

**IN THE DISTRICT COURT
AT INVERCARGILL**

**CRI-2015-025-000511
[2016] NZDC 4863**

THE QUEEN

v

MARK ANTHONY DEVERY

Hearing: 16 March 2016
Appearances: J N P Young for the Crown
W N Dawkins for the Defendant
Judgment: 16 March 2016

NOTES OF JUDGE B A FARNAN ON SENTENCING

[1] I have before me today for sentence, Mark Anthony Devery. Mr Devery, you are facing 11 charges of theft by a person in a special relationship which carry maximum penalties of seven years' imprisonment; and six charges of obtaining by deception, also carrying a maximum penalties of seven years' imprisonment. You are aged 51. You are separated from your partner but I am now told by Mr Dawkins that in fact you may be in the process of reconciling with her.

Summary of facts

[2] Your offending came about as a result of events that unfolded from May 2009 when you and three other directors purchased a dairy farm in Western Southland. On 1 June 2009 you commenced your position as equity manager. This role included managing the day-to-day running of the farm, as well as being a

shareholder in the farm. Your managerial position included a residential property in the Tuatapere area. You were the only shareholder residing on the property.

[3] In late August 2012 one of the directors visited the farm and noticed that the dairy calves on the property had not been given ear tags. This was unusual as calves are generally tagged as soon as they are born. Due to this and other suspicions, the director requested that the farm financial administrator complete an audit on Farms Minder Stock System, which is particular software that records animal records and details. All of the dairy cows are given a code at birth and that identifies them like a fingerprint and no two cows will have the same birth ID. The particular farm had a unique identification which was NTBL. Your unique herd code is KRCV. The other directors were unaware that you had your own herd code.

[4] The audit revealed that all of the farm heifers had been electronically transferred out or sold from the farm records to another herd code. It also showed that the farm heifers had been artificially inseminated by a technician. This was against company policy as calves born via artificial insemination could cause a difficult first calving for the heifer due to their size and you have heard a discussion between myself and your counsel, Mr Dawkins, regarding that today. These heifers had then been electronically transferred or sold back to the farm. The other directors had not approved the transfer for sale of these animals.

[5] After being notified of this, the other farm directors arrived unannounced at the farm and carried out a stock take. They discovered a number of the farm cows had been tagged with your brass tags and not the farm tags. A search of the farm calf shed found further tags associated with you in an envelope with you and your wife's name on them.

[6] On 24 September the directors held a disciplinary meeting with you discussing the unauthorising transfer of the company stock. During the disciplinary meeting you admitted you had arranged for the artificial insemination with the intention of obtaining the calves for your own benefit. You were subsequently dismissed from the employment on the farm.

[7] On 28 September the police executed a search warrant. During that search the police seized a computer hard-drive belonging to you. On that hard drive was your Minder diary which is exclusive to the hard-drive and that diary cannot be accessed by any other means. Other documentation relating to bank account, stock agents, meat processing companies and trucking companies were also located and seized.

[8] On 17 May a forensic analyst with the Police Electronic Crime Lab virtualised your hard-drive so that the police could remotely access it. In accessing your diary, it became evident that you had been transferring or selling stock out of the company ownership into the ownership of your own company using the Minder tagging programme.

[9] The Minder diary showed that on 1 November you had transferred, effectively selling, nine rising one-year heifer calves, belonging to the farm, to your own records via the Minder system. These animals were subsequently - as you have heard Mr Dawkins say to me today - transferred back to the farm on 28 March 2012. You kept the calves from these animals, tagging them with your own herd code.

[10] The Minder diary also showed that on 1 November you had transferred, effectively selling, 124 rising two-year heifer calves belonging to the farm to your own herd code again using the Minder system. You arranged for the 124 rising two-year heifer calves to be artificially inseminated by a technician on the farm's run-off block. These animals were then transferred back to the farm on 23 March 2012.

