IN THE COURT OF APPEAL OF NEW ZEALAND

CA186/2012
[2013] NZCA 196

BETWEEN	TREVOR ALLAN LUDLOW Appellant
AND	THE QUEEN Respondent

CA727/2012

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AND	THE QUEEN Respondent

Hearing:	2 May 2013
Court:	White, Simon France and Asher JJ
Counsel:	Appellant in person S P Symon for Respondent
Judgment:	7 June 2013 at 3.30 pm

JUDGMENT OF THE COURT

The appeals against sentence are dismissed.

REASONS OF THE COURT

(Given by Asher J)

Introduction

[1] Trevor Allan Ludlow appeals against two different but related sentence decisions arising out of the collapse of National Finance 2000 Ltd (National Finance) which he owned and controlled. The first is the decision of Judge Bouchier on 20 October 2011 where he was sentenced on seven charges involving significant commercial fraud to five years and seven months' imprisonment.[1] The second is the decision of Toogood J on 26 January 2012 where on related charges Mr Ludlow was sentenced to a further nine months' imprisonment.[2] The total resulting penalty for all this offending was six years and four months' imprisonment.[3] The appeals are heard together.

[2] Mr Ludlow had been a shareholder and director of National Finance. His experience and credentials were emphasised in a 2005 prospectus issued by National Finance. The company operated in the financial services market, primarily offering motor vehicle finance. Members of the public were able to invest in the company through secured debenture stock and unsecured subordinate promissory notes. A significant proportion of the advances made by National Finance were to companies in the Payless group of companies, of which Mr Ludlow was the sole director and shareholder.

[3] When National Finance went into receivership in May 2006, investments by debenture holders totalled over $21 million. Mr Ludlow has assisted the receivers in the recovery process. Total losses after all recoveries are estimated at $14 million.

[4] Following the receivership, two different sets of charges were laid against Mr Ludlow. The Serious Fraud Office (the SFO) charged him with six counts of theft by a person in a special relationship under s 220 of the Crimes Act 1961, which carries a maximum sentence of seven years' imprisonment, and one charge of false accounting under s 260 of the Crimes Act 1961, for which there is a maximum sentence of 10 years' imprisonment. Mr Ludlow pleaded not guilty to all but one of

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1 *R v Ludlow* DC Auckland CRI-2009-004-23758, 20 October 2011.
2 *R v Ludlow* HC Auckland CRI-2008-004-20412, 26 January 2012.
3 At [34].

those charges. After a trial in the District Court he was convicted by Judge Bouchier,[4] and sentenced to five years and seven months' imprisonment.

[5] The second set of charges was laid by the Financial Markets Authority (the FMA). There was one count of misstatement in a registered prospectus under s 58 of the Securities Act 1978 which carries a maximum penalty of five years' imprisonment, and seven counts of making false statements under s 41 of the Financial Reporting Act 1993 which has the same maximum penalty. Mr Ludlow pleaded guilty to the charges, and was sentenced by Toogood J to an additional nine months' imprisonment.

[6] Mr Ludlow was represented by counsel at his sentencings in the District Court and High Court. He appeared for himself in this Court and presented his submissions by video link. In general terms his argument was that the end sentence of Judge Bouchier was too high, and Toogood J should not have added a further nine months on to the sentence. He submitted that any sentence on the FMA charges should have been concurrent with the sentences already imposed in the District Court. Although in his written submissions he said that he accepted the starting points reached, he did not appear to comprehend the legal meaning of the starting point concept. Mr Ludlow was in essence asserting that the starting points were too high. He compared the culpability of his offending to that of other defendants who, he argued, had received lower sentences. He emphasised certain mitigating factors that he argued had been given insufficient weight. He submitted that his end sentence on all the counts should have been between two and a half and three and a half years' imprisonment.

