masterton land. The NBS loan was secured by guarantees from three of the Forestlands companies' assets supported by mortgages over those assets. You were responsible for facilitating the offer of securities over those companies' assets in order to produce the NBS loan.

[8] The Forestlands companies' financial statements for the year ending 31 March 2014 were signed by you and delivered to the Register of Companies. The 2014 financial statements for Forestlands companies numbered (18) and (19) did not disclose the mortgages and guarantees over those company's assets which were used as security for the NBS loan. Similarly, that same year, the financial statements for Forestlands Company number (2) did not disclose the mortgages and guarantees over its assets used as security for a loan. Further, there was non-disclosure of limited guarantees over those company's assets which were used for the loan.

[9] On 22 June 2015 you signed a conditional sale and purchase agreement for all forestry assets held by the Forestlands companies. At the time you had sole oversight and responsibility for the sale and you did not advise shareholders of the possibility of the sale before it was finalised. The sale was completed in October 2016 and totalled \$23.5 million.

[10] In late 2016 complaints were received by the Financial Markets Authority from investors in the companies because of the failure to file financial statements. You in turn were spoken to by Financial Markets Authority personnel.

[11] You delegated the duty to maintain the share register of each of the companies to your office manager but you retained overall responsibility for the upkeep of records throughout.

[12] The share register for each of the companies was not properly kept. The liquidators have had to apply to the High Court for directions to rectify deficiencies. These failures have resulted in significant delays in paying all eligible shareholders any share of the funds that may be available following the liquidation. You contributed to the failures because you knew that the share certificates of some of the Forestlands companies contained inaccuracies. You did not obtain professional advice on the issue of keeping share registers until March 2017 when you were prompted by the Financial Markets Authority, and although it was your office manager who initially put procedures in place to update the share register, these procedures were not adhered to. None of the share registers were audited by independent auditors prior to the FMA's request for a record of the latest share register in its audit in March 2017.

[13] In regard to charge 1 of making a false statement, in failing to disclose the underlying securities for the NBS loan in the 2014 financial statements, you misrepresented to shareholders the true financial state of Forestlands companies numbered (18), (19) and (2).

[14] In regard to the charges, of which there are three, of failing to deliver financial statements for the years ended 31 March 2015, March 2016 and March 2017 that were never filed by the Forestlands Company in circumstances where you were responsible for facilitating and overseeing the process of filing the financial statements, one of the reasons they could not be filed was because of the state of the accounting records. Proper accounting records had not been kept.

[15] It seems that the failure to report to the investors is what triggered the Financial Markets Authority's investigation into all of the Forestlands companies'

affairs, which has in turn led to the discovery of these facts related to the most serious of the charges you face of making a false statement.

[16] You apply for a discharge without conviction. In assessing a discharge without conviction the Court must first consider the gravity of the offending behaviour which requires considering the nature and gravity of the charge or charges faced, the circumstances of the offending behaviour and the circumstances of the person who has committed the offence, the offender.

[17] The Court must then go on to consider the direct and indirect consequences of a conviction for the particular offender.

[18] The next stage is for the Court to do a proportionality assessment, assessing whether the direct and indirect consequences of a conviction for the offender outweigh the overall interests of justice in a conviction or convictions being entered.

[19] It is important to point out, particularly in your case, that the consequences of a conviction assessment means that the Court must consider whether there is a real and appreciable risk of the consequences coming into play, rather than there being certainty that they will come into play, in the particular case.

[20] Finally, there is a residual discretion for the Court to consider as to whether it is in the overall interests of justice that a discharge without conviction is granted in a particular case.

[21] Counsel for the Financial Markets Authority opposes a discharge without conviction. They say that this is moderately serious offending behaviour and that overall the purported consequences of a conviction for you are not outweighed by the public interest in conviction.

