IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA534/2018
[2019] NZCA 644

BETWEEN	DAVID SIMON BARTON Appellant
AND	THE QUEEN Respondent

Hearing: 24 September 2019

Court: Cooper, Ellis and Peters JJ

Counsel: T D Clee for Appellant
R K Thomson for Respondent

Judgment: 13 December 2019 at 11.30 am

JUDGMENT OF THE COURT

A The application to adjourn the appeal is declined.

B The appeal against sentence is dismissed.

C The application to defer the commencement of sentence is declined.

D Mr Barton is to surrender himself to the Registrar at the Auckland District Court (Criminal Counter, 65–69 Albert Street) before 10.00 am on Wednesday 18 December 2019.

REASONS OF THE COURT

(Given by Peters J)

[1] Following a jury trial in December 2017 before Judge Glubb in the District Court at Auckland, Mr Barton was convicted of 10 charges of knowingly

failing to provide a tax return when required to do so, with the intention of evading the assessment or payment of tax.[1] Each charge related to a tax year between 31 March 2008 and 2017 inclusive.

[2] In August 2018, the Judge sentenced Mr Barton to three years, two months and two weeks' imprisonment.[2] Mr Barton appeals against sentence on the ground that it is manifestly excessive.[3]

[3] At the conclusion of sentencing, the Judge declined both Mr Barton's applications for bail pending appeal[4] and to defer the commencement of sentence for up to two months.[5] Mr Barton appealed the refusal of bail, successfully, and he has remained on bail since.[6]

Tax debt and reparation

[4] The Judge sentenced Mr Barton on the basis that he had defaulted in the payment of core tax of $400,000, that is Mr Barton would have been assessed for this sum had he filed his income tax returns when due (core tax).[7] This assessment was favourable to Mr Barton. Mr Barton's accountants assessed the sum due as $410,702, and counsel themselves had agreed the sum was at least $436,000.

[5] The Judge did not refer to the total due from Mr Barton including interest and penalties but plainly it would have been substantial at the time of sentencing, and would be even more so now.

[6] By the time of sentencing, Mr Barton had paid $43,000 in reduction of the core tax, reducing the same to $357,000, and he promised to pay a further $37,000.[8] As appears below, the Judge reduced Mr Barton's sentence on account of both sums although, as it turns out, Mr Barton did not pay the $37,000.

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1 Tax Administration Act 1994, ss 143B(1)(b) and (f), with each charge carrying a maximum term of imprisonment of five years.
2 *R v Barton* [2018] NZDC 17502 at [46].
3 Mr Barton abandoned his appeal against conviction on 5 March 2019.
4 *R v Barton* [2018] NZDC 17494.
5 *R v Barton*, above n 2, at [49]; and Sentencing Act 2002, s 100.
6 *Barton v R* [2018] NZHC 2490.
7 *R v Barton*, above n 2, at [3].
8 At [3].

[7] In the week before we heard the appeal, a further $122,000 was remitted, on Mr Barton's behalf, to the Commissioner. This sum was advanced by third parties to Mr Barton.

[8] The Commissioner remitted the funds to the Official Assignee, as Mr Barton is a bankrupt. Crown counsel, Ms Thomson, advised us the Official Assignee will be entitled to deduct any outstanding costs and an allowance for Mr Barton's living expenses, before paying the balance to the Commissioner, the Commissioner being Mr Barton's sole creditor. If the Commissioner receives most of the $122,000 Mr Barton will have paid say $165,000, or 40 per cent, of the core tax, leaving $235,000 and whatever may be due in interest and penalties outstanding.

Application for adjournment

[9] By memorandum dated 18 September 2019, Mr Clee, counsel for Mr Barton on appeal (but not at trial or on sentence), applied to adjourn the hearing of the appeal. This application was declined on the papers.

[10] Mr Clee renewed the application for adjournment before us, on this occasion supported by an affidavit from Mr Barton filed shortly, that is an hour or two, before we heard the appeal. The basis for the application was that, if the adjournment were granted, Mr Barton would be able to repay the core tax in full.

[11] We declined to adjourn the hearing of the appeal. Mr Barton was sentenced more than a year ago, he has been on bail since, and we were not persuaded the reasons advanced warranted any further delay.

Background

[12] The Judge was satisfied that, although the IRD had requested the returns repeatedly, Mr Barton had made a deliberate decision not to file them but, rather, to apply the tax due to personal or family matters.[9] The Judge characterised Mr Barton's offending as planned, premediated, significant, deliberate and persistent.[10]

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9 At [4].
10 At [6].

[13] The Judge:[11]

(a) adopted a starting point of four years' imprisonment;

(b) uplifted the starting point by six months for Mr Barton's criminal history;

(c) deducted 20 per cent for Mr Barton's recent filing of all outstanding returns, for remorse, and for reparation, that is the $43,000 and the promised $37,000; and

(d) deducted a further eight per cent for Mr Barton's "selfless commitment and contribution to [his] community", evidenced by many affidavits from third parties.

[14] The Judge did not order further reparation, as the Commissioner did not seek such an order.[12] The Judge also remitted fines of more than $10,000.[13]

Submissions

[15] Mr Clee submitted the Judge's starting point and uplift for Mr Barton's prior criminal history were excessive. Mr Clee also submitted we should increase the Judge's 20 per cent discount, given the payment of the $122,000 referred to above. Lastly, but only in his reply submissions, Mr Clee made a further application for an order deferring the commencement of sentence.

