

R v SHAWN DARRELL RICHARD

OUTLINE OF CROWN SUBMISSIONS IN REPLY

INTRODUCTION

1. It appears from the outline of submissions of Mr Richard that there is little, if any difference between the parties about the relevant principles applying to the sentence to be imposed in these proceedings.
2. In terms of the application of those principles to the facts of this case the Crown principally relies on its submissions in chief where the issues are sufficiently set out. There are, however, six matters raised in the submissions on behalf of Mr Richard that the Crown wishes specifically to respond to:
 - a. Submissions about the objective seriousness of the offences;
 - b. Submissions about the value of assistance offered;
 - c. Submissions about hardship;
 - d. Submissions about the possibility of cumulative sentences being imposed;
 - e. Flader's role; and
 - f. Submissions about *R v Williams* (2005) NSWSC 315.

OBJECTIVE SERIOUSNESS OF THE OFFENCES

3. In paragraph 10 of the submissions filed on behalf of Mr Richard it is suggested in the context of the "*objective assessment of the losses suffered*" (as a result of the offender's conduct) that "*as a percentage of clients total investments with Astarra Funds Management, the exposure to the Astarra Strategic Fund represented on average 10% of their total investments*": see Tab 13 of the defence bundle of documents.
4. Examination of Tab 13 (a letter from a Mr Phipps-Ellis who is a director of a corporate superannuation client of Astarra Funds Management) makes clear that the statement quoted refers only to the superannuation funds of the employees of his company. As is apparent from paragraph 38 of the Crown submissions in chief, the losses sustained by investors went far beyond the employees of Mr Phipps-Ellis' company.

VALUE OF ASSISTANCE OFFERED

5. As to paragraphs 16 to 18 of the submissions filed on behalf of the offender the Crown relies upon the principles in paragraph 44 of the Crown Submissions on Sentence (which it does not understand to be in dispute) and upon the statement of Mr Wright dated 6 July 2011 filed with these submissions in a sealed envelope. The practical value to ASIC, in particular, of Mr Richard's assistance is addressed in that statement.

HARDSHIP

6. In paragraph 21 of the submissions filed on behalf of Mr Richard it is stated, correctly, that due to his family residing in Canada, Mr Richard will not have the support in the form of visits that might be expected in the case of Australian national.
7. The following matters are submitted to be relevant to place that matter in context:
 - a. The offender is a Canadian citizen who was issued an Australian permanent residency visa on 3rd December 2007;
 - b. The fact that an offender will serve his sentence in a foreign country does not mitigate an appropriate sentence being imposed: *R v Ferrer-Esis* (1991) 55 A Crim R 231 at 239 per Hunt J (with Gleeson CJ and Lee CJ at CL agreeing);
 - c. At best this matter is only ever entitled to minimum weight: *R v Chu* (NSW CCA, unreported 16.10.98) Spigleman CJ (with McInerney & Sperling JJ agreeing);
 - d. In this case, the offender's testimonials suggest that he has significant support in Australia.

STRUCTURE OF THE SENTENCE

8. In paragraph 29 of the submissions filed on behalf of Mr Richard it is suggested that because the Crown, in its submissions in chief did not submit that the sentences imposed ought to be partly or wholly cumulative or otherwise than concurrent, the Crown must have recognised that partly or wholly cumulative sentences were inappropriate. That is not the case.
9. The structure of any sentence is, of course, a matter entirely for the Court having regard to relevant principles. An important principle in relation to cumulative and concurrent sentences is totality: *Mill v The Queen* (1988) 166 CLR 59 at 63.2. This principle applies in the present case in the context of "rolled up counts"; Crown submissions in chief paragraphs [6]-[8]. The question is not the number of offences but the criminality revealed by them: *R v Knight* [2004] NSWCCA 145 at [25] (tab 9).
10. As the submissions made on behalf of Mr Richard assume that the attitude of the Crown may assist the Court about the question of sentence structure, the following submissions are made:
 - a. The two charges (and indeed the third charge which the offender wishes to be taken into account) are "rolled up" charges;
 - b. The statement of facts sets out the circumstances giving rise to the first charge against s1041G(1) of the *Corporations Act 2001* under the headings –
 - i. Charge No.1: Circumstance "A" (at page 8 of the statement of facts).
 - ii. Charge No.1: Circumstance "B" (at page 12 of the statement of facts).
 - c. The statement of facts also sets out the circumstances giving rise to the second charge against s1041G(1) of the *Corporations Act 2001* under the headings –

