

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN
[SQUARE BRACKETS].

**IN THE DISTRICT COURT
AT AUCKLAND**

**CRI-2015-004-011587
[2017] NZDC 25304**

COMMISSIONER OF INLAND REVENUE
Prosecutor

v

MICHAEL ROBERT NAISBITT
Defendant

Hearing: 9 November 2017

Appearances: P Broczek for the Prosecutor
S Kilian for the Defendant

Judgment: 9 November 2017

NOTES OF JUDGE A E KIERNAN ON SENTENCING

[1] Michael Naisbitt, you are before the Court for sentence today on 26 offences, essentially of tax fraud, contrary to the Tax Administration Act 1994. The maximum penalty for each is five years' imprisonment or a \$50,000 fine. The dates of the offending range from 2007 to 2014. This sentencing follows guilty pleas that you entered on 28 July this year.

[2] The charges were first in Court on 15 December 2015 and it is common ground that you did in the past, following a case review hearing, seek a sentence indication which was given by Judge Simpson on 21 November 2016 and there were further record relating to that from Judge Simpson on 23 February 2017. Ultimately, you chose not to accept that Judge's indication of sentence and, therefore, I am considering

matters afresh today. I am not bound by that sentence indication and, of course, something you did not accept so you have not entered guilty pleas on the basis of it.

[3] The charges came before me on 27 October last for sentence. I declined to sentence you on that date because Mr Kilian, on your behalf, made clear in his submissions, and also in Court, that there was available \$82,000 which could be provided within five days after sentence. He wanted me to take that into account as a reparation offer, a lump sum, followed up by further reparation after sentence at that time. I was not prepared to take into account a promise of reparation and then sentence you in advance so matters were adjourned until today for that purpose, to give you the opportunity to make those funds available if you wished to make that offer.

[4] Today Mr Kilian has presented to the Court a trust account cheque from his firm's trust account made out to the Ministry of Justice in the amount of \$82,000. That is dated today and appears to be signed so that cheque is currently with the registrar awaiting the outcome of this sentencing.

[5] In sentencing you I look at the charges, of course, the summary of facts, which I will refer to in a moment, the submissions that the lawyers have filed, and there are a great number of cases that they have each referred to, and also the provisions of the Sentencing Act 2002.

[6] Starting with the summary of facts, and this you have accepted when you entered your pleas, it is a document a number of pages long. You registered for income tax in May 1989 and, as the summary says, you were the sole director and shareholder of a number of companies which you registered for GST and income tax. The companies were R&R Accounting Limited, MRN Solutions Limited, MRN Technology Limited, MRN Systems and the nature of each of those businesses was recorded as either game retailing in your name or an accounting service or software development, a book-keeping service.

[7] It seems from 1998 to 2006 you earned salary and wages and your employers were predominantly accounting firms. In 2007 your income was limited to a small

amount of wages and a small shareholder salary from R&R and that lower income resulted in a rebate entitlement in a small tax refund.

[8] You returned no income in 2008. In 2009 a small amount of shareholder salary from MRN Solutions and due to rebate entitlements you paid no tax on your shareholder salary.

[9] For the 2007 to 2009 years you did not declare a profit or loss from your self-employed activity. No IR10s are filed during that period.

[10] The summary then goes to record the offending in some detail. Your own income tax returns, filed by you for years ended 2010 to 2013, included significant amounts of gross interest and resident withholding tax of 30 percent of the gross. Gross wages also included in 2012. For all of those years you claimed losses against your income. As a result, your tax liability in each year was nil and the interest resident withholding tax and PAYE credit in 2012 were all refunded. You, in fact, never received the claimed interest payments and were not entitled to the refunds or the rebates PAYE. All the returns you filed were false and filed with the purpose of retaining refunds you knew you were not entitled to.

