IN THE SUPREME COURT OF NEW ZEALAND

SC 79/2015
[2016] NZSC 7

BETWEEN	BARRIE JAMES SKINNER Applicant
AND	THE QUEEN Respondent

SC 126/2015

BETWEEN	DAVID INGRAM ROWLEY Applicant
AND	THE QUEEN Respondent

Court:	William Young, Glazebrook and Arnold JJ
Counsel:	R M Lithgow QC for Applicant 79/2015 R C Laurenson for Applicant 126/2015 H W Ebersohn for Respondent
Judgment:	15 February 2016

JUDGMENT OF THE COURT

A Leave to appeal is granted on the question whether s 109 of the Tax Administration Act 1994 precluded conviction on counts 101–110 (*Rowley v R* [2015] NZCA 233, (2015) 27 NZTC 22-011).

B In all other respects the applications for leave to appeal are dismissed save that, in the case of Mr Rowley's challenge to his sentence, this is with the reservation identified in [23].

REASONS

Background

[1] The applicants were accountants who operated a taxation advisory business known as Tax Planning Services Ltd (TPS). Following a lengthy trial before Kós J (who sat without a jury) they were convicted on numerous charges involving the dishonest use of documents, attempting to pervert the course of justice and supplying false information to the Inland Revenue Department as to their income.[1]

[2] On the Judge's findings, the applicants created false tax positions for clients built around invoices in respect of transactions which had not taken place. These invoices resulted in the clients deriving income tax and GST benefits to which they were not entitled. The document use charges focused on the false income tax and GST returns which were filed by or on behalf of the clients.[2] The Judge found that they had attempted to pervert the course of justice by attempting to persuade clients to give false explanations to tax investigators and the provision to the clients of further false documentation to support such explanations.[3] The Judge also found that they had not returned as income their shares of the benefits of the frauds and, in this way, had supplied false information to the Inland Revenue Department.[4] We will refer to these last charges as alleging tax evasion.

[3] Subsequent appeals to the Court of Appeal against conviction (by both applicants) and sentence (by Mr Rowley) were dismissed.[5]

The Judge's conclusion as to the falsity of the transactions and the significance of voluntary disclosures

[4] Most of the TPS clients involved in the charges conceded, pursuant to voluntary disclosures, the tax positions that they had previously asserted. On the Crown case these disclosures had, in many instances, been made on the advice of the

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1 *R v Rowley* [2012] NZHC 1778, (2012) 25 NZTC ¶20-133 [*Rowley* (HC)].
2 See at [39]–[393]. A summary of the Judge's conclusions on these charges is provided at [460]–[462].
3 See at [394]–[433] and, in summary form, at [463]–[466].
4 See at [434]–[457] and, in summary form, at [467]–[468].
5 *Rowley v R* [2015] NZCA 233, (2015) 27 NZTC ¶22-011 (Ellen France P, Harrison and Stevens JJ) [*Rowley* (CA)].

applicants. These disclosures were in reasonably general terms and did not go into much, if any, detail as to the basis of the concessions. In his judgment, the Judge made it clear that he regarded the disclosures and underlying advice given by the applicants as not entirely congruent with honest belief on their part that the invoices reflected genuine transactions.[6]

[5] In the Court of Appeal, the applicant seems to have challenged the findings of falsity of the transactions only indirectly via contentions that:[7]

(a) the judge's reliance on the disclosure statements was a step in his reasoning as to falsity;

(b) such reliance was misplaced; and

(c) therefore the conclusion as to falsity was wrong (or at least challengeable).

[6] The Court of Appeal noted that the applicants had not challenged the "cornerstone findings of falsity."[8] Counsel for the applicants suggest that this remark indicates that the Court of Appeal had not appreciated that the conclusion of falsity was challenged.[9] We disagree. It is clear from what was later said in the judgment that the Court of Appeal appreciated that the falsity finding was in issue.[10] We see the "cornerstone" remark of the Court of Appeal as emphasising, as we have, the indirectness of the challenge.

