Godwin v The Queen [2003] NTCCA 7

PARTIES:	LIONEL ANTHONY GODWIN
	v
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA 5 of 2002 (9913901)
DELIVERED:	12 September 2003
HEARING DATES:	18 and 19 August 2003
JUDGMENT OF:	MARTIN CJ, THOMAS & RILEY JJ

REPRESENTATION:

Counsel:

Appellant:	C.R. McDonald QC, R. Goldflam
Respondent:	P.X. Elliott

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Judgment ID Number:	ril0324
Number of pages:	31

ril0324

IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Godwin v The Queen [2003] NTCCA 7
No. CA 5 of 2002 (9913901)

BETWEEN:

LIONEL ANTHONY GODWIN
Appellant

AND:

THE QUEEN
Respondent

CORAM: MARTIN CJ, THOMAS & RILEY JJ

REASONS FOR JUDGMENT

(Delivered 12 September 2003)

THE COURT:

[1] In 1997 the appellant embarked upon an ever-escalating series of dishonest and deceitful acts that continued until early 1998. As a direct consequence of his conduct many people suffered loss, including his then de facto wife, her father, his business partners and a private company that lent money to the business.

[2] On 10 December 2001 the appellant pleaded guilty to 8 offences arising out of his misconduct, being: the obtaining of property by deception contrary to s 227(1) of the Criminal Code (3 counts); publishing a false statement with intent to deceive contrary to s 234 of the Criminal Code; forgery contrary to s 258(d) of the Criminal Code (3 counts); and by deception procuring the execution of a valuable security, namely a mortgage, contrary to s 235(2) of the Criminal Code. On 5 February 2002, after a hearing at which evidence was called and some of the victims were cross-examined, the appellant was sentenced to imprisonment for a period of 12 years with a non-parole period of 6 years. The sentence was backdated to take into account time spent in custody.

[3] The appellant has obtained leave to appeal against the sentence on the grounds that the sentence was manifestly excessive and that the sentence imposed infringed the totality principle. He seeks leave to appeal on a number of other grounds including:

(a) The learned judge erred in concluding that the case could not be regarded as an early plea;

(b) The learned judge erred in that insufficient weight was given to the applicant's remorse;

(c) The learned judge failed to give adequate reasons for the sentence he imposed;

(d) The learned judge's sentencing remarks were tainted by error of law in that he failed to take into account relevant considerations, namely the quantum of the loss suffered and the issue of restitution;

(e) The learned sentencing judge erred in failing to give the applicant's prospects of rehabilitation sufficient weight;

(f) The learned judge erred in the exercise of his discretion in sentencing the appellant to an aggregate term of imprisonment.

The application in relation to ground (f) was abandoned during the course of argument. The issue of restitution was not addressed in written or oral submissions.

CIRCUMSTANCES OF OFFENDING

[4] The circumstances of the offending are complex and convoluted. We will endeavour to state them in summary form, drawing upon the remarks of the learned sentencing judge.

[5] In October 1995 the appellant (who had been discharged from bankruptcy in 1993) and his de facto wife, Traci Lewfatt, purchased a house at 7 Brayshaw Terrace, Millner, at a cost of $200,000. The appellant was given $20,000 by his father towards the deposit and Ms Lewfatt borrowed $20,000. The remaining $160,000 was borrowed from the National Australia Bank which took a first mortgage over the property. At that time the appellant was indebted to Esanda Finance in respect of a Toyota Landcruiser which he had purchased for $78,836. By June 1997 approximately $45,000 remained owing to Esanda in relation to the vehicle. In addition, in 1996, the appellant borrowed $50,000 from a Mr Wilson to establish a fertiliser export company in China. Although that loan was supposed to be secured by a

second mortgage over the Brayshaw Terrace property, the mortgage was never registered through error on the part of solicitors representing Mr Wilson. The export business did not proceed and the $50,000 remained owing to Mr Wilson.

[6] Early in 1997 the appellant advised his father-in-law, Walter Lewfatt, that he had conducted a Land Titles Office search on Mr Lewfatt's residence at 22 Wells Street, Ludmilla. He was aware that Mr Lewfatt had personal debts totalling some $22,000 and a small mortgage over the property of some $23,000. The appellant suggested that money could be borrowed against the equity in 22 Wells Street. He suggested borrowing an amount of $100,000 which would enable Mr Lewfatt to consolidate his loans and allow the appellant to use the remaining money to invest. Mr Lewfatt agreed to the proposition on the understanding that the appellant and Traci Lewfatt would meet all repayments. The appellant arranged the loan through the National Australia Bank and Mr Lewfatt's property was mortgaged to the bank by way of security.

