

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

**CRI-2013-004-010074  
[2016] NZHC 1186**

**THE QUEEN**

v

**MARK ANDREW TURNOCK**

Hearing: 17 and 18 February 2016  
Further Defence submissions - 29 February 2016  
Further Crown submissions - 10 March 2016

Appearances: K Chang and D Robinson for the Crown  
S Lance for the Defendant

Judgment: 2 June 2016

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**JUDGMENT OF HINTON J**

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*This judgment was delivered by me on 2 June 2016 at 5.00 pm  
pursuant to Rule 11.5 of the High Court Rules*

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*Registrar / Deputy Registrar*

*Counsel/Solicitors:*  
K Chang, Meredith Connell, Auckland  
S Lance, Barrister, Auckland

## **Introduction**

[1] I have to resolve a matter of disputed fact for purposes of sentencing, which is whether Mr Turnock actually saw the false statements that are the subject of a charge.

[2] On 9 October 2015, Mr Turnock pleaded guilty to one charge under s 41(1)(a) of the Financial Reporting Act 1993 (FRA), of making a false or misleading statement in a document required by the FRA.

[3] The charge is a consolidation of two original charges relating to making false statements in the 2008 and 2009 financial statements of SPG Investment Company No. 1 Ltd (SPG1).

[4] The notes to the financial statements state in each instance: “There were no related party transactions during the year under review”. These statements were false, as in each instance there were (significant) related party transactions.

[5] On 24 November 2015, Mr Turnock applied for a discharge without conviction under s 106 of the Sentencing Act 2002 and filed an affidavit in support. The Crown filed submissions in opposition. In a Minute dated 7 December 2015, Brewer J recorded that there was disagreement as to Mr Turnock’s state of mind at the time of the offending, which was material to sentence. That led to this two-day disputed facts hearing before me, followed by written submissions, the last of which were filed on 10 March 2016.

## **Facts not in dispute**

[6] I must accept as proved, all facts, express or implied, that are essential to the plea of guilty.<sup>1</sup>

[7] The facts that I take as proven, following Mr Turnock’s guilty plea under s 41 of the FRA are as follows:

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<sup>1</sup> Sentencing Act 2002, s 24(1)(b).

- (a) Each of the 2008 and 2009 SPG1 financial statements were documents required by the FRA.
- (b) Each of the 2008 and 2009 SPG1 financial statements contained the statement: “There were no related party transactions during the year in review”.
- (c) Mr Turnock made each of the related party statements.
- (d) At the time each of the related party statements were made, they were materially false.
- (e) Mr Turnock knew that each of the related party statements was materially false.

### **Fact in dispute**

[8] Mr Turnock says he knew that each of the related party statements was materially false (which necessarily follows given the guilty plea), but he did not know that the statements were contained in the 2008 and 2009 financial statements.

[9] The question for factual determination by me is: “Was Mr Turnock aware that the related party statements were present in the 2008 and 2009 financial statements?”

### **The relevance of the factual question**

[10] For purposes of s 41, a director is assumed to know the contents of a document that he or she is statutorily bound to sign (and has signed). Put another way, the “making” of a statement by a director under s 41 of the FRA, assumes knowledge of the contents of the statement. On that basis, the Crown was not required, and is not required, to prove actual knowledge on Mr Turnock’s part, of the existence of the related party statements. The parties are on the same footing in this

regard, because Mr Turnock has pleaded guilty, despite contending that he did not know the false statements were in the accounts.

[11] The present issue relates only to sentencing. Mr Turnock says the answer is very relevant to sentencing. He refers to the Minute of Brewer J. The Crown say the answer is of only limited relevance. They say it cannot have been Parliament's intention for directors who choose not to read a document (or portions of it) before signing, to be in a better position than those who do.

### **Relevant background**

[12] Mr Turnock was one of two directors of SPG1 which was set up to hold investments, including property developments. The other director was Mr Andrew Robinson. The company sought and attracted 20 shareholders who paid \$1.122 million for their shares. They held their shares pursuant to a Deed of Participation (the Deed) dated 31 January 2007.

[13] Clause 8.7 of the Deed prohibited SPG1 from entering into related party transactions, except as expressly provided in the Deed, or by extraordinary resolution. There were no extraordinary resolutions in 2008 or 2009 and the Deed did not otherwise provide for related party transactions.

[14] The 2008 and 2009 SPG1 financial statements recorded under the heading "Non-Current Assets", an investment called "Paihia Road" and "Paihia Road/Titirangi Developments" respectively. In each year, the investment was substantial. As I have noted already, the financial statements for each of those years stated that there were no related party transactions during the year in review. However, the investments, which appeared to be direct investments in property, were actually loans (or similar) to a company called Heka Developments Ltd (Heka), which was owned by Mr Turnock and his brother.

[15] The SPG1 financial statements were prepared by an accountant, Michael Maitland, and the incorrect related party statements were the result of Mr Maitland's adopting the default setting in the financial package. He fully acknowledged that.

[16] Mr Turnock says he then signed the accounts in error, as he did not read the material thoroughly enough before signing.

