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COURT DELIVERS SENTENCING GUIDELINES

Summary of Judgment

The Court of Appeal[1] today delivered new sentencing guidelines for fraud and theft where the offender is in a position of trust. It also gave guidelines for the appropriate remedy where a court has found there has been a breach of the right to have a criminal hearing within a reasonable time.

Background

On 9 May 2019, Harrington Legen Jack ("the offender") pleaded guilty to eight counts of fraud by abuse of position. The offences were committed between 2 and 8 June 2012 when the offender was employed by Santander as a customer service adviser at its call centre in Belfast. The total amount defrauded was £78,500. The offender had logged into Santander's computer system using the unique login and password of a colleague, referred to in the judgment as "BS". In May and June 2012 he used BS's details to access the accounts of two customers to gain knowledge of their balances. On 2, 7 and 8 June 2012 he made a total of eight fraudulent transfers from these accounts to "mule" bank accounts from which the monies were then withdrawn by the "mule" bank account holders.

On 8 June 2012, the offender abruptly left work and sent his manager an email saying he was resigning as he had been offered a job at Queen's University (the University later confirmed that whilst the offender had applied for a job he had not been shortlisted for interview). On 9 June 2012, Santander became aware of the fraudulent transfers and commenced an investigation. This confirmed that BS was not at work on one of the days on which the fraudulent transfers was made; the offender was working every day there was a fraudulent transfer; the offender had logged on at a workstation neighbouring the computer from which the fraudulent transfers were made; and there was no activity under his unique login number at each of the times that BS's unique login number was being used. BS felt the investigation carried out by Santander was "very hostile and accusatory" and left her feeling that she was never free of suspicion. This ultimately led to her leaving her employment.

Santander reported the matter to the police on 16 January 2013. The police requested further information which was not provided by Santander until 17 February 2014. There was then a period of eight months before the offender was first interviewed by the police. The offender made no comment during initial police interviews on 24 and 31 October 2014. At the third interview on 31 October his solicitor read out a prepared statement in which the offender denied any involvement in the fraudulent activity or having any contact with any of the "mule" account holders. He was not interviewed by the police again until 25 May 2017. No new evidence was put to him on this date and he continued to reply "no comment" to all questions. He was told that the matter was being reported to the PPS with a view to prosecution. The police accounted for the period between interviews on the basis that they were carrying out investigations into the eight "mule" account holders, some of whom turned out to be fictitious. The offender was served with a summons on 11

[1] The judgment was delivered by Lord Justice Stephens. The panel was the Lord Chief Justice, Lord Justice Stephens and Lord Justice McCloskey.

June 2018 and committed to the Crown Court on 4 March 2019. On 9 May 2019 he was re-arraigned and pleaded guilty to all eight counts. On 25 October 2019, the offender was sentenced to concurrent community service orders amounting to 240 hours of community service together with a compensation order of £14,000 in favour of Santander. The Director of Public Prosecutions referred the sentences of the Court of Appeal on the grounds that they were each unduly lenient.

Sentencing for fraud and theft where the offender is in a position of trust including fraud by abuse of position

The maximum sentence in Northern Ireland for fraud, whether committed in breach of sections 2, 3 or 4 of the Fraud Act 2006 is (i) on summary conviction, six months' imprisonment or an unlimited fine or both, (ii) on conviction on indictment, ten years' imprisonment or a fine, or both. In England and Wales there is a definitive sentencing guideline entitled *Fraud, Bribery and Money Laundering Offences*. That guideline does not extend to Northern Ireland although it provides assistance in identifying aggravating and mitigating factors and guidance as to the two stage process for assessing harm:

- The first stage of assessing harm is the actual, intended or risk of loss arising from the offence expressed in monetary terms. Actual loss is straightforward. Intended loss relates to offences where the circumstances prevent the actual loss that is intended to be caused by the fraudulent activity. Risk of loss involves consideration of both the likelihood of harm occurring and the extent of it if it does. Risk of loss is less serious than actual or intended loss. The sentencing range is chosen by the use of either actual or intended loss whichever is the greater. Where the offence has caused risk of loss but no (or much less) actual loss the normal approach is to move down to the corresponding next category for actual or intended loss. However that is not appropriate if the likelihood or extent of risked loss is particularly high.
- The second stage of assessing harm relates to the impact of the loss on the victim or victims.

