IN THE DISTRICT COURT
AT WELLINGTON

CRI-2013-085-007462

SERIOUS FRAUD OFFICE
FINANCIAL MARKETS AUTHORITY
Informants

v

DAVID ROBERT GILMOUR ROSS
Defendant

Hearing: 15 November 2013

Appearances: K McDonald QC for the Informants
G Turkington for the Defendant

Judgment: 15 November 2013

NOTES OF JUDGE D R W BARRY ON SENTENCING

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[1] Mr Ross, you are 63 years old. You stand for sentence here in respect of four representative charges of false accounting brought by the Crown through the Serious Fraud Office. Those represent a continuum of offending between 2000 and 2012 and are split into four charges because of an amendment to the law in 2003 which, amongst other things, increased the sentence on those lead false accounting charges from seven to 10 years.

[2] There is a fifth representative charge of theft by a person in a special relationship extending between 2003 and 2012, and that has a maximum of seven years' imprisonment.

[3] There are another three charges brought under the aegis of the Financial Markets Authority for supplying false information, for dishonestly obtaining authorisation to act as an authorised financial adviser, and for acting as a

broker without registration. The first two of those carry as maximum penalties fines only. As such, it is acknowledged by the Crown that the imposition of fines is simply unrealistic in the context of your position, the losses that are suffered by victims, and that any available monies would be directed toward reparation. The third charge of acting unlawfully as a broker without registration carries a maximum of 12 months' imprisonment.

Facts

[4] The facts on one level are labyrinthine and on another are startlingly and starkly simple. You have been a financial adviser for over 20 years. In 2011 you gained approval as an authorised financial adviser from the Financial Markets Authority, of course wholly oblivious of the fact that you were offending in this way and had been for years.

[5] Your umbrella company, Ross Asset Management, was solely directed by you. You had sole decision making authority. As part of the facade of your operation you had created deeds providing that you would manage clients' portfolios in a proper manner, you would comply with instructions given by clients, and that all money in the portfolio should be managed properly by you and when not invested paid into an account in the name of individual clients.

[6] The deception was furthered with your quarterly investment reports to investors listing transactions for the quarter, and giving book value and market value of the individual investors' portfolios. You took management fees calculated each quarter as a percentage of the market value of the portfolio as stated in the quarterly reports. Typically those fees ranged between 1 and 1.5 percent of the market value stated on the portfolio.

[7] By 2012 investors began complaining that they were experiencing difficulty or were simply unable to withdraw funds from your company. That saw the Financial Markets Authority apply to the High Court who appointed receivers and managers in November of 2012. Those receivers took over control of all of your

corporate vehicles including Ross Asset Management and another entity known as Bevis Marks Corporation.

[8] In their first report the receivers identified there were purported investments of just under $450 million. The majority of those, nearly $438 million, were held in the name of the Bevis Marks entity purportedly relating to securities held mostly overseas. Only about $10.2 million existed, held by other entities such as banks or brokers. Total investor withdrawals and management fees over the last five years had exceeded contributions to the funds by more than $60 million. The receivers were able to point out in that November report it was likely that any historical returns advised to investors were either exaggerated or fictitious.

[9] That led to the charges. The lead charges are the false accounting charges and these relate to the trading positions stated for the Bevis Marks securities and also the closing positions of Bevis Marks securities. Between June 2000 and September 2003 fictitious transactions for the trading of these securities on paper had profits recorded of nearly $36.5 million, and between 2003 and 2012 those fictitious transactions saw paper profit, entered into the computer system on your instructions, of nearly $315 million.

[10] Likewise, between 2000 and 2003 fictitious transactions accounted for in the closing position of Bevis Marks securities were recorded at about $106 million and between 2003 and 2012 the closing positions of those Bevis Marks securities you had recorded as more than $384 million.

[11] What was happening was that the quarterly investment reports for your investors were generated out of that same computer system and they either hid losses or overstated the performance of investor portfolios. That information put into the hands of investors was instrumental in obtaining new investors, retaining existing investors, and furthering the losses that would inevitably follow.

[12] The charge of theft by a person in a special relationship arises from the basis that you received these funds on the terms that they were to be managed in a proper manner, in compliance with instructions given, and where not invested they were to

be paid into a bank account into the name of individual investors. You deliberately dealt with those funds otherwise because you were using funds paid in to repay the paper investments of other of your clients. In all, hundreds of investors, at least 700 from both New Zealand and overseas, have lost somewhere in the order of $115 million through investing with you.