The District Court sentencing on the SFO charges

The decision

[7] The sentencing for the SFO Crimes Act counts took place before Judge Bouchier in the District Court at Auckland on 20 October 2011. In her earlier

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4 *R v Ludlow* DC Auckland CRI-2009-004-23758, 26 July 2011.

decision as to conviction, unsuccessfully appealed to the Court of Appeal,[5] the Judge found that Mr Ludlow had taken from National Finance without entitlement a total of $3,712,814. After liquidation the net losses were actually $2,883,000. In a defended facts hearing on the day of sentence, Judge Bouchier found that in appropriating the money for his private ends Mr Ludlow had acted dishonestly. In the sentence decision she found that there were particular aggravating features. Great harm had been caused to individual investors who had lost their personal savings and who were often elderly or had few other personal resources.[6] There was an abuse of a position of trust or authority.[7] There was also an element of premeditation in that there was continuous concealment of transactions, enabling the frauds to continue over a period of 19 months.

[8] The Judge considered a number of other comparable sentences where the actions of directors had caused the loss of large amounts invested by the public.[8] She considered the offending serious, although perhaps not the most serious of its type,[9] and determined that the appropriate starting point was six and a half years' imprisonment. She noted, however, that Mr Ludlow had no previous convictions, previously had good character, and had provided material assistance to the liquidator.[10] She also noted a guilty plea that was entered to the first count, but observed that in the light of all the other factors (presumably because six of the seven counts were defended) there should be no specific discount for the guilty plea. Rather, she took into account all the mitigating factors (presumably including the single guilty plea), and discounted the six and a half years by 15 per cent to reach the end sentence of five years and seven months' imprisonment.[11]

[9] Mr Ludlow in his submissions made a number of references to starting points and mitigating factors. Understandably he did not show a full appreciation of the approach to sentencing set out in *R v Taueki*.[12] It is necessary for us to consider the sentencing process and whether there were errors in approach as Mr Ludlow has

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5 *Ludlow v R* [2013] NZCA 83.
6 *R v Ludlow*, above n 1, at [41].
7 At [20]–[23] and [41].
8 At [24]–[35].
9 At [41].
10 At [41].
11 At [42].
12 *R v Taueki* [2005] 3 NZLR 372 (CA).

argued, to determine whether the end sentence was manifestly excessive. We bear in mind that the maximum sentence on each of the s 220 counts was seven years' imprisonment, and on the false accounting charge 10 years' imprisonment.

Other relevant sentences

[10] Mr Ludlow's wife, Ms Carol Braithwaite, was convicted on a single charge of distributing a registered prospectus containing untrue statements and sentenced to 10 months' home detention and 300 hours of community work.[13] Mr Anthony Banbrook, another director of National Finance charged with one count of misstatement in a registered prospectus, was sentenced to eight and a half months' home detention and ordered to pay $75,000 reparation.[14] Mr John Gray, the company accountant for National Finance who pleaded guilty to one charge of false accounting under s 260 of the Crimes Act and two charges under s 220 was sentenced to nine months' home detention.[15] A starting point of five years had been determined by the sentencing judge.[16] These sentences are of little assistance in determining the correct sentence for Mr Ludlow. There was no dishonesty and no personal gain from the related party transactions by these co-offenders. They had subservient roles, acting under Mr Ludlow's general direction. The culpability of all three co-offenders was at a much lower level than that of Mr Ludlow. Further, Mr Gray gave assistance to the Crown in the form of giving evidence at trial.

Culpability

[11] There are a number of significant features about the offending which showed a high degree of culpability on the part of Mr Ludlow. These were:

(a) Mr Ludlow was in charge of National Finance and in charge of the offending actions.

(b) The total losses of $14 million, the amount ultimately lost to investors of $3,712,814, and the amount of related party advances to interests

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13 *R v Braithwaite* [2012] NZHC 2412.
14 *R v Banbrook* [2013] NZHC 462.
15 The sentence substituted on appeal to the High Court: *Gray v Serious Fraud Office* HC Auckland CRI-2010-404-476, 31 March 2011.
16 *Serious Fraud Office v Gray* DC Auckland CRI-2010-004-18269, 26 November 2010.

associated with him of $1,738,681. Mr Ludlow or his family were the ultimate beneficiaries of these advances. The money was used, amongst other things, to purchase four recreational villas in Fiji.

(c) Mr Ludlow took the monies knowing that he had no right to do so. He acted dishonestly.

(d) In relation to the false accounting, there was deliberate concealment.

(e) There was premeditation. The offending was planned.

(f) The offending took place over a period of 19 months.