[11] Further, the Minder diary show that on 1 October 2011 you had transferred, effectively selling, 105 rising one-year heifer calves belonging to the farm to your own herd code. You once again arranged for the 105 rising one-year heifer calves to be artificially inseminated as I have discussed with you. These animals were transferred back to the farm herd code on 28 March. The calves from these animals were kept by you.

[12] No authority was given to you to transact these animals out of the company ownership and you had never disclosed those transactions to your fellow directors. No monies had ever been received by the company for the initial subsequent sale of these animals, nor had the company been paid when you had purchased these animals.

[13] On 1 June the police sent out a privacy request to local meat processing companies requesting invoicing information for you. The information the police received back showed that you had sold numerous animals to local meat processing companies.

[14] On 24 June the police executed production orders in relation to your various bank accounts. In analysing those bank accounts they identified 11 transactions where the proceeds from the stock sold had gone into your personal bank accounts and that has formed the basis of those charges I have already referred to.

[15] On 30 November 2010 one steer was sold to PGG Wrightsons from your farm address for \$913.37. Payment for this animal went to your personal bank account. Likewise on 7 December you sold 7000 litres of Alton Valley milk from the farm vat for \$823.52 to a fellow farmer, although I am told today by Mr Dawkins that this milk had not been collected by Fonterra in the usual way because there were issues with access to the property that day. Payment for that milk - that you received - of that sum of \$823.52 was paid to your personal bank account.

[16] Likewise on 11 January 2011 you sold two dairy cows from the farm address for over \$2000 and the proceeds were paid to your account. On 11 April 2011 you sold three dairy cows and received in excess of \$2000 for those cows, again the money being paid to your bank account. Further, on 20 September you sold one dairy cow, receiving over \$800. On 10 January you sold two dairy cows, obtaining \$2000. Again, all of those monies were paid to your personal bank accounts.

[17] Subsequently, on 13 February 2012 and 28 February 2012, you sold a further 27 dairy cows, receiving in excess of \$8000 (close to \$9000) which was paid to your personal bank accounts.

[18] Finally, there were three further matters of offending on 6 March 2012, 17 April 2012 and 31 May 2012 which involved a total of 17 dairy cattle or calves. You received in excess of \$11,000 for those, again paid into your personal bank account.

[19] All of those separate transactions totalled in excess of \$28,000. The reparation monies have been paid by you back to your fellow directors.

Victim impact and restorative justice

[20] One of the matters I have to consider when sentencing you, Mr Devery, is the impact that this offending of yours has had on the victims of your offending.

[21] You have attended a restorative justice conference and, of course, you were very much aware of the impact on the victims. They spoke very candidly at the restorative justice conference. I have read the report of that. I am sure you have had plenty of opportunity to reflect on how your victims have felt about your offending and how disappointed they have been in the way in which you have treated them. It seems from the information I have before me that they were confident in your ability as a farmer. Even today, I am still being told by one of the victims who presented her victim impact statement to me in person, that they acknowledge the quality of your work as a farmer, that they saw themselves as giving you an opportunity to move into farm ownership, and that you clearly let them down in that regard.

[22] You will also have not missed the fact of the distress shown, particularly by the victim that read her victim impact statement to me, explaining the impact on her personally, not only in terms of the financial matters but the impact on the family, having to be separated from her husband when he had to spend time on the farm, and of course the impact that had on their children.

[23] You will, of course, have heard that, as absentee directors, they trusted you. Your counsel today, Mr Dawkins, has clearly acknowledged to me that there is a clear breach of trust on your behalf towards your fellow directors.

[24] I note that although you apologised profusely and may have appeared genuine to an objective observer, your apology at the conference - and also subsequently and prior to that - was not necessarily accepted by your victims. You have heard that specifically discussed today and you have heard my discussion with Mr Dawkins in that regard.

[25] Your victims find your behaviour unbelievable and a great breach of trust. They cannot believe that you behaved in this way for such a long period as they all felt, notwithstanding some of the issues in your past, that they had given you a chance. As I have already mentioned to you, they acknowledged in the material before me that you are a particularly good farmer.