[11] The summary then records the R&R income tax returns, again false income tax returns available for that company for the purpose of obtaining refunds. The R&R GST returns, they had no basis and were all false, created so as to obtain refunds. You used those refunds, the summary says, for your own private expenditure. MRN Solutions income tax returns again had no basis and were all false, created for the purpose of obtaining refunds. Similarly, with MRN Solutions GST returns and MRN tax GST returns. MRN Systems GST returns, again, falsely created for refunds.

[12] So the summary of the fraudulently-obtained income tax and GST refunds led in 2014 to the Inland Revenue's first investigative step to ask you for documentation in relation to the MRN Systems GST return for the period ended 31 January 2014. You provided some invoices to them. There appear to be no substantive basis for those invoices between the associated companies that you had set up.

[13] In April 2014 the department notified you of an audit for all your relevant entities and periods and all documentation was requested. You immediately ceased filing any further GST returns. You were contacted a number of times in relation to the audit. There was some correspondence between you and the investigators in September and October 2014 and, ultimately, you were sent a notice under s 19 Tax Administration Act requiring you to attend an inquiry. The summary notes that you did not attend that s 19 inquiry and, ultimately, failed to provide any of the requested information and were generally unco-operative.

[14] Analysis of the relevant bank accounts shows there was no basis for the income tax and GST returns that you had filed so the conclusion set out in the summary is that you fabricated all of the relevant returns so as to receive refunds you knew you were not entitled to.

[15] During the offending period you worked for chartered accountants preparing tax returns and financial statements, therefore the offending was achieved by using multiple entities and claiming relatively small refunds each return period. That had the effect of minimising the risk of offending being detected. You went so far as to create fake invoices to attempt to provide support for your claims before Inland Revenue launched a full audit. During the period you did contact Inland Revenue on a number of occasions to check on the expected refunds, either for yourself personally or for the companies, indicating you were dependent on the refunds to pay your normal living costs. The income tax refunds total \$50,827.17, the GST refunds, \$85,004.39, so the total is \$135,831.56. They are summarised in an appendix attached to the summary.

[16] There is also further offending relating to an income tax return in the name of [name deleted] Limited. That company and that person was one of your clients. You filed an income tax return on her behalf and the company for the year ended 31 March 2013. That return was similar to the fraudulent income tax returns you filed for yourself and your companies in that losses were offset by significant interest earned and refunds were claimed. When asked about this return by investigators, Ms [name deleted] said she simply provided her financial details to you to complete a return for the company and to her surprise you told her that the company would be getting a

refund. The return that you filed resulted in a refund of \$3,219.25. You had filed that false return. You also used her Inland Revenue online access, which she had given you, to change the bank account to your own so that the refund went into your own account.

[17] You do have previous convictions, Mr Naisbitt, but not for this sort of offending.

[18] The total amount of the fraud overall is \$139,050.81.

[19] Essentially, Mr Naisbitt, without detailing every single transaction, it appears that you would have filed well over 60 returns during that period between February 2007 and February 2014 using six different entities. Although you are not qualified as an accountant you, as has been said, have worked for a number of years in the accounting area and I have heard that a company that you worked for, and indeed contract you to, at the moment I am told described you as a senior accountant.

[20] In regard to the sentencing today, Mr Broczek, on behalf of the Department, has filed written submissions and there are a number of submissions on the file which I have read. They were submitted previously at the time of the sentence indication and there have been further submissions since. Essentially, the Department advocates a starting point in the region of three years' imprisonment and perhaps a little lower in some of the submissions. The informant has emphasised the sophistication of your offending and the specialist knowledge that allowed you to defraud the tax system. The amount of the loss is relevant, of course, as has been submitted and, of course, the planning or premeditation that clearly went into it. I have been provided with a number of cases and, of course, there are many cases in this area. They are all slightly different, of course, on the facts and I am going to refer to some of them shortly.

[21] The issue of reparation was one that exercised the counsel for the Department previously. Of course, reparation is important as a purpose of sentencing and I will make reference to the reparation offer that you make today and that you offer for the future shortly.