[7] The applicants were represented at trial by Mr Michael Lennard who had also been acting for them at the time of the tax investigations. In affidavits filed in the Court of Appeal in support of their conviction appeals, he said that he had, at the time of the tax investigations, advised them to recommend voluntary disclosure to their clients on the basis of his view that the transactions would be set-aside as tax

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6 *Rowley* (HC), above n 1, at [126].
7 *Rowley* (CA), above n 5, at [40].
8 At [20].
9 The primary submissions on this issue were advanced by Mr Lithgow on behalf of Mr Skinner with Mr Laurenson adopting them on behalf of Mr Rowley.
10 See the discussion at [37]–[52], especially at [40](a).

avoidance. The disclosures he recommended recognised that the claimed deductions were not available as a matter of taxation law, but were not concessions as to the falsity of the transactions. Mr Lennard did not consider the disclosures to be inconsistent with his instructions from the applicants, namely that the transactions were genuine and they had honestly (but in Mr Lennard's view mistakenly) believed that the transactions were effective for tax purposes. Mr Lennard also said that there was nothing unusual in the general terms in which the disclosures were expressed. He said that it was not until he read the judgment of Kós J that he appreciated that the roles of the applicants in relation to the voluntary disclosures might be held against them.

[8] In the course of the trial the Judge made it clear that he saw the capitulations which the voluntary disclosures represented as material to honest belief in the genuineness of the transactions. The issue was thus on the table at trial, albeit that it seems to achieved salience only when Mr Rowley gave evidence (which was after Mr Skinner).

[9] In his evidence, Mr Skinner said that the form of the voluntary disclosures was settled by Mr Lennard. When dealing with one particular disclosure (which was made by his sister) he said that he considered at the time (and still did) that the amount for which a deduction had been claimed was genuinely deductible. More generally the applicants (and particularly Mr Rowley) denied or played down involvement on their part in the making of the voluntary disclosures. Mr Rowley's explanation for the voluntary disclosures was that they were a response to concerns about (a) what he sought to portray as an aggressive approach by the Inland Revenue Department to the investigations (in particular the unwillingness of investigators to permit tax advisers to attend statutory interviews) and (b) possible liability for penalties. Mr Rowley asserted a continuing belief that the original tax treatment had been correct save for some timing issues. In particular he did not contend that the voluntary disclosures resulted from an awareness that the transactions would be set-aside as involving unacceptable tax avoidance. Mr Rowley was also in the awkward position of having acknowledged (as the Judge found) to another lawyer that the

transactions were not genuine.[11] This was at the time of the tax investigation and in connection with the stance that lawyer's client should adopt. That acknowledgement occurred at around the same time as, or shortly after, the applicants were engaging in concerted steps to pervert the course of justice in relation to false explanations to be offered to the tax investigators (steps which included the concoction of false documents).

[10] These arguments were addressed in the Court of Appeal judgment (at [43]–[51]). The Court noted that the contention advanced on appeal by the applicants on the basis of Mr Lennard's affidavits was inconsistent with the approach which they had taken at trial.[12]

[11] The applicant also maintained that the use made by the Judge of the voluntary disclosures was inconsistent with s 32 of the Evidence Act 2006. This point was fully addressed by the Court of Appeal at [53]–[59].

[12] The applicants complain as to the approach of the Court of Appeal to the admissibility of Mr Lennard's affidavits, in particular the conclusion (or perhaps assumption) that they would be admissible only if leave were granted and the refusal of leave on the basis that they were "of no moment as to the merits".[13] Given the Court of Appeal's reasons for rejecting the argument which the affidavits were relied on to support, the process complaints are of no moment.

[13] We are far from persuaded that the Judge was wrong to rely on the voluntary disclosures. But, in any event, given the minor role they played in the Judge's reasoning process as to the falsity of the transactions we do not see the Judge's reliance on them as engaging the miscarriage of justice ground. And given the particularity of the point, there is no associated issue of general or public importance which warrants leave to appeal being granted.

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11 *Rowley* (HC), above n 1, at [128]–[132].
12 *Rowley* (CA), above n 5, at [43].
13 At [6].

The tax evasion charges

[14] The applicants seek leave to appeal in respect of these charges on two bases.