Crown submissions

[26] Both the Crown and the defence have filed detailed submissions in support of your sentencing today. Sentencings like this are never easy. There are no specific guideline decisions to guide the Court as to a possible outcome.

[27] The Crown say in their submissions that I should consider a starting point for your offending in excess of three years. They consider that your offending is significantly serious, that the starting point should be three years and six months and that even with discounts I should consider sentencing you to a full-time period of imprisonment and not get to below two years for you to be considered for home detention.

[28] The Crown acknowledge that you are entitled to a discount for your early guilty plea. While they did acknowledge some possible discount for remorse, that has to be tempered by the views of the victims with regards to that. Clearly the Crown quite properly acknowledge you are entitled a discount for attending the restorative justice conference and for the payment of the reparation.

Defence submissions

[29] Your counsel, Mr Dawkins, takes quite a different approach. He says that most of the cases relied upon by the Crown are more serious than yours, involving much greater sums of money. You have heard discussions about that today. I accept that a number of the cases referred to by the Crown specifically refer to much greater commercial losses to the complainants in those individual cases, that there were significant losses. For example *R v Davis*¹ where there was a sophisticated system with a loss in excess of \$277,000. There was another case, *Visser v Police*² that the Crown were referring to, where there was fraudulently obtained by the defendant in that case, sums in excess of \$270,000.

[30] Mr Dawkins, on your behalf, says that your situation, to some extent, is more analogous to the cases that the Courts are familiar with, with regards to benefit fraud. While, of course, there is some significant difference between benefit fraud and your offending, you were in a commercial relationship with the fellow directors that you defrauded, whereas persons who are involved in benefit fraud are persons receiving a benefit and they themselves are generally of low income.

[31] Mr Dawkins submits that if I am at the two years or lower level, that I should then, as I have to, consider home detention. He initially submitted to me when you were last before the Court, that I deal with you in a somewhat creative way. I was not prepared to do that at that time and indicated to both counsel that I intended to put you off to see if we could, in fact, obtain a home detention address. You now have a suitable home detention address.

Gravity

[32] However, before I even get anywhere near that point, Mr Devery, I need to consider the gravity of your offending. I need to consider your overall culpability, which in this case is moderate or perhaps more than that. The maximum penalty for the charges you are facing, as I have already told you, is seven years' imprisonment.

¹ *R v Davis* [2009] NZCA 26

² *Visser v Police* [2015] NZHC 3275

This offending by you involved offending over an extended period of time. Some of your victims believe you started offending right from the outset of your involvement with them. However, I put that comment to one side because the offending for which I must sentence you today is not related to that longer period of time, but for a period of some years. The offending, however, did involve premeditation. You had to set up system to hide your offending. Clearly you knew from your fellow directors that they did not wish particularly for young calves to be inseminated in the way in which you did, because they were concerned about the health of the particular calves and also the long term viability of the calves if they were treated in that way.

[33] I have already talked about breach of trust. Clearly in this case, Mr Devery, there was a breach of trust. Your business partners lived elsewhere and left you alone, effectively, in the day-to-day running of the farm. That is important because they placed such a high level of trust on you as absentee co-directors. They did that for several reasons, certainly because they were not able to be present and that is from a practical perspective, but also because they felt confident in your abilities to effectively run the farm on their behalf but in co-operation with them. All of that was notwithstanding the fact that you had come to them with a somewhat chequered earlier career, shall we say, in terms of your previous life where you did have previous convictions. They showed faith and belief in you for which, in my view, you have let them down. That is a matter I can take into account.

Reparation

[34] I am satisfied for the purposes of sentencing today that the reparation has been paid in full. However, you did hear from the two victim impact statements that were read to you that there have been effects, both emotionally and financially over and above the payments that you have made to your co-directors, that go beyond the reparation that you have paid.