New Sentencing Guidelines

In Northern Ireland the applicable sentencing guidelines were to be found in *R v Barrick* [1985] Cr App R (S) 142, *R v Gault* [1989] NI 232 and *R v Clarke* [1998] 2 Cr App R (S) 137. The Court of Appeal today set new guidelines for sentencing for fraud and theft where the offender is in a position of trust including fraud by abuse of position:

- The offender would usually be a person of hitherto impeccable character: it would be practically certain that he would never offend again, and he would never again be able to secure similar employment, with all that meant in terms of disgrace for him and hardship for himself and his family.
- There is no proper ground for distinguishing between cases of this kind simply on the basis of the offender's occupation. Professionals should expect to be punished as severely as others and in some cases, more severely.
- In general a term of immediate imprisonment is inevitable, save in very exceptional circumstances or where the amount of money obtained was small.
- The court should pass a sufficiently substantial term of imprisonment to mark publicly the gravity of the offence.

- The actual or intended loss (or if appropriate the risk of loss) is not the only factor to be considered, but it might in many cases provide a useful guide (although many factors other than the amount involved may affect sentence). The useful guide is:
    - where the amount is not small, but is less than £30,000, terms of imprisonment from the very short up to 21 months will be appropriate;
    - cases involving sums between £30,000 and £175,000, will merit two to three years;
    - cases involving sums between £175,000 and £400,000, will merit three to four years;
    - cases involving between £400,000 and £2 million will merit between five to nine years;
    - cases involving £2 million or more, will merit 10 years or more (subject of course to the maximum sentence for the particular offence).
- These terms are appropriate for contested cases. Pleas of guilty will attract an appropriate discount.
- Where the sums involved are exceptionally large, and not stolen on a single occasion, or the dishonesty is directed at more than one victim or group of victims, consecutive sentences may be called for.

The Court of Appeal also set out other matters which sentencers should pay regard to in determining what the proper level of sentence should be:

- The quality and degree of trust reposed in the offender including his rank;
- The period over which the fraud or the thefts have been perpetrated;
- The use to which the money or property dishonestly taken was put;
- The effect upon the victim;
- The impact of the offences on the public and public confidence;
- The effect on fellow-employees or partners;
- The effect on the offender himself;
- His own history;
- Those matters of mitigation special to himself such as illness; being placed under great strain by excessive responsibility or the like; finally, any help given by him to the police.

In *Barrick* one of the mitigating factors identified was whether there had "been a long delay, say over two years, between his being confronted with his dishonesty by his professional body or the police and the start of his trial." The Court of Appeal said that as a general proposition this should now be considered exclusively by the sentencing court affording to an offender such remedy as may be just and appropriate for breach of the reasonable time requirement in Article 6 ECHR.

Community Service Orders

The imposition of a Community Service Order ("CSO") is provided for by Articles 8 – 17 of the Criminal Justice (Northern Ireland) Order 1996 ("the 1996 Order"). The factors relevant to deciding to impose a CSO (aside from the statutory conditions) are:

- The offence is an isolated incident not likely to be repeated;
- The offender has a stable home and family;
- The offender is in employment and has little or no criminal record;
- The offender is of generally good character and makes efforts to avoid offending;
- The offence is in the nature of a crime against public order or the community.

A CSO is not a trivial punishment. It requires the offender to pay back to society something to make good the damage, and to redeem himself in the eyes of the community.

Aggravating and mitigating features

The Court of Appeal noted the following aggravating features in this case:

- Organised offending which involved planning;
- The central role played by the offender;
- The repetitive nature of the offending as there was a total of eight transactions over three days. This gave the offender time to reflect on his offending;
- More than one victim. It was contended on behalf of the offender that there was one victim of the offences, namely Santander which was responsible for refunding the two customers from whose accounts the offender had made fraudulent transfers. The Court of Appeal rejected that contention saying that "not only was Santander a victim but so also were the two customers who were caused concern and temporary financial loss. In addition BS was a victim as were the four other banks who sustained financial losses".
- The offender was motivated by financial gain though the Court accepted that the amount of financial gain which is capable of proof to the criminal standard is limited to £5,000.
- The level of financial harm intended and actual financial harm was £78,500. It is an aggravating feature in the sense that it is used to identify the sentencing range and to select an appropriate starting point in that range. Thereafter it should not be used otherwise there would be double counting.
- There was modest emotional harm caused to the two Santander customers.
- The Court of Appeal considered that the way in which BS was treated by Santander and the serious impact on her ability to retain her employment was caused by the offender. This had a serious detrimental effect on an innocent employee and the Court considered this to be a serious aggravating feature.
- The frauds were committed in breach of trust. The Court of Appeal said that the quality and degree of trust reposed in the offender, including his rank, can amount to an aggravating feature: "In this way those occupying elevated positions of trust either through rank or through the nature of their position should receive an appropriately longer sentence. In this case the offender did not hold an elevated rank with Santander; he was a call service operator. We accept that Santander invested him with a substantial degree of trust in that he had access to the personal bank account details of customers but we consider that trust should have been subject to appropriate checks carried out by Santander. On the facts of this case and standing back we accept that the breach of trust, which is a component of the offence is not an additional aggravating feature".