(g) Given the way Mr Ludlow promoted himself personally to investors, there was a breach of trust.

(h) The victims were vulnerable persons, and they have suffered grievously.

[12] While Judge Bouchier observed that the Crimes Act offending was not of the most serious of its type, we have no doubt that this was serious offending requiring a stern response. There was active dishonesty in practice over a lengthy period of time.

The starting point

[13] In *R v McKelvey*[17] Cooke P observed that it should be well understood in our society that the taking of money by persons in a position of trust is not to be treated lightly. The more serious cases will normally result in long terms of imprisonment. It was stated in *R v Varjan*:[18]

> 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

[17] *R v McKelvey* [1990] 2 NZLR 558 (CA) at 580.
[18] *R v Varjan* CA 97/03, 26 June 2003 at [22].

> offending occurred; the seriousness of breaches of trust involved; and the impact on victims.

All these factors were relevant in this sentencing to varying degrees, from moderate to serious.

[14] Mr Ludlow referred us to a number of sentences where the offending was not Crimes Act offending, and did not involve dishonesty.[19] When there is s 220 offending involving dishonesty at a high level, the sentences are considerably higher.

[15] In *Watson v R*[20] a starting point of eight years' imprisonment was upheld by this Court where Mr Watson was guilty of two counts of theft by a person in a special relationship under s 220. Mr Watson had been the manager and financial controller of a group of companies, and over some eight years had stolen $5.5 million. In the decision of this Court of *Tallentire v R*,[21] where Mr Tallentire was convicted of the theft of $12.1 million under charges laid under s 220 of the Crimes Act, it was noted that the various cases cited were of limited assistance and it was better to consider the various factors relevant to culpability. A starting point of eight years and six months' imprisonment was approved.

[16] The amount stolen by Mr Ludlow was less than in those cases, but there were the marked aggravating factors that we have referred to. We consider the starting point chosen by Judge Bouchier of six and a half years' imprisonment was in all the circumstances within the range.

Personal factors

[17] Judge Bouchier discounted the sentence by 15 per cent. She took into account Mr Ludlow's previous good character, his remorse and co-operation in recovering monies from the company. She also took into account the guilty plea, although she rightly gave a minimal discount because the plea was given during the trial at the close of the Crown case and related only to one of seven counts.

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19 *Doolan v R* [2011] NZCA 542; *R v Hotchin* HC Auckland CRI-2009-092-20927, 4 March 2011; *R v Davidson* HC Auckland CRI-2008-004-29179, 7 October 2011; and *R v Graham* [2012] NZHC 575.

20 *Watson v R* [2012] NZCA 17.

21 *Tallentire v R* [2012] NZCA 610, [2013] 1 NZLR 548.

[18] We assume that the bulk of the 15 per cent discount related to Mr Ludlow's previous good character, remorse and assistance, and we consider that appropriate. Mr Ludlow pressed upon on us the significance of his offer to give evidence for the prosecution, and submitted that Judge Bouchier failed to give that offer sufficient recognition. He relied on the discount given to his co-offender, Mr Gray, for his cooperation with the Crown. Given that the prosecution could foresee no circumstance in which Mr Ludlow's evidence might be used, we consider that the 15 per cent discount given by the Judge to have fully embraced the extent of Mr Ludlow's co-operation. There is no basis for criticism of the overall sentence imposed of five years and seven months' imprisonment, which was within the range.

The High Court sentencing on the FMA charges

The decision

[19] We have noted in preparing this decision that a 15 per cent discount would have resulted in a final sentence of five years and six months' imprisonment rather than five years and seven months had Judge Bouchier rounded down instead of up. However, in relation to a minor calculation error of this type where the final sentence is well within range, we consider any reduction unnecessary.[22] There remains no basis for criticism of the overall sentence.

[20] The SFO charges had focussed on the monies used and taken by Mr Ludlow. The FMA charges focussed on Mr Ludlow's actions in issuing a prospectus and relying on documents which were false and misleading and contained untrue statements.