[22] The informant has referred to, as I have said, a number of cases and distinguished your offending from some of the cases that Mr Kilian has put forward on your behalf but the task of a sentencing Court is always to assess the gravity of the offending in a particular case, to apply the principles and purposes of sentencing set out in the Sentencing Act and although there must be generally consistency in sentencing and the least restrictive outcome, the important purposes of denunciation and deterrence are primary in offending of this sort as, indeed, Mr Broczek has emphasised in his oral submissions today.

[23] Mr Broczek has also suggested to the Court that there cannot be genuine remorse and you cannot, in the light of what he says is recent conduct following the laying of these charges, be regarded as fully compliant with your tax obligations. Of course, I am sentencing you only for the charges before the Court today. It is, though, a concern that directly relates to deterrence when it is submitted in Court at the time of sentencing that a person who has accepted responsibility for serious tax fraud may be continuing to neglect proper tax obligations. However, I make clear that I am not dealing with you obviously for any suggested lack of compliance outside the area of these charges.

[24] Mr Broczek has emphasised what he suggests is a sophisticated system which took some time for investigators to unravel. This was not offending where there were simple filing of returns. There were a number of complicated documents and paperwork required to achieve the results that you obviously did and that is apparent perhaps by the period of time over which you were able to effect the offending which you have now, ultimately, accepted.

[25] Mr Kilian, on your behalf, had also filed submissions previously. He addressed some of the issues that Judge Simpson had noted in the sentence indication but, as I have made clear, I am sentencing you de novo today. That indication does not apply. He urges the Court to take a starting point in the range of 18 to 24 months' imprisonment, to give you a discount for plea and he suggests 15 to 20 percent. He asks the Court to consider your personal circumstances, the ability to pay reparation, which is now a firm offer today, and urges the Court to ultimately impose a term of home detention. He acknowledges in his submissions the significant loss that has been

suffered. He suggests it was not particularly sophisticated offending in that there were no, for example, false identities created and he suggests many of the cases that have been referred to by counsel for the Department can be distinguished. He has pointed in particular to the case of *Commissioner v Ardern*¹, from this Court, the District Court, last year, evading tax over a four year period, \$117,000, an offender received community work, community detention and a reparation order. *Commissioner of Inland Revenue v Korana*² evading payments over a period, \$454,000, starting point of three and a half years, a final term of 21 months and home detention ultimately for eight months. *Commissioner of Inland Revenue v Jefferson*,³ \$115,000, fraud, aiding and abetting, non-payment of PAYE, sentenced in terms of community detention, community work and reparation.

[26] As I have said, there are a great number of cases in this area. I wish to refer first of all to the higher Courts authorities and note that, of course, there is no tariff set for fraud sentencing and that is because fraud can be committed in a diverse range of circumstances. However, defrauding the Inland Revenue is not a victimless crime and as Simon France J said in *R v Masters*:⁴

Defrauding the Revenue is criminal activity that affects ultimately the whole of society. In this context accountability and denunciation are closely linked. The important message is the correct label. The business context, and the fact that the victim is the IRD, should not be allowed to obscure the plain fact that this is straightforward theft from the community.

[27] In *Hogan v Ministry of Social Development*⁵ the full Court said at that stage there is no distinction in sentencing for the different types of fraud and one of the key principles is the need for a deterrent sentence where offending occurred over a lengthy period involving large amounts. It has also been said and summarised in that decision that:

Fraud on a public agency is not to be treated for sentencing purposes as being more serious or less serious than fraud upon individuals or private companies or organisations. What is determinative is the degree of dishonesty, the amounts obtained, the repetitiveness and premeditation of the behaviour, the need to denounce the conduct and to deter others when balanced against the

¹ *Commissioner of Inland Revenue v Ardern*

² *Commissioner of Inland Revenue v Korana*

³ *Commissioner of Inland Revenue v Jefferson*

⁴ *R v Masters* HC Auckland CRI-2003-092-30868, 13 May 2005

⁵ *Hogan v Ministry of Social Development* (2005) 23 CRNZ 500

mitigating features relating to the offence and the offender. Where offending constitutes a serious example of fraud, whether described as “benefit fraud or otherwise” because of all the aggravating features a term of imprisonment may be justified.