[22] In regard to the offending behaviour itself there has been a lot of discussion in Court today and in the detailed written submissions I have received about assessment of the gravity of your offending behaviour. That is in part because offending behaviour of this kind, gratefully, is not common. There is not a lot of case law available related

to this kind of offending behaviour in our country. You have heard extensive reference to three other cases where the lawyers have attempted to try and apply the principles that the Court outlined in those cases to the facts that apply in your case.

[23] One thing I cannot ignore in assessing the gravity of the offending behaviour in your case is that there has been a significant impact on shareholders. In this case counsel for the Financial Markets Authority accepts that there is no identifiable financial loss to any of the investors, but for each of those investors, in circumstances where there was a lack of reporting for a significant period of time, measured in years, when they were not advised of your intention, as the director, to sell the company, and then for them to find out that you not only have not complied with your reporting obligations, but you have made false statements in your role as a director, and where their reality is that this has all taken a significant period of time to resolve, even since you were first charged in 2020, where they have received some of the money they invested back, but they are not sure what they still might receive, when based on the prospectus they relied on when they invested in any of the companies at any given time over the years, they were relying on the representations that you made as the director that they were likely upon the foresting of the particular plots to realise not inconsiderable profits.

[24] I have received victim impact statements from two of the shareholders. I know that there are others that are here today, two in person and others by audio visual link, to hear what happens in this case. I want to make it clear to you that their presence does not alter my assessment about the gravity of your offending behaviour in any way.

[25] Despite that, it is important that I acknowledge their interest in the proceeding because they have each been personally affected, particularly by the less serious charges that you face of the failing to report which undermines the rationale behind this legislation, because investors, whether big or small in our country, want to feel protected by the processes, the legal processes that are in place for protecting their investments when others in our society, the directors of the company, whether that be one as it is in this case, yourself personally, or many, are in a position of trust in regard to their funds.

[26] One of the victim impact statements records that there is a sense that one of the companies that they had shares in was being used as a money grabber to support other companies which has left them feeling angry and frustrated. They are concerned that it demonstrates dishonesty and greed on your part without regard for the interests of others who had invested.

[27] In regard to the second victim impact statement that I have, the victim felt angry and betrayed by the failures to account to the shareholders because it left them in the dark, not knowing what the value of their asset was and without any ability to predict the value for the future. They also felt angry and in the dark that they were not advised of the sale price of the assets or the returns that they would receive at any given point in time.

[28] The reality is that although part of your explanation for what has occurred is that you had to rely on others, office administrators, accountants and business managers to run these companies, which is entirely understandable given the extent of the companies' business, that you as director did not ensure that systems were in place and that reporting was completed as required in law to protect the owners, the other owners, the investors in these companies.

[29] You have submitted in your affidavit evidence, in explanations to others during the course of the investigation and to the probation officer who interviewed you that a part of the rationale for not reporting about the sale in circumstances where you technically were not required to do so was because you were trying to protect the financial interests of all of the investors for legitimate financial reasons. Sadly, whilst that may have been your motivation, it left the other investors feeling in the dark in circumstances where they were also in the dark because of the lack of reporting by you. It culminated in a sense of them being left out of the loop.

[30] This was a significant sum of money in regard to the lead charge that was not disclosed in the making of the false statement. That makes your offending behaviour not insignificant. Also, the flow-on effects have been significant for the other people affected by this offending behaviour, acknowledging that there is no direct link between the offending behaviour and any quantified financial loss to the victims.

[31] You have provided a number of inconsistent statements to investigators, the Court and the probation officer about your motivations for what occurred, for the deficiencies in your role as director, including that you were trying to keep administrative costs down, that you were trying to preserve the best financial price for the sale of the companies which were being sold to one purchaser as one going concern, and also that things had just become overwhelming and confusing in circumstances where others were responsible for the day-to-day administration of the company. Overall, I consider that this is moderately concerning offending behaviour because it involves dishonesty in circumstances where you had a high level of responsibility as a director of companies worth a significant value.