Starting point

[16] Mr Clee submitted the Judge's starting point should not have exceeded two and a half to three years' imprisonment. In support of this submission, Mr Clee relied on *Clemm v Commissioner of Inland Revenue* as a case in which the Court had adopted such a starting point in respect of similar offending.[14] *Clemm* was one of the

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11 At [42]–[45].
12 At [51].
13 At [50].
14 *Clemm v Commissioner of Inland Revenue* (2005) 22 NZTC 19,495 (HC).

authorities to which the Judge himself referred in fixing Mr Barton's starting point of four years.

[17] Mrs Clemm, a solicitor, was for sentence having pleaded guilty to 25 charges of using a document with intent to defraud. Eighteen charges arose from Mrs Clemm's underpayment of tax (and ACC levies) over six years, leaving Mrs Clemm liable for core tax and GST of $197,630.37 and $74,065.70 respectively.[15] The interest inclusive (but net of penalties) sum for which Mrs Clemm was liable was approximately $415,000.[16]

[18] The remaining seven charges arose from Mrs Clemm's theft of $46,456.09 from several clients over four years.[17]

[19] In sentencing Mrs Clemm, the District Court Judge adopted a starting point of four years' imprisonment, saying this was to reflect the aggravating features of Mrs Clemm's breach of her clients' trust, the substantial sums involved and the sustained period of her offending.[18] The Judge then reduced the starting point for Mrs Clemm's reparation, prior good record and her guilty pleas.

[20] On appeal, counsel for Mrs Clemm contended the starting point was excessive. The High Court Judge referred to a then prevailing uncertainty as to precisely what was encompassed in a "starting point".[19] The Judge considered the sentencing Judge's starting point should be treated as two and a half to three years' imprisonment if exclusive of the aggravating features of the offending, and three and a half to four years' imprisonment if inclusive.[20]

[21] Given that current sentencing methodology anticipates a starting point will include aggravating features of offending, we are satisfied the four-year starting point imposed and upheld in *Clemm* is equivalent to the four years the Judge adopted in this case.

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15 At [1].
16 At [11].
17 At [1].
18 At [15].
19 At [18].
20 At [19].

[22] Finally on *Clemm*, although Mrs Clemm's breach of her clients' trust distinguishes her offending from Mr Barton's, Mr Barton's offending occurred over a longer period and the core tax he sought to avoid exceeded the $270,000 or thereabouts applying in Mrs Clemm's case.

[23] Mr Clee did not refer to any other authorities in support of his submission the starting point was excessive. As it is, when reference is made to the relevant cases, it is clear the starting point he adopted was within the appropriate range. *R v Marsters* and *R v O'Connor* are the most pertinent of these authorities.[21]

[24] In *Marsters*, the High Court Judge adopted a starting point of four years' imprisonment in respect of 48 charges of use of a document with intent to defraud.[22] Mr Marsters had defrauded the Commissioner of Inland Revenue of $341,143.09, by wrongly obtaining GST refunds.[23] On appeal, this Court assessed the four-year starting point as "within range", having regard to the duration, scale, and deliberate and repetitive nature of the offending.[24]

[25] In *O'Connor*, the Court adopted a starting point of four years, six months' imprisonment for Dr O'Connor's deliberate and determined evasion of tax of approximately $360,000, over eight years.[25]

[26] Having regard to these authorities, the Judge's starting point in this case of four years' imprisonment was within range.

Uplift for prior offending

[27] Mr Clee also submitted that the Judge's uplift for Mr Barton's criminal history was excessive and should have been no more than two months.

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21 *R v Marsters* (2005) 22 NZTC 19,649 (CA); and *R v O'Connor* [2013] NZHC 2393.
22 *R v Marsters*, above n 21, at [11].
23 The maximum term of imprisonment for the offending was seven years, so more than in the present case.
24 At [22].
25 *R v O'Connor*, above n 21, at [11].

[28] Leaving aside the present offending, Mr Barton's criminal history runs to 15 pages. As the Judge said, Mr Barton has numerous convictions for dishonesty offending. Mr Clee submitted the convictions were largely historic. We do not accept this. Mr Barton had convictions for 80 dishonesty offences committed between 1993 and 1999, and for which he was sentenced to three years' imprisonment. He committed another six such offences in the course of 2004 and 2005, and he commenced this most recent offending when he failed to file his income tax return when due for the year ended 31 March 2008.

[29] Given this history, a six-month uplift was not excessive.

Reparation

[30] Mr Clee acknowledged the Judge's 20 per cent discount for the matters referred to in [13(c)] above was substantial. However, he asked us to make an additional reduction on account of the further reparation of $122,000 to which we have referred.

[31] The circumstances of this case do not warrant any further indulgence to Mr Barton.

[32] First, the Judge's generous 20 per cent discount assumed receipt of the promised but unpaid $37,000. Secondly, although on occasion this Court will take account of events, including reparation, that occur post-sentence,[26] a very substantial part of Mr Barton's core tax (let alone interest and penalties) remains outstanding, even allowing for the payment of the $122,000.

Deferral of sentence

[33] Finally, and as we have said, Mr Clee renewed Mr Barton's application for a deferral of the commencement of sentence. We declined that application too, no good reason having been advanced.

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[26] *Monk v R* [2013] NZCA 564 at [33]; and *Orchard v R* [2019] NZCA 529 at [24].

Result

[34] We decline the application to adjourn the hearing of this appeal.

[35] We dismiss the appeal against sentence.

[36] We decline the application to defer the commencement of sentence.

[37] Mr Barton is to surrender himself to the Registrar at the Auckland District Court (Criminal Counter, 65–69 Albert Street) before 10.00 am on Wednesday 18 December 2019.

Solicitors:
Crown Law Office, Wellington for Respondent