[13] The Financial Markets Authority charges speak largely for themselves. What you did was impugn the integrity of the regulatory and compliance arms of the Financial Markets Authority by your actions. Put simply, Mr Ross, you ran what is known as a Ponzi scheme, that is, a fraudulent investment enterprise in which the investments of later investors are largely used to pay off other investors, giving all of the appearance of good returns to investors. You stole from the people who trusted you with their life savings. You constructed an enormous web of increasingly complex deceit to maintain this illusion that you were a skilled and trusted adviser and benefactor.

[14] The cold, hard, reality is that you were a liar and a thief operating on a scale unprecedented in this country. What you have done is wrought misery on hundreds of people, most ruined financially, many elderly and frail, and many suffering far more than simply monetary losses which are bad enough anyway.

Victims

[15] On that subject I need to turn to the position of your victims because their position is central to this sentencing exercise. We have had four victim impact statements read today in Court and the raw hurt and anger was palpable. I have read the folder of victim impact statements, around 40 of them, and here today in numbers are victims whose mere presence manifests their loss, their distress, and their sense of betrayal.

[16] At the heart of your dishonesty is not just the money that you lost but the lengths that you went to cultivate relationships with your victims in order to keep their trust, as well as their money, while you were in fact wreaking financial ruin upon them. These are honest and hardworking people. These are not corporate

accounts, these are not faceless entities. These are the life savings of people that you have simply dissipated.

[17] Typically your victims range from middle-aged to people in their eighties. They include the disabled, the frail, and the ill. Many have been forced to sell their houses to pay debt, many are forced to continue working into their old age because you have lost their life savings, and the common themes emergent in their statements are firstly feelings of guilt because they have recommended friends and family to you, and feelings of guilt because they have lost monies that were intended to support their own families. There are feelings of helplessness, despair, and anger, and of betrayal. Effectively your hubris has wrought incalculable harm to the lives of many hundreds of people who were trusting and vulnerable and are now devastated.

[18] It needs to be said from the outset that whatever monies can be recovered, and recognising that you are taking steps to ensure that the receivers have access to whatever assets you have, the reality is, as you recognise through Mr Turkington, that any reparation is literally a drop in the bucket. It needs to be said also that no sentence this Court imposes can help those people, no prison sentence can restore them or probably even provide solace to them, they simply remain your victims.

Crown

[19] The Crown through Ms McDonald for the Serious Fraud Office has outlined in written submissions, which she has spoken to today, the appropriate purposes and principles that underlie this sentencing exercise. She points out the aggravating factors from the Crown perspective and from the perspective of the Financial Markets Authority, and she has referred me to various authorities, in other words sentencing cases in this country in recent years, to which I will return.

[20] The Crown submit, based on those principles, aggravating factors, and authorities, that a cumulative starting point must be taken because the maximum sentence on any of the lead charges is 10 years. The Crown submit that a real

starting point of nearer 15 years is appropriate. That would be apportioned amongst the charges.

[21] The Crown submit that any credit by way of discount, particularly for recognition of prior good character, should be tempered by the reality that although you have no previous convictions this offending has been going on for at least the last 12 years. The Crown recognise that there must be fulsome credit for a guilty plea that came early in the context of the charges that were laid and submit that an effective end sentence of around 10 years and six months is appropriate. The Crown submit that a minimum period of imprisonment of at least half of that should be imposed. The Crown submit that the offending against the Financial Markets Authority Act 2011 and its compliance regime should be seen as an aggravating factor and draw an increase in the effective penalty.

Defence

[22] Mr Turkington on your behalf accepts, and you acknowledge through him, the losses that you have caused these victims. He says your remorse and contrition is genuine and palpable. You accept that stern punishment in the form of a significant term of imprisonment is inevitable. He points out that after your guilty plea you were taken into custody without any attempt at applying for bail, recognising that was part of the ultimate penalty.

[23] He tells me that you have executed a document that will go to the receivers whereby you place at their disposal whatever available assets you have, including your interest in the family home and two other properties. The final figure that will be realised is unknowable at this stage but you accept it is miniscule compared with the losses, but he submits it does represent your contrition and remorse.

[24] He submits this money was simply lost in this web of deceit, that there are no hidden funds, you have no ill-gotten gains. Mr Turkington submits that, accepting the aggravating factors, a starting point of around 12 years' imprisonment is appropriate. He submits there should be discounts for your co-operation and good character of up to around 13 percent, and a further 25 percent discount to represent

your guilty plea. He points to your full co-operation with the Financial Markets Authority and Serious Fraud Office, your prior good character, your frail health, your age, and the difficulty that a sentence of imprisonment will pose because of that frailty and your age.