[15] The first relates to s 109 of the Tax Administration Act 1994. Under this section a "disputable decision" may be disputed only in objection or challenge proceedings and is otherwise "deemed to be … correct in all respects". The income tax returns in issue were assessments and thus "disputable decisions".[14] On the argument of the applicants, it follows that they are deemed to be correct unless and until they are set-aside under the 1994 Act. On this basis, the applicant contends that it was not open to the Crown in the criminal proceedings to allege that the returns were not correct.

[16] We grant leave to appeal in respect of this ground. In addressing the appeal we will wish to consider arguments not only as to the particular approaches taken on this issue by Kós J and the Court of Appeal but also that favoured by the Court of Appeal in *R v Smith*.[15]

[17] The applicants also challenge their convictions on these counts on the basis that: (a) the Crown was required to show that they appreciated that the share of the benefits of the tax frauds which they retained was required to be returned as income; and (b) it was not proved that they had appreciated that. Given that this argument must be assessed on the bases that (a) we are dealing with the proceeds of tax frauds and (b) these tax frauds were committed by accountants practising as tax specialists, the inference of knowledge which the Judge drew was unsurprising. This conclusion was reviewed by the Court of Appeal and we see no appearance of error in their analysis.[16]

Mr Rowley's sentence

[18] Mr Rowley was sentenced to a total of eight years' imprisonment. This was made up of six and half years on the dishonest use counts, 18 months (cumulative) for the attempts to pervert the course of justice and two years (concurrent) for the tax

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14 Tax Administration Act 1994, s 3, definition of "disputable decision", para (a).
15 *R v Smith* [2008] NZCA 371, (2009) 24 NZTC ¶23,004.
16 *Rowley* (CA), above n 5, at [74]–[82].

evasion charges. In adopting this approach, the Judge treated the dishonest use counts as the "lead charges" for the purpose of sentencing. He then said:[17]

> I agree, also, that the attempt to pervert the course of justice offences are in their own right significantly culpable acts. They are linked to the substantive frauds, because they involved attempts to conceal those frauds. But the criminality of the those acts is distinct. Those offences will, therefore, attract a discrete cumulative sentence, uplifting the sentence for the lead fraud charges.

[19] The Court of Appeal considered that Mr Rowley's overall sentence of eight years was well within range just for the dishonest use charges; this given the scale of the offending (with the Court assessing the benefit to the applicants as being in the order of $2,300,000) and its elaborate nature and the consequences for the applicants' clients. On this basis, the Court saw the final sentence (which incorporated the attempts to pervert the course of justice) as generous.[18]

[20] Counsel for Mr Rowley takes a number of points as to all of this. He maintains that the starting points adopted by the Judge and Court of Appeal were too high. As to this he challenged the $2,300,000 figure relied on by the Court of Appeal. He also suggested that the sentences imposed did not sufficiently mark out what he claimed was the lesser culpability of Mr Rowley compared to that of Mr Skinner.[19] He also complained that no allowance was made for Mr Rowley's good character. He also suggested that the attempts to pervert the course of justice counts did not add appreciably to the criminality of Mr Rowley as they were "parasitic" on the earlier offending.

[21] Whatever the precise extent of the personal benefit derived by the applicants, it is clear that it was substantial as were the frauds themselves. Mr Rowley's culpability in relation to the frauds was less than that of Mr Skinner but he took an active role throughout, including in the attempts to pervert the course of justice. The primary offending occurred over five years and as late as the eve of trial Mr Rowley was still creating false documents; this with a view to furthering his defence. And although it is true that the attempting to defeat the course of justice charges were

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17 *R v Rowley* [2012] NZHC 2087 at [32].
18 *Rowley* (CA), above n 5, at [83]–[89].
19 Mr Skinner was sentenced to eight years, six months' imprisonment.

closely associated with the other counts, they involved distinct and additional criminality.

[22] In those circumstances we are not persuaded that the proposed appeal against sentence raises an issue of general or public importance or that there is any appearance of a miscarriage of justice.

What happens if the appeals in relation to the tax evasion charges are allowed?

[23] If these appeals are allowed, it may be necessary to revisit the sentences imposed on both applicants. The dismissal of Mr Rowley's application for leave to appeal against sentence is without prejudice to that possibility.

Solicitors:
Crown Law Office, Wellington for Respondent