[32] I then turn to your personal circumstances and consider whether they aggravate or mitigate the situation. You are a mature man who has no previous convictions. It seems that the way you were running these companies got out of control and that you did not take sufficient responsibility for the fact that you were personally responsible to investors, or were wilfully blind to the fact that investors were not being reported to.

[33] In respect of the making a false statement charge, you should never have allowed that situation to arise given the responsibilities of a director of companies such as this to make accurate statements about financial positions for loans of significant values.

[34] You are not a person who comes before the Court charged with fraud. That is an important distinction between your case and others. There is no evidence that you have intentionally defrauded anyone in your dealings with your companies. Your absence of previous convictions is relevant to the overall assessment of the gravity of your offending behaviour. Persons of your age in your late fifties should be entitled to call into account your previous good record and commitments to the community when dealing with matters in a criminal court. Those are clearly mitigating factors in assessing the gravity of your offending behaviour.

[35] I now turn to the consequences of a conviction for you. I have received a lot of information about your background that I do not intend to go into in significant

detail because a lot of the information is largely irrelevant to my consideration today, over and above acknowledging that you have led a hardworking life, contributing to society and working very hard on and in the numerous business ventures that you and your wife have been involved in over the years.

[36] The other aspects of the consequences for you that you rely on is that this offending behaviour has already had a significant impact on you because of the public attention, because of the length of time that it has taken for these charges to resolve, in circumstances where everything about the outstanding funds from the company has essentially been in limbo. Today I have heard why that is. It is put forward on your behalf that it is significant for a person like you who has had a position of standing in the business community to be facing charges like this and to have been placed in a situation where you cannot work in any public company for a significant number of years, if ever again. The adverse publicity has led to public vilification of not only yourself but your wife, with flow-on effects to businesses that she owns which has been extremely hurtful for her and for you. You feel a sense of responsibility for that situation.

[37] Another consequence, the most significant consequence put forward on your behalf, is that you very much want to be able to be personally actively involved in the day-to-day running of your wife's companies that she is starting up again in the hope that the two of you can try and make some money before you reach retirement age in a few short years. She is starting a company that is fully funded by other family members because neither of you have any assets or savings at present due to this investigation and proceeding. That new business venture is involved in the distribution of items from France and also in the making and distribution by retail sale of garments in the fashion industry that your wife has designed where those garments need to be made overseas.

[38] Both you and your wife depone in your affidavits that it is very important to the two of you that you can have an active role in the companies by visiting France to select the products for distribution in New Zealand in circumstances where you will have sole distribution rights for those products. Also it is submitted to be important that you are able to travel to China and perhaps other countries to assist her in

negotiating contracts related to the making of the garments. There is a concern expressed that if you cannot travel to those countries, that you will not be able to travel together, in circumstances where you have always done that before, which will hinder business plans and also hinder your ability to be actively involved in the businesses.

[39] I have received a legal opinion from a specialist immigration lawyer from Auckland who has expressed views relying on the particular legislative provisions applicable in each of the identified countries. In regard to China, it is reported that a conviction will have a negative effect on the outcome of any visa application that you need to make which may well mean you cannot get into the country. In regards to France, you may from 2024 have difficulties on gaining access into the country because of their visa requirements, or alternatively you may have to step through more hoops meaning that there is no certainty about visa application outcomes. There is also reference to Hong Kong, India and Australia, but based on your affidavit and that of your wife, I am not sure why those have been included because there has been no suggestion that you would be travelling to those countries for business.

[40] In response to that submission Mr McMullan for the Financial Markets Authority has pointed out that it is not clear where you want to go on the evidence that has been put before the Court. He said the Court needs to consider that you are not seeking to pursue business interests in China, rather that you are seeking to further New Zealand business interests in China, therefore the visa application would be seen in that context by Chinese authorities. He submits that there is insufficient evidence that there will be a particular barrier to you entering into China or France and even less of an indication of a barrier to entry into countries such as the UK, India and Australia.