Sentence

[25] It falls then to me to assess the gravity of this offending in coming to a starting point. The aggravating factors include the scale of the offending. That encompasses the sheer amounts of money lost and the duration of this calculated dishonesty which stands at the most serious level seen in this country yet with overall losses, as has been stated, up to around $115 million, at least 700 victims, and around 12 years of offending against them.

[26] Next there is the vulnerability of these victims. They placed their trust in you to invest their hard-earned savings honestly. The breach of that trust was total. The other aggravating factor that should not be overlooked is the impugning of the integrity of the Financial Markets Authority, its regime, and the new laws that were put in place for financial advisers around regulation and compliance.

[27] So, the Crown submit a starting point of around 15 years, the defence around 12 years. Clearly the seriousness of this offending is very high. The charges are representative, that means that they represent a continuum of offending over these 12 years. You have blighted the remaining lives of these many hundreds of often elderly and all innocent citizens and lost up to $115 million. Factored into that mix it is to be seen that what you did was not motivated primarily by greed or high living but seemingly to maintain an illusion, some sort of twisted form of vanity or hubris.

[28] Taking into account those factors I consider that a starting point of imprisonment of 16 years is appropriate. Looking then to personal factors, there are no personal aggravating factors, you have no prior convictions. Then I look to personal factors that go to your credit by way of discount from that starting point. I do note and recognise your earlier years of honest living and I temper that, as the

Crown have submitted I should, by taking into account that you have spent the last 12 years constantly offending.

[29] Secondly, I accept that your remorse is genuine and into the balance I weigh on that score that it became manifest only after this house of cards collapsed. Up until then you maintained that illusion as fiercely and robustly as you could. I accept there is full co-operation with the authorities. I take into account your offer of reparation. Nominal as it is, it is the manifestation of contrition. I take into account your fragile health. Your depression on the face of it seemed to have been triggered by the reality of your position rather than any underlying mental illness, and alongside that one must recognise that a long prison sentence is more difficult for an elderly person.

[30] Taking into account those factors, I see that as warranting a 10 percent discount, which on my calculation is about 19 months, leaving a reference point of 14 years and five months.

[31] Then I am bound to add in further discount to recognise your early guilty plea. The appellate Courts have set a full discount for an early guilty plea at 25 percent. From that reference point that discounts another three years and seven months. That in turn leaves an end sentence of 10 years and 10 months' imprisonment.

[32] That of itself is more than the maximum for the lead sentences which carry maximums of 10 years' imprisonment, and on those lead sentences I impose a sentence of eight years' imprisonment.

[33] On the other Crimes Act 1961 charges with maximums of seven years' imprisonment there will be a sentence of two years and 10 months. That is concurrent with each other, cumulative on the eight year sentence.

[34] On the Financial Markets Authority and Financial Advisers Act 2008 charges that carry fines only you will be convicted and discharged. A fine is, as I said, simply untenable.

[35] On the third charge under the Financial Service Providers (Registration and Dispute Resolution) Act 2008 of working as a broker when unregistered there is a sentence, from a maximum of 12 months, of eight months' imprisonment. That is concurrent with the lead sentences as that offending has been taken into account as a global aggravating factor in reaching the start points that I did.

Minimum period of imprisonment

[36] That brings us to the point of consideration of whether a minimum period of imprisonment should be imposed. The Crown seek a minimum term of imprisonment of at least 50 percent of the end sentence. Mr Turkington has submitted that such sentences are usually imposed in the cases of people who pose a risk to the community and to the safety of members of the community such as serious violent or sexual offenders. He submits that at your age, with a significant term of imprisonment that you will be serving, that is ordeal enough, that is the least restrictive outcome, and there is no need to impose a minimum period of imprisonment.

[37] I find that this offending is sufficiently serious that the ordinary minimum length of imprisonment of one third of the stated sentence would not be enough to denounce, deter, or effectively punish this offending. Given all of the features of your offending that is simply insufficient. I accept at the same time there is no issue around community safety or protection in your case and a minimum term of imprisonment, while warranted, I fix at 50 percent of that end sentence which amounts to five years and five months.

[38] There is an order for reparation recognised in terms of this deed to be finalised and executed with the receivers. Payments will be made with liaison with the registrar and via the officers of the receivers and managers.

[39] In view of the expressed wishes of the victims who have read their statements, I will make an order that there is to be no publication of their names or material that could lead to their identification.

D R W Barry
District Court Judge