[28] That is from paragraph 40 in *Hogan v Ministry of Social Development* quoting from Anderson J in *Faiers v Police*.⁶

[29] The principles that emerge from the authorities generally is that fraud on a Government department is to be regarded no differently than other sorts of fraud. It is theft from the community and deterrence is an important purpose of sentencing. In your case, Mr Naisbitt, the offending is serious given the amounts obtained and the period of time over which it occurred and, in my view, it was premeditated and somewhat sophisticated offending.

[30] The Court of Appeal decision in *James v R*⁷ has perhaps a similar factual background and that is referred to in the informant’s submissions. There was an appeal there against a sentence of two years’ imprisonment, 19 offences under the Tax Administration Act, two discrete categories, eight offences of tax evasion, amounting to \$174,000 of which over \$147,000 had been repaid. The second category, of aiding and abetting four companies to apply PAYE deductions other than in payment to the IRD. On appeal it was submitted the sentencing Judge had dismissed the option of a reparation-based sentence and that home detention could have adequately satisfied principles of deterrence and denunciation for a low risk offender like the appellant. In dismissing the appeal, the Court of Appeal noted that whether home detention would meet those objectives in the particular case was a strictly evaluative exercise and a matter of judgment for the sentencing Judge. The ultimate result in the Appeal Court was unsuccessful and home detention was not substituted for the two year prison sentence. The aggravating features of the offending in *James v R* meant that although there was significant reparation paid, the sentencing Judge being upheld in the Appeal Court did not feel that a home detention sentence was justified.

⁶ *Faiers v Police* (1989) 5 CRNZ 186

⁷ *James v R*

[31] So the key distinction, Mr Naisbitt, perhaps in your case is that you offer a significant reparation payment today and Mr Kilian on your behalf is confident that you will be able to satisfy a further reparation order and he asks me to take those things into account in considering whether an ultimate sentence of home detention is appropriate.

[32] There are other decisions that I could, of course, refer to but the important issues, as I have already said, are the amount of the fraud, the period of time over which it occurs, the level of sophistication and the need for deterrence and denunciation. There is generally, on reviewing all the cases, a reluctance of the Courts to impose home detention as a sentence when many of the aggravating features that are present here are present, so premeditation, sophistication, large sums of money involved and a period of time of offending so it is ultimately an evaluative exercise, of course, for each sentencing Judge.

[33] In your case the particular aggravating features that I identify are these: this was sophisticated, persistent and premeditated offending over a number of years. The amount of the fraud overall, almost \$140,000. The breach of trust as a tax agent for Ms [name deleted], which is reflected in the charges, is also a relevant aggravating feature. Your previous convictions are not in this area and I disregard them in terms of aggravating features.

[34] In your favour as mitigation, ultimately, guilty pleas after a long process. In my view, with all the background that has been traversed and that I have referred to, a 15 percent discount is appropriate, not 20 percent, given the timing and the way things ensued but a 15 percent discount in my view is appropriate. A further discount, of course, is available for reparation, the \$82,000 that you have available today and the ongoing offer of \$2000 a month, which Mr Kilian offers on your behalf.

[35] It is a concern though to the Court, Mr Naisbitt, that I am told that you work as an independent contractor for Gilligan Rowe and Associates, and in completing documents and then returning them to the firm for presentation or filing that you have not told that company of these charges or, indeed, the convictions that have already been entered. Mr Kilian is confident on his instructions from you that you will retain

that employment because you are not actually submitting documents to any authorities but there is nothing before me today in writing to confirm that that employment will be available to you even on a contracting basis. Nevertheless, I am told that you have available as a net income at present with that work available to you between \$2000 and \$2500 a week. Your partner, whom I see supporting you in Court again today, lives with you. There is no mortgage to pay and he says a realistic ongoing offer of reparation would be \$2000 a month and he urges me to make that order.