Starting point

[35] I have formed a view that there was, as I have already mentioned, premeditation on your behalf and that it was offending over an extended period of time. What I need to assess is what is an appropriate starting point for you. Mr Dawkins - without perhaps fully conceding this morning to me that his earlier submission of a 12 month starting point was somewhat light - was very firm in his submission to me that the Crown submission of a starting point of three and a half years was excessive.

[36] While I cannot in any way agree with Mr Dawkins in terms of a 12 month starting point for you, I have formed a view that your case is different and can be distinguished from the more serious cases relied upon by the Crown, and that a three and a half year starting point is too high. However, I am of a view that a two and a half to three year starting point is not out of line with the cases that I have read, being all of the detailed cases that have been presented to me by Mr Dawkins and also having considered all of the cases in detail by the Crown.

[37] Further, Mr Dawkins submits that I could consider discounts up to 45 percent. I have formed a view that that would be excessive in this case. However, you are entitled to a discount, that is clear, for your willingness to undertake restorative justice. You are entitled to a discount for a reparation. Of course, you are entitled to the maximum credit for a guilty plea. This is one of those cases where I could get close to a discount towards the 40 percent or slightly less than that.

[38] It is my view that from a starting point of 36 months (three years) that I will give you a discount of 12 months, which takes me down to two years' imprisonment.

Home detention

[39] Having reached that point of two years, Mr Devery, I now need to consider whether I sentence you to home detention.

MR DAWKINS ADDRESSES THE COURT

[40] There are two issues I need to consider. Because I have got to two years, I need to consider whether the purposes and principles of sentencing would be met by a sentence of home detention; but I also need to consider the totality principle and whether or not an end sentence would breach the totality principle.

[41] Mr Dawkins has reminded me that I did give an indication to Mr Devery, when I had him before me previously, that I might be able to get down to a 21 month end sentence. I have moved from that position, having heard from the victims today, and have formed a view that the discount that I may have given previously for remorse for Mr Devery is no longer appropriate.

[42] It seems to me that while I must acknowledge his willingness to attend the restorative justice conference - and of course he did and I acknowledge that it cannot have been easy - and that he paid the reparation, there are elements of his apparent expressed remorse that I do not necessarily accept. I have formed a view that it is not appropriate for me to give him any firm amount for remorse, although there will be a recognition or reflection of some element of remorse by virtue of his attendance at the restorative justice conference.

[43] Weighing all of that in the mix and reminding myself of the totality principle, I am prepared to reduce my end point to 22 months. Having reached that point, I now, of course, need to further consider, as I have said, the purposes and principles of sentencing and whether or not that would be met by a sentence of home detention.

[44] I must impose the least restrictive sentence on you, Mr Devery, but I also need to deter you and others from this type of offending, and I need to denounce your conduct. In this case those factors are particularly important. I need to invoke in you a sense of responsibility. You will be subject to restrictions for a considerable period of time if I impose a sentence of home detention on you. Some might say that this penalty will be harder than a full-time prison sentence, but in this case my comment in regards to that is "so be it" and, from my perspective, you have brought this on yourself.

Result

[45] Accordingly, Mr Devery, my sentence for you in respect of each of the charges that you are facing, is a sentence of 11 months' home detention.

- (a) You are to serve that sentence at [address deleted].
- (b) You are to travel directly to that address and await the arrival of the monitoring company field officer.
- (c) You are to reside at that address and not move to any new residential address without the approval of the probation officer.
- (d) You are not to consume or to be in possession of alcohol or drugs not prescribed to you.

[46] I also impose standard post detention conditions for a period of six months following the expiry of your home detention sentence.

[47] It is also available to me to impose community work on you. In this matter, Mr Devery, on balance, it was a very close decision on my behalf to come to the conclusion that the purposes and principles of sentencing were met by a sentence of home detention. However, being mindful of the fact that one of the purposes and principles of sentencing is to invoke in you a sense of responsibility, I am going to impose hours of community work as well. I impose a total of 175 hours' community work.

[48] The sentence of this Court is for eleven months' home detention plus 175 hours' community work. There is no reparation payable because you have already paid that.

B A Farnan
District Court Judge