[17] Before establishing SPG1, Mr Turnock had held a number of roles in the financial sector, including as a banker. He holds a Bachelor of Commerce in Economics and a Diploma in Banking. His personal profile states that he has completed Stage 3 Accountancy.

### **Decision**

[18] The relevant financial statements were very brief documents, with only five to six notes. "RELATED PARTIES" appears in bold above the relevant note. Overall, the statements are easily and quickly read.

[19] While I accept Mr Turnock's evidence that he did not have any accounting experience at the time he established SPG1, I have no doubt that he would have been keenly aware of the relevance of the related party statement notes in the financial statements of SPG1, given his qualifications, banking experience and the fact that he and Mr Robinson had attracted external investors. In any event, on his own evidence, he was keenly aware of the point because he said in his interview with the Financial Markets Authority on 16 August 2013 that (i) it was always his intention that SPG1 be able to do related party transactions, (ii) that he had read through the Deed with highlighters on every clause, and (iii) that he was sure there was a version that did not restrict related party transactions. As I have mentioned, the Deed which Mr Turnock had signed, heavily restricted such transactions. No version, or draft of the Deed, was located that provided otherwise. That is relevant as to credibility, but the immediate point is that clearly Mr Turnock was keenly aware of the significance of related party transactions.

[20] When Ms Crawford, one of the investors, wrote to Mr Turnock asking about the terms of the investment by SPG1 with Heka, Mr Turnock replied on 5 July 2012: "Related Party. The establishment of the investment company allowed this from the start. From the point of disclosure; it has been recorded in the financial accounts and I have been open with anyone whom I have discussed this with."

[21] Each of these statements was untrue. The Deed which Mr Turnock had signed, expressly prohibited related party transactions in the absence of an extraordinary resolution. Related party transactions had not been disclosed in the 2008 and 2009 financial statements. I also have seen no evidence from either the Crown or Mr Turnock of his having been open with anyone with whom he had discussed the matter of the related party transactions including Mr Maitland and the concerned investors. I accept Mr Maitland's evidence in all respects, including that he was not provided by Mr Turnock with documents that would have enabled him to understand the Heka transactions and that, after completing the 2009 financial statements, he was not satisfied with explanations Mr Turnock gave him about the nature of the Heka transactions. To the extent Mr Turnock's evidence was at odds with Mr Maitland's, I reject it.

[22] Mr Turnock's email of 5 July 2012 goes to his credibility in a way which I find directly relevant here. If what Mr Turnock says about his lack of reading of the related party statements is correct, and he had still not read them by his 5 July 2012 email, then he would not have been in a position to say whether the related party transactions had been disclosed or not. If, by the time of his email, Mr Turnock had read the related party statements in the notes, then he would have known perfectly well that the related party transactions had not been disclosed in the financial accounts. The other alternative is that he is prepared to make extremely assertive and bald statements about matters which he did not know, because he had not bothered reading them even up to the date of his 5 July 2012 email. I find that most unlikely in a context where the related party transactions were in the spotlight, or clearly about to be, and, in any event, I find it similarly reflects adversely on Mr Turnock's credibility.

[23] There were a number of similar instances where Mr Turnock baldly denied the obvious. His delays and responses when several of the investors were querying the Heka transactions, admittedly well after the event, showed that he was fully aware of the significance of the related party statements in the accounts and the Deed (albeit that he was misrepresenting all three).

[24] It would be somewhat extraordinary for Mr Turnock to happen to be unaware of provisions about a matter that was so important to him, in three significant documents, the 2007 Deed, the 2008 financial statements and the 2009 financial statements. That again is a matter that goes against his credibility.

[25] Mr Turnock stood to gain financially from the false statements in the accounts. In 2008 and 2009, Heka was in a negative equity position and operating at a loss, so the cash injection from SPG1 was needed, particularly when the advances were made by SPG1 without any interest being charged and without a duly registered security. Mr Turnock therefore had some motive to leave the statements at the default setting, as Mr Maitland had drafted them.

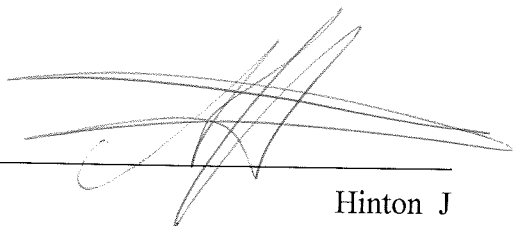
[26] Mr Turnock also impressed me as a person who was not careless, as he claimed to have been, and in fact as someone who is probably quite careful and capable, that is someone who would not fail to read important notes in two consecutive sets of financial statements.

[27] For all of these reasons, I have concluded that Mr Turnock was aware that the related party statements were present in the 2008 and 2009 financial statements.

### **Sentencing**

[28] Sentencing will be at 9 am on Wednesday 22 June 2016. I direct that a pre-sentence report be provided, with a home detention appendix.

[29] Any further submissions on sentence should be filed by the Crown by 5 pm on Thursday 16 June 2016 and by the defence by 5 pm on Monday 20 June 2016.



Hinton J