[41] You also put forward that it is extremely difficult for you to move forward in life with the reputational damage that you have already suffered. In those circumstances it is particularly important that you be able to travel in furtherance of the businesses your wife is already actively involved in which you support.

[42] I now turn to the proportionality assessment. I have been referred to the decision of *Ross v Police* by your lawyer in support of your application for a discharge

without conviction.¹ In 2008 a High Court judge overturned convictions for a person facing not dissimilar charges to yours, in circumstances where your lawyer says that their offending behaviour is more concerning than yours because the offending behaviour in that case was so deliberate and that it was repeated and enduring. It is clear to me that that defendant's particular circumstances carried significant weight with the Court when they granted the discharge without conviction.

[43] In your case I consider that it would be unfair of me to ignore that there may well be a barrier to you being able to have visas to enter China and/or France, and perhaps even other countries, or at the very least that obtaining visas may well be more complicated, particularly when there are also language barriers likely to be at play. I also entirely understand why you want to be involved in your wife's businesses in circumstances where she has made it clear that you add significant value and skills to the overall business model that the two of you engage in. Despite recognising that, when I carry out the proportionality assessment in circumstances where this is concerning offending behaviour by you, where it has touched the lives of others as it has and involved a not insignificant sum of money not being disclosed, or liabilities not being disclosed in regard to the lead charge, aggravated by the failure to report to investors, I do not consider that the consequences of conviction outweigh the public interest in there being convictions in your particular case. Accordingly, I decline your application for a discharge without conviction.

[44] I now move on to consider what the sentence outcome should be. I consider that in circumstances where the only cases that are available to me for comparison are the cases of *R v Turnock* and *R v Robinson*, where there is little to distinguish the type of offending behaviour in those cases with yours as it relates to the charge of making a false statement under this particular legislation, and having regard to the value of the false statement, that the appropriate start point for sentence should be at the lower point in the range that Mr McMullan for the Financial Markets Authority has advocated for of 12 months' imprisonment.²

¹ *Ross v Police* HC Tauranga CRI-2008-470-23, 4 September 2008.

² *R v Turnock* [2016] NZHC 1364; and *R v Robinson* [2015] NZHC 2641.

[45] I consider that you should receive a 15 per cent credit for your guilty pleas. They were not entered early in circumstances where I am very aware that it was the looming trial that led you to focus on whether you should be proceeding to trial. However, I also have to acknowledge that a significant number of charges have been withdrawn against you and it is clear that there must have been a period of time where it was difficult for you to get your head around what it was that you were actually accused of.

[46] I consider that your absence of previous convictions should be taken into account at this stage of the sentencing process. I am going to give you a further discrete discount of five percent for that factor which arrives at an end point of 10 months' imprisonment.

[47] I have considered the probation report and all of your other personal circumstances, Mr Kearns. While those that feel a sense of loss might think that it is in the overall interests of justice that a term of imprisonment is imposed I do not consider that that is required in your case, having regard to your personal circumstances. Convictions will be serious for you. I understand and accept that. Given that it is a short term of imprisonment that we have ended up at, it is open to me to impose an alternative to a term of imprisonment. It is also incumbent on me to impose the least restrictive outcome appropriate in the particular case. In all the circumstances I consider that the appropriate outcome should be a sentence of four months' community detention. That sentence will be served from tomorrow at your home address. There will be a curfew between the hours of 9 pm and 7 am every day.

[48] I am also directing that you perform 100 hours of community work to give back to the community in a meaningful way. I make a direction that it should be a community placement and that it can in fact be at the very same place that you have already been doing community work up until now, which provides a significant benefit to the community in which you live. Ultimately, that is a matter for Corrections. I endorse that you have a community placement.

[49] On charges 2, 3 and 4, which are the failing to report charges, there will a conviction and discharge. I am not going to impose a fine because I have taken the facts of those into account in regard to the more serious charge.

Judge JE Rielly

District Court Judge | Kaiwhakawā o te Kōti ā-Rohe

Date of authentication | Rā motuhēhēnga: 18/09/2023