The Court of Appeal noted the following mitigating features were present:

- The offender pleaded guilty;
- The offender had no relevant previous convictions together with a good work record, both before and after the offending (although case law has made it clear that the fact that the offender is a person of hitherto impeccable character has no impact on the general requirement for an immediate custodial sentence so this feature has limited impact);
- Restitution of £14,000 was offered and made by the offender which is a factor of some weight;
- The delay in the case which is to be analysed in accordance with a potential breach of the reasonable time requirement in Article 6.1 ECHR.

The reasonable time requirement in Article 6 ECHR

The offences which were committed between 2 and 8 June 2012 were discovered on 9 June 2012. The offender was not sentenced until over seven years later on 25 October 2019. It was contended on his behalf that there has been a breach of the requirement in Article 6 ECHR that in "the determination of any criminal charge against him, everyone is entitled to a … hearing within a reasonable time" ("the reasonable time requirement"). It was also contended that the offender was entitled to "an effective, just and proportionate remedy" for that breach by a reduction in the penalty by the imposition of a CSO as opposed to a term of imprisonment. Article 6(1) ECHR provides that in "the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

The first matter for the court to consider is when, for the purposes of Article 6(1), does a person become subject to a criminal charge? Article 6(3) states that everyone "*charged with a criminal offence*" has certain minimum rights. The Court of Appeal said the test that should be applied when considering the question as to when for the purposes of Article 6(1), a person become subject to a criminal charge is when they were officially notified that they would be prosecuted or notified of the likelihood of criminal proceedings against them.

Once the date is identified the next question is whether the time between the criminal charge and the hearing is unreasonable. The Court of Appeal said the most important general principles include the following:

- The threshold of proving a breach of the reasonable time requirement is an elevated one, not easily traversed;
- In determining whether a breach of the reasonable time requirement has been established the court will consider the complexity of the case, the conduct of the offender and the manner in which the case has been dealt with by the administrative and judicial authorities concerned. The first and third of these factors may overlap; and
- Particular caution is required before concluding that an accused person's maintenance of a not guilty stance has made a material contribution to the delay under consideration.

If a breach is established then consideration has to be given to the remedy which should be "effective, just and proportionate". The appropriate remedy will depend on the nature of the breach and all the circumstances including the rationale that a person charged should not remain too long in a state of uncertainty about his fate. Case law has identified that if a breach is established after there has been a hearing, the appropriate remedy may be a public acknowledgement of the breach, a reduction in the penalty imposed on a convicted defendant or the payment of compensation to an acquitted defendant. The evaluative exercise should take into account the impact of the delay on the offender and the requirement that offenders are realistically punished for their offences. These competing public and private interests must be balanced and the balance must result in a proportionate response. The impact of the delay must be established in evidence by the offender and must take into account that usually the offender has been at liberty throughout the period of the breach. If it is contended that there has been an effect on health or family life this also has to be established in evidence by the offender.

The Court of Appeal noted that frequently a public acknowledgement of the breach will be sufficient. It said it would not be appropriate for it to set out prescriptive guidance except to observe that:

> "In cases involving hardened recidivists who must be impervious to concern, in the case of vile and heinous crimes or in the case of dangerous criminals who pose a significant risk to members of the public of serious harm the appropriate response would be a public acknowledgment without any reduction in the penalty. The public could not have confidence in a criminal justice system that first caused delay and then as a consequence unleashed a dangerous criminal on the public."

The Court of Appeal noted a practice of sentencing judges in this jurisdiction which involved making allowance for Article 6 ECHR delay by adjusting custodial sentences downwards. It emphasised that "whilst previously there may have been such a practice … in future before there is any reduction the guidance in this case must be followed." The Court said that if evaluation of the remedy is that there should be a reduction in sentence then the question arises as to whether the reduction should come before or after the discount for the plea. It said the proper approach is to identify the impact of all of the aggravating and mitigating factors to determine the starting point before applying the reduction for breach of the reasonable time requirement:

> "The breach of the reasonable time requirement brings greater focus to the question of delay as it requires for instance the identification of a starting point which is not simply being confronted by a professional body or the police. It is because of that greater focus that this aspect of mitigation should be analysed in accordance with the reasonable time requirement. There is no requirement to attribute a specific period of weeks, months or years to the reduction in penalty provided that it is clear that it has been taken into account and that there is an indication in general terms as to the extent to which it has been. For instance the degree of aggravating or mitigating features can be described generally as serious or minor. There is no reason why the impact of delay cannot be described in those terms. In this way a breach of the reasonable time requirement should be considered in fixing the starting point before applying the reduction for the plea."