[36] What is also put forward as mitigation is your gambling addiction. That is traversed in the pre-sentence report and that notes that you are a gambling addict and that you have been engaging with Problem Gambling since November 2016. Today I am told from the bar that you attend every three weeks or counselling is still available to you and that appears from the probation report to be a significant driver for your offending. Mr Kilian urges me to regard that as a mitigating feature. It is difficult, Mr Naisbitt, for me to provide as a mitigating feature without evidence a self-confessed gambling addiction and counselling for that in the context of tax fraud over a number of years so I do not propose to give you further credit in mitigation for that addiction without that evidence.

[37] Other matters referred to in the pre-sentence report, which does recommend home detention, are the reparation issues which I have already mentioned and I should note that the address has been assessed and in principle is suitable and that is on the North Shore.

[38] So, mitigation, 15 percent for the guilty pleas and, of course, an allowance for reparation offer.

[39] The principles and purposes of sentencing in this area are importantly, as I have said, denunciation and deterrence and the need to hold you accountable, the prospect of reparation, the need for consistency generally and the least restrictive outcome. You were clearly in a position to defraud the tax system at minimal risk, given your experience over a number of years in the accountancy area.

[40] Mr Naisbitt, having said all of those things, I am now going to fix a starting point for your offending and I do this having assessed the level of your offending and also reviewed all the decisions that counsel have provided me with and I have referred to some of them. In my view, an appropriate starting point for offending at this level over this period with the features I have identified would be two years and nine months' imprisonment so that is where I start.

[41] I would give you then a 15 percent discount for your pleas of guilty. That is essentially 4.95 months, almost five months, so that would take a sentence down to two years and four months' imprisonment.

[42] The other factor that I give you credit for in mitigation is, of course, the reparation payments offer. The total amount is over \$139,000. I am going to make a reparation order for the full amount, \$139,050.81. Today you offer payment through your lawyer's trust account cheque of \$82,000 and the further order that I make is that payment of the balance be made at \$2000 per month starting on 1 January 2018. For that further mitigation occasioned by the reparation, significant offer made today, and the ongoing ability to satisfy the full amount, in my view a final sentence would be just under two years' imprisonment.

[43] Because it is just under two years' imprisonment, I can then consider whether home detention would be an appropriate outcome. In your case, Mr Naisbitt, I have decided by a small margin, and it is obviously a case where as you can tell from what I have said in sentencing you, the need for deterrence and denunciation is paramount and in my view those purposes can be achieved by home detention. It will be for the significant period of 11 months. That starts today, it will be at the address that has been checked and you will have seen the recommended special conditions in the probation report. They include assessments for gambling addiction, any other departmental programme, a rehabilitative programme, no alcohol or drugs and probation officer needs to approve employment so even though at present you have employment you are able to conduct from home on a contracting basis, that will need to be approved by the probation officer.

[44] I am also going to impose conditions to last six months beyond the 11 months of home detention and they will be the same conditions, so basically the sentence today is for a year and five months altogether and you will get served with the paperwork now before you leave the Court to go home and wait for the monitoring company and the probation officer.

[45] [Your Honour, I just raise whether any community work hours would be considered as well? There are cases often where home detention as well as community work is imposed] Thank you, Mr Broczek, I appreciate that. Often that is the consideration of the Court. I have considered that and I decided that a significant term of home detention, 11 months, plus the release conditions is in itself a stern sentence and I do not propose to impose community work as well.

[46] That is the sentence. Stand up now, Mr Naisbitt, please, so 11 months' home detention, special conditions as set out in the probation report and those conditions to continue six months beyond the sentence end date.

[47] Just finally, Mr Kilian, I think the registrar has still got the cheque. That can now be transmitted down to the registry with the file. We will get them to come and get it, so now that the sentence has been completed that can be recorded and the other payments set up from 1 January.

A E Kiernan
District Court Judge