[7] At that time Mr Lewfatt was planning an overseas trip and the appellant suggested that Ms Lewfatt be granted a power of attorney in respect of her father's house so that she could sign necessary documents. Mr Lewfatt agreed and on 7 February 1997 power of attorney documents were registered.

[8] Mr Lewfatt and his daughter became legally responsible for the repayment of the loan. Mr Lewfatt's existing mortgage and debts were paid off and the balance of approximately $50,000 was utilised by the appellant to reduce his own debts and a sum of $30,000 was paid into an account in the name of Lewin (NT) Pty Ltd, a company of which the appellant and Ms Lewfatt were directors and shareholders. The appellant operated the Lewin company cheque account as if it was a personal cheque account.

[9] During this period the appellant was employed in an insulation business and, in the course of his employment, dealt with a sheet-metal fabrication business, Territory Sheet Metal. The appellant learned that the directors of Territory Sheet Metal Pty Ltd, David Smith and Ted Dean, had devised a method of constructing housing units which led to significant cost savings and consequently an increased profit margin over conventional housing construction. The appellant was aware that Territory Sheet Metal required capital to enable the company to embark upon a planned unit development. He told the directors that he could provide finance for the development. He claimed that he owned unencumbered properties at 22 Wells Street and 7 Brayshaw Terrace. He also stated that he owned, unencumbered, his Toyota Landcruiser valued at $60,000 and that he owned a significant share portfolio along with large cash savings. Each of these statements was false.

[10] Accepting the false statements to be true, the directors agreed to allow the appellant to become a partner in the unit development and he was to contribute the sum of $400,000. In early June 1997 the company LTD Pty

Ltd was registered, with the appellant, Mr Smith and Mr Dean listed as directors and equal shareholders. The company was formed to complete the unit development with the actual work being undertaken by Territory Sheet Metal and other subcontractors. The development was costed at $750,000 which was to be financed by the appellant's contribution of $400,000 and a sum of $350,000 borrowed from the Commonwealth Bank.

[11] In June 1997 the appellant convinced his father-in-law and Ms Lewfatt to agree to increase the loan against Mr Lewfatt's property by a further $100,000. After some hesitation, and in light of assurances provided by the appellant, Mr Lewfatt agreed. The appellant arranged the additional loan with the National Australia Bank, leaving the Wells Street property mortgaged to that bank as security for a total loan of $200,000. Mr Lewfatt and his daughter Ms Lewfatt were legally responsible for the loan repayments.

[12] At the time the appellant entered into the arrangements with Smith and Dean in relation to LTD, he had significant liabilities . Matters he should have disclosed included that the property at 7 Brayshaw Terrace was mortgaged to the National Australia Bank for approximately $160,000; the property at Wells Street was mortgaged to the same bank for $200,000 most of which he had received; Traci Lewfatt was repaying a personal loan of $20,000; the appellant and Traci Lewfatt were together repaying a personal loan to the National Australia Bank of $50,000; an amount of approximately $45,000 was outstanding to Esanda in relation to the Landcruiser; and the $50,000

debt to Mr Wilson was outstanding. Contrary to the information provided by the appellant to his fellow directors, he had no shareholdings and no cash savings. Ms Lewfatt was pregnant and in the process of giving up her employment. At that time the appellant negotiated with LTD a $1000 per week salary or wage for himself, drawn from the LTD account. That was his only income.

[13] In June and July 1997 the appellant paid a total of $36,800 into the LTD account. The majority of that money came from the Wells Street loan. However between June and August 1997 he borrowed from the LTD account a total of $40,000 saying to his fellow directors that he had urgent expenses.

[14] As construction of the units progressed the $350,000 bank loan was utilised and a number of cheques drawn on the LTD account were dishonoured due to there being insufficient funds in the account. The Commonwealth Bank expressed concern as to the operation of the account and the appellant informed the manager that he was expecting a large payment from interstate to rectify the problem. That was not true. The other directors reminded the appellant that they were dependent upon the $400,000 he was to put into the company. He falsely told them that he had put $270,000 into the account and was intending to pay more. He had not put $270,000 into the account and he was incapable of paying more. He proceeded to open another LTD account this time with the Westpac Bank. That account had a nil balance.