- i. Charge No. 2: Circumstance "A" (at page 15 of the statement of facts).
 - ii. Charge No. 2: Circumstance "B" (at page 18 of the statement of facts).
 - iii. Charge No. 2: Circumstance "C" (at page 20 of the statement of facts).
 - iv. Charge No. 2: Circumstance "D" (at page 23 of the statement of facts).
 - v. Charge No. 2: Circumstance "E" (at page 25 of the statement of facts).
- d. The statement of facts also sets out the circumstances giving rise to the charge (referred to in the s16BA *Crimes Act 1914*) against s1041E(1) of the *Corporations Act 2001* under the heading –
- i. Scheduled Charge: Circumstance "A" (at page 26 of the statement of facts).
 - ii. Scheduled Charge: Circumstance "B" (at page 30 of the statement of facts).
11. The Crown submits that while, in one sense, it is appropriate to describe the offender's conduct as part of a "scheme", in each of the three charges before the Court the dishonest conduct referred to in the statement of facts is distinguishable.
12. Accordingly, to give effect to a total sentence properly reflecting the offender's criminality, it is submitted that the Court could properly impose sentences which are made partly or wholly cumulative.

FLADER'S ROLE

13. As to paragraphs 30 to 32 of the submissions filed on behalf of the offender the Crown primarily relies upon paragraphs 24 to 32, 56 and 58 of the Crown Submissions on Sentence and *Stephens v R* [2010] NSWCCA 93 at [45]-[47].
14. In addition, while it might be true that the "activities of Flader demonstrate criminality far in excess of that of the offender", as stated in paragraph 32 of the submissions filed on behalf of the offender, it does not follow that this precludes a finding that the offender's criminality falls into the worst category of case *for the particular offences with which the offender has been charged*. Flader's criminality reflected in the agreed facts is greater because it encompasses different and more serious offences which carry maximum penalties greater than 5 years imprisonment.

R v WILLIAMS (2005) NSWSC 315

15. In paragraph 33 of the submissions filed on behalf of the offender it is submitted that the case of Williams "demonstrates a criminality well beyond that of Mr Richard." The Crown says that whilst there are aspects of this case that are similar to the present case such as –
- a. plea offer prior to being charged followed by an early plea,
 - b. prior good character and
 - c. disqualification from managing a corporation
- Richard's criminality is significantly greater than that of Williams.
16. Williams faced three charges representing a total maximum penalty of 12 years imprisonment:

- a. The first charge related to a prospectus, signed by Williams, from which there was a material omission. In effect this was a failure on the part of Williams to maintain an appropriate standard of corporate governance, a failure to make diligent inquiry and a significant breach of trust as the CEO of HIH. For this offence he was sentenced to imprisonment for 2 years.
 - b. The second charge related to the making of a misleading statement in an Annual Report, the result of the accounting treatment of reinsurance arrangements. For this offence he was sentenced to imprisonment for 1 year and 3 months.
 - c. The third charge alleges that he was reckless and failed to exercise his powers and discharge his duties for a proper purpose by signing a letter which contained a misleading statement. For this offence he was sentenced to imprisonment for 1 year and 3 months.
17. Overall Williams was sentenced to 4 years and 6 months with a non-parole period of 2 years and 9 months. The court noted that the offences as charged and particularised involved recklessness and material omission giving rise to misleading statements and *not* intentional dishonesty which might have supported more serious charges, either under the *Corporations Act* or other criminal legislation. The Court also noted that the offences were not committed for personal gain.
18. Richard on the other hand is facing two charges involving intentional dishonesty. The third charge which Richard admits and asks to be taken into account most closely resembles the type of criminality involved in the charges against Williams. In addition, unlike Williams, Richard did receive personal gain from the commission of the offences.

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Tony Payne SC
Counsel for the Crown