Whether there was a breach of the reasonable time requirement in this case

The Court of Appeal noted that this should ordinarily be a matter for the trial judge. The offender contended that he became subject to a criminal charge during the course of the police interviews under caution on 31 October 2014. The prosecution contended that the appropriate date was 25 May 2017 when at the end of the police interview the offender was informed by the investigating officer that she would be reporting the matter to the PPS with a view to prosecution. The Court said it must have been apparent to the offender on 31 October 2014 that the police had overwhelming evidence with which to prosecute him and had asserted that the offender had committed the offences. The Court considered that this amounted to an official notification that the offender was likely to be prosecuted. It also considered that all the indications during the questioning on 31 October 2014 were that the police were in a position to report the proceedings with a view to prosecution and that they did not need to obtain more evidence. Another factor was that during the interview on 24 October 2014 the offender responded to questions but on 31 October 2014 when presented with overwhelming evidence there were no sensible responses which he could make except to brazen it out with a pre-prepared statement. The Court said that change in attitude on

behalf of the offender added to the evidence that on 31 October 2014 there was an official notification that he was likely to be prosecuted:

> "We emphasise that ordinarily an interview will not engage the Article 6 reasonable time requirement. However the nature of the interview may do so in some cases and this was such a case."

The next question was whether the delay to the hearing was unreasonable. The only explanation proffered was that the police were investigating the "mule" account holders. The Court did not consider that this could possibly account for a period of some five years from 31 October 2014 until the hearing though not all of the five year period was in breach of the reasonable time requirement. The Court considered that the period of breach was 2 years and 8 months. It then turned to consider the evidence of the impact of that breach on the offender. The probation report recorded that he has no health issues however the impact of the offence (including in part the impact of delay) had taken its toll on him emotionally especially as he realised the negative impact this has had on his extended family. On the other hand he has been at liberty throughout, he has been employed by Shorts and he has enjoyed family life. The Court said this amounted to a modest degree of adverse impact caused by the breach of the reasonable time requirement. Finally it emphasised the public interest in imposing a realistic punishment for these offences:

> "On the evidence available to us we consider that the appropriate remedy is a public acknowledgment of the breach of the reasonable time requirement which acknowledgment we give. Certainly there was nothing in the breach which would have justified the reduction in sentence from a period of imprisonment to CSOs. Such a reduction in penalty would be a significant and complete departure from established guidelines and it could not have been warranted."

Consideration

The Court of Appeal commented that in all but the most exceptional cases those convicted, even on their plea of guilty, of offences of this type should receive an immediate custodial sentence. It said that in this case the actual and intended loss was £78,500 so that the application of the useful guide would indicate a sentence of two to three years. It considered the starting point ought to have been at least two years imprisonment. Thereafter taking into account the aggravating and mitigating features (excluding the discount for the plea) it considered that the sentence ought to have been increased to at least two years and six months. The Court said it arrived at that increase primarily given the particularly serious aggravating feature of the impact of the offending on BS. It commented that the offender is entitled to discount for his guilty plea and said that a generous discount would be in the region of 20% so that the sentence which ought to have been imposed was one of two years imprisonment together with a public acknowledgment of a breach of the reasonable time requirement:

> "In our judgment the offender's case was not sufficiently exceptional to warrant a non-custodial sentence. We are of the view that a sentence of imprisonment of two years should have been imposed on the offender and that the sentences passed by the learned judge were unduly lenient."

Discretion

Where the Court of Appeal concludes that a sentence is unduly lenient, it retains a discretion whether to quash the sentence imposed and substitute a more severe penalty. The Court noted that the offender has completed approximately one half of the CSOs. It said that if the sentences were quashed and a determinate custodial sentence imposed, then there would have to be a reduction in the two year sentence for double jeopardy given that the offender would now be sent to prison. In addition there would have to be a further reduction to take into account that he has completed approximately one half of the CSOs. The reduced custodial sentence which would then be imposed would have to be balanced against the benefits to be obtained from continuing with the CSOs. The Court noted that the Probation Service had recognised that the offender would benefit from a period of supervision to challenge him in relation to his pro-criminal thinking attitudes and risk taking behaviour that led to the commission of these offences. It also noted that the offender has participated in the CSOs and that the reports back from the Probation Service are positive. Finally it emphasised that CSOs involve some degree of loss of liberty and it was wrong to consider them a soft option:

> "We have taken into account the countervailing interest in an appropriate custodial sentence being passed on the offender. We note that by this judgment we have identified various matters that should assist in any future sentencing exercises. We consider that on the wholly exceptional facts of this case in the exercise of discretion we should not quash the sentences and we do not do so."

Conclusion

The sentences that were imposed were unduly lenient. The Court declined to quash the sentences.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (https://judiciaryni.uk).

ENDS

If you have any further enquiries about this or other court related matters please contact:

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