[15] Mr Smith and Mr Dean were concerned by the cashflow problem and consulted with Mr Michael Flynn who offered to become a lender of last resort in relation to a further 8 units which the company planned to construct. They were confident that their cashflow problem related to overpayment errors to contractors which could be rectified. Mr Flynn agreed to loan LTD a total of $800,000 to complete the 8-unit development and this money was to be paid in stages on demand. Mr Flynn agreed to provide the money through his company, Northern Property Group Pty Ltd, and, on 23 July 1997, that company paid $100,000 to the Commonwealth Bank account of LTD. As security, Northern Property Group Pty Ltd took a registered charge over LTD.

[16] On 6 August 1997 the appellant arranged for a cheque in the amount of $100,000 to be drawn on his Lewin (NT) Pty Ltd account with Westpac Bank and deposited in the LTD Commonwealth Bank account. The Lewin account at that time was overdrawn. On 8 August 1997 the appellant arranged for a cheque in the sum of $100,000 to be drawn on the newly opened LTD Westpac account and paid into the LTD Commonwealth account. There were no funds in the LTD Westpac account. Both cheques were subsequently dishonoured. However, prior to them being dishonoured the appellant arranged for a cheque to be drawn on the Commonwealth Bank LTD account for payment of the sum of $115,194.81 in respect of the land on which the units were being constructed. That cheque was drawn against the uncleared funds from the two cheques which the appellant had caused to

be deposited into the LTD Commonwealth Bank account. The dishonouring of those cheques meant that the land payment made by the appellant drew heavily on the previously arranged overdraft sum of $350,000. On 15 August 1997 the overdraft was exceeded and cheques drawn on the LTD Commonwealth Bank account were again being dishonoured. On 25 August 1997 a further $100,000 was obtained from Northern Property Group to alleviate the problem. The effect of these transactions was that the appellant was disguising the fact that he had not complied with his agreement to deposit $400,000 into the company account. It was in that context that the individual charges against the appellant arose. Those charges were as follows:

Count 1

[17] On 29 August 1997 the appellant approached his fellow directors, Smith and Dean, and stated that he wished to purchase a Toyota Landcruiser from Bridge Autos. He told them that his de facto wife was expecting the birth of their first child and he wanted to present the vehicle as a gift to her. The fellow directors refused, saying that the company was well into construction and no funds were available from the LTD account. The appellant stated that if he could purchase the vehicle immediately he would save $6000 on the purchase price. He falsely stated that he was in the process of selling shares and would be in a good position to pay back the borrowed company

money within a week. The appellant knew this was untrue and that he did not in fact have any shares to sell.

[18] Smith and Dean were deceived into believing that the appellant had already paid a substantial portion of his capital contribution to the company and believed that he had sufficient shares that he was in the process of selling, and that the appellant intended to use the proceeds of that share sale to repay them the following week. Consequently, they approved the appellant's request to draw a company cheque for the purchase of the vehicle. He obtained $60,575 and purchased the Toyota vehicle.

[19] The appellant, not having any shares to sell as he had claimed, did not repay those monies.

Count 3

[20] On 12 September 1997 he drew a cheque on his Lewin account with Westpac Bank, payable to LTD for an amount of $100,000. He deposited that cheque into LTD's Commonwealth Bank account. The balance of the Lewin account at the time of writing the cheque was $179. The cheque was dishonoured. On 15 September 1997 the appellant completed an LTD cheque drawn on the Commonwealth account for an amount of $100,000 payable to Lewin (NT) Pty Ltd. This cheque was honoured and consequently the Lewin account was credited with $100,000. The co-directors of LTD were unaware of the transaction and did not authorise such

use of the company money. The money obtained was withdrawn from funds provided to the LTD account by the Northern Property Group.

[21] On 19 September 1997 the appellant completed a cheque drawn on his Lewin account for $100,000 payable to LTD. The appellant banked this cheque to LTD's Commonwealth Bank account and that cheque was honoured as it was drawn from clear funds previously obtained from LTD. The transactions disguised the fact that the appellant had not paid any money to the LTD account.

[22] The appellant was aware that the Commonwealth Bank LTD account was overdrawn and the Commonwealth Bank management spoke to him about this. The appellant was also aware that the account was being assisted by money borrowed from the Northern Property Group. The appellant was aware