

IN THE SUPREME COURT OF NEW ZEALAND

SC 39/2015
[2015] NZSC 106

BETWEEN RONALD PETER ROSENBERG
 Applicant

AND THE QUEEN
 Respondent

Court: Elias CJ, William Young and Arnold JJ

Counsel: R C Laurenson for Applicant
 M D Downs and Z R Hamill for Respondent

Judgment: 20 July 2015

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant, Mr Rosenberg, together with a co-offender, Mr Hunt, was convicted following a Judge-alone trial before Judge Davidson on 41 counts of dishonestly using a document. Each count carried a maximum penalty of seven years' imprisonment. On sentencing, the Judge treated the fraud as involving at least \$9.75 million.¹ He assessed the culpability of the two as being similar, with any differences being insufficient to justify any distinction in sentencing.² Judge Davidson sentenced Mr Rosenberg to imprisonment for three years and ordered him to pay reparation of \$400,000 and Mr Hunt, who was bankrupt, to imprisonment for a term of three and a half years.

¹ *R v Rosenberg* DC Wellington CRI-2012-085-002862, 29 May 2014 at [13].

² At [16].

[2] Mr Rosenberg appealed to the Court of Appeal against the reparation component of his sentence only. That appeal was unsuccessful.³ He now seeks leave to appeal to this Court, but again only in respect of the reparation order of \$400,000. As in the Court of Appeal,⁴ Mr Rosenberg says that if the Court was minded to allow his appeal against the reparation order but to increase his term of imprisonment as a consequence, he would prefer the reparation order to stand.

[3] The fraud, which was carried out between 2005 and 2008, involved the under-reporting of gas consumption by two companies, E-Gas Ltd and E-Gas 2000 Ltd (together, E-Gas). According to the Judge, it was designed to enhance the solvency of E-Gas. Before his sentencing, Mr Rosenberg settled civil proceedings brought against him, Mr Hunt and other directors and shareholders of E-Gas by the liquidators of E-Gas. In conjunction with these proceedings, the liquidators applied to set aside a general security agreement held by Multi Gas (NZ) Ltd over E-Gas, which secured indebtedness of \$7.584 million. Mr Rosenberg was a director of Multi Gas and he controlled 60 per cent of its shareholding (both directly and through related interests). Mr Rosenberg and his interests did not pursue claims of \$4.55 million and, in addition, he contributed \$120,000 to the settlement, the effect of which was significant in that it improved the recovery by unsecured creditors of E-Gas from around 16 per cent to around 67 per cent.

[4] The two grounds which Mr Rosenberg wishes to pursue if leave is granted are that:

- (a) Judge Davidson did not take adequate account of the settlement in sentencing Mr Rosenberg.
- (b) There was an unfair disparity between the sentence imposed on Mr Rosenberg and that imposed on Mr Hunt.

These are the same points as were raised before the Court of Appeal.

³ *Rosenberg v R* [2015] NZCA 97.

⁴ At [2].

[5] On the first point, Mr Laurensen for Mr Rosenberg referred to a number of provisions in the Sentencing Act 2002, ss 10(1)(b) and 32(6) in particular. Relevantly, s 10(1)(b) requires a sentencing judge to take into account any agreement between the offender and the victim as to how the offender might remedy the wrong; s 32(6) requires the judge to consider any such agreement when determining the amount of any reparation. Mr Laurensen submitted that Judge Davidson did not take sufficient account of these provisions.

[6] On the second point, Mr Laurensen said that Mr Hunt had, in effect, had the benefit of the settlement entered into by Mr Rosenberg and his interests even though he had not contributed to it. Mr Rosenberg was entitled to a lesser sentence in light of that settlement, without any further order of reparation.

[7] We are not satisfied that it is necessary in the interests of justice that we hear and determine the proposed appeal. First, while we accept that, in the abstract, there may be an issue of principle as to the relationship between civil settlements and sentences involving reparation, we do not accept that this is an appropriate case to consider the issue. This is because we do not accept the constraint that the applicant has endeavoured to place upon the Court by indicating that if the Court was minded to quash the reparation order and increase his term of imprisonment, he would prefer that the sentence be left as it currently stands. It is not appropriate that an applicant attempt to limit the Court in that way.

[8] Second, we do not see any risk of a serious miscarriage of justice in this particular case. It is clear the Judge Davidson was aware of the settlement and that he took it into account. It may be that Mr Hunt also derived some of the benefit from it, given the relatively low starting point adopted by the Judge for both offenders, but we do not see that as necessarily raising a disparity concern. The Judge was entitled to consider ordering reparation against Mr Rosenberg, and was required to order reparation unless that caused undue hardship.⁵ He gave credit for the order in reducing the term of imprisonment that would otherwise have been imposed on Mr Rosenberg.

⁵ Sentencing Act 2002, s 12.

[9] The application for leave to appeal is dismissed.

Solicitors:
Johnston Lawrence Lawyers, Wellington for Applicant
Crown Law Office, Wellington for Respondent