[21] In sentencing Mr Ludlow on those charges, Toogood J noted that Mr Ludlow held himself out as having a wide and varied experience in business, and that he had traded on that to obtain funds from the public.[23] The prospectus that was issued for National Finance in September 2005 contained no less than 10 untrue statements. These included an understatement of the value of the related party transactions by around $775,000. These were loans to members of Mr Ludlow's family and

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22 *S v R* [2011] NZCA 178.
23 *R v Ludlow*, above n 2, at [5].

companies of which he was a director. There was a grossly understated provision for bad debts, and there were false declarations regarding the company's assets. Toogood J accepted the Crown's submission that the offending had to be marked by penalties separate from the Crimes Act offending, but noted that the two sets of offences were closely related and that the totality principle had to be applied.[24]

[22] The Judge considered the losses and stresses placed on the victims.[25] Overall he found that investors had lost over $14 million, Mr Ludlow had been in a position of trust and held himself out to investors on that basis, and his offending involved a degree of premeditation.[26] By reason of the related party loans and the uses to which he put the money obtained by making false statements he gained personally from the breach of his duties.[27] Many of the victims were retired and elderly.

[23] The Judge considered other comparable sentences and ultimately accepted the Crown submission that the appropriate starting point for sentence was four years' imprisonment.[28] He then proceeded to consider mitigating factors and stated that he would allow a discount of five to 10 per cent to take into account Mr Ludlow's previous good character, his remorse and the help he had given to the receivers and liquidators.[29] He held that he was also entitled to a further discount on account of his guilty pleas, which were not made at the earliest possible stage. He assessed the discount at 10 to 15 per cent.[30]

[24] Toogood J noted the principle of totality and decided that the appropriate overall sentence if the District Court and High Court charges had been heard together would have been eight years' imprisonment (being Judge Bouchier's six and a half year starting point, plus another year and a half for the FMA charges in the High Court).[31] In the end, bearing in mind the various discounting factors, he determined that the total period of imprisonment for all the offending should be six years and four months' imprisonment, which meant that there should be

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24 At [10].
25 At [12].
26 At [17].
27 At [17].
28 At [20]–[23].
29 At [25]–[27].
30 At [27].
31 At [30].

nine months added to the overall sentence. Thus, on the FMA charges he sentenced Mr Ludlow to a term of imprisonment of nine months on each charge, to be served concurrently with each other but cumulative on the SFO charges, after the five years and seven months was served.

The starting point

[25] The sentences imposed against the directors of Nathans Finance Ltd, which were considered and upheld on appeal to this Court in *Doolan v R*,[32] are relevant. In that case, the shortfall to secured debenture investors was in the order of $168 million. The facts were very different from those in Mr Ludlow's case. No dishonesty was involved, and each offender's acts were characterised in the High Court as being at the lower end of culpability for offending under s 58 of the Securities Act. This Court confirmed that characterisation, and held that the most serious of offending under s 58 would be that involving dishonesty. Starting points were fixed of three years and three months' imprisonment. Mr Moses was chairman of the Board and had an intimate knowledge of the company's financial position. This Court commented that the sentence for Mr Moses was, if anything, on the light side.[33]

[26] Given the aggravating factors that we have outlined in Mr Ludlow's case, in particular the planned dishonesty over a considerable period of time, the starting point of four years' imprisonment reached by Toogood J was entirely within the range.

[27] Mr Ludlow, in his submissions both at the hearing and in an additional submission filed after the hearing, placed weight on the sentences in *R v Kirk* and the need for this Court to ensure consistency in sentencing decisions.[34] In that case Messrs Kirk and Macdonald had been involved in the collapse of Five Star Finance. The ultimate loss to investors was $43 million. The starting points fixed in the District Court were six years' imprisonment for Mr Kirk, and five years' imprisonment for Mr Macdonald. However, the Judge in that case expressly

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32 *Doolan v R* [2011] NZCA 542.
33 At [43].
34 *R v Kirk* DC Auckland CRI-2009-004-24026, 21 December 2010.

sentenced Messrs Kirk and Macdonald on the basis that they had played a subsidiary role in the offending. It also appears that the Judge stopped short of finding actual dishonesty on their part.[35] Toogood J, correctly in our view, saw Mr Ludlow's level of personal culpability as greater than Messrs Kirk and Macdonald.[36] We also comment that the ultimate sentence of Messrs Kirk and Macdonald must be approached with caution, as the Judge acknowledged he was influenced by the fact that this was the first case of its kind and the two prosecuting entities had jointly promoted an overall starting point of six and a half years.[37]

The approach to the two groups of offences

[28] As Venning J noted in determining an earlier autrefois convict application by Mr Ludlow,[38] there is a difference between charges under the Crimes Act, which focus on what an offender did once the money had been received, and charges under the Securities Act and Financial Reporting Act, where the focus is on the false representations that have been made to investors to obtain the money. There are higher maximum penalties for the Crimes Act charges as against the Securities Act and Financial Reporting Act charges, so it could be expected that the starting point for the SFO charges was higher.

[29] The SFO and FMA offending, while distinct in terms of the statutory offences, covered the same dishonest course of conduct by Mr Ludlow. Ideally Mr Ludlow should have faced sentencing on both the SFO and FMA charges on one single sentencing occasion, with his culpability being assessed taking into account all his offending actions over the time period. The SFO charges, as the more serious, would have been taken as the primary offending.

[30] The approach taken in a number of High Court cases where convicted directors of companies have been sentenced under the Crimes Act and Securities Act has been, first, for the starting point to be fixed on the Crimes Act charges as the more serious charges, secondly, for a starting point on the Securities Act charges also

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35 At [70].
36 *R v Ludlow*, above n 2, at [23].
37 *R v Kirk*, above n 34, at [46] and [98].
38 *R v Ludlow* HC Auckland CRI-2008-004-020412, 18 August 2011 at [17].

to be fixed, and finally, the total sentence then modified to take into account the totality principle.[39] For instance, in *R v Petricevic* a starting point of six and a half years was fixed for the Crimes Act and Companies Act charges, and four and a half years for the Securities Act charges, but taking into account the totality principle the end sentence was seven and a half years' imprisonment. That sentence was imposed on the Crimes Act offences, with lower concurrent sentences on the Securities Act offences.

[31] Here, however, Toogood J was not in the position of having all the counts before him. He faced effectively the second of split hearings given that Mr Ludlow had already been sentenced on the Crimes Act counts. In these circumstances, we are of the view that he adopted the best available technique for fairly assessing totality by considering the appropriate penalty for all the SFO and FMA charges in the round, and then imposing a cumulative sentence for the extra sentence arising from that total consideration. There was a certain continuity and commonality in Mr Ludlow's dishonest conduct. We note that in two other High Court cases where Judges faced split sentencings for Crimes Act and Securities Act offending, the sentencing Judges adopted the approach of calculating the appropriate sentence for the offender as if that offender had been sentenced on all charges at the one time.[40] They determined the penalty that ought to have been imposed for the offending looking at it in the round.

The end sentence

[32] The net result of the approach Toogood J took was to find an overall starting point of eight years' imprisonment, an extra year and a half over and above the starting point on the SFO sentencing. That seems to us to be appropriate, taking into account the factors we have referred to, in particular Mr Ludlow's dishonesty and personal gain in the false soliciting of funds from the public over a considerable period of time, and then the stealing of those funds for his own use.

[33] We have already traversed the mitigating factors. In the end in reaching sentence of six years and four months, Toogood J allowed a discount of

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[39] *R v Petricevic* [2012] NZHC 785; *R v Roest* [2012] NZHC 1086.
[40] *R v Bowden* [2012] NZHC 1249; *R v Ryan* [2013] NZHC 501.

approximately 21 per cent. This was more than Judge Bouchier's 15 per cent, but then there were added mitigating factors in the High Court, in particular the late pleas of guilty. In the end we consider the discount allowed to have been fair.

[34] It follows that we reject the suggestion there should have been a concurrent sentence on the FMA charges. It was appropriate that there be separate cumulative recognition for the criminality involved in dishonestly soliciting the funds, as distinct from stealing them. The same uplift for the added culpability involved in the FMA offending would have been appropriate if Mr Ludlow had been sentenced on all of his offending on one occasion. We discern no error in the sentencing approach of either Judge, and we consider the effective end sentence of six years four months' imprisonment to be within the range.

Result

[35] The appeals against sentence are dismissed.

Solicitors:
Crown Solicitor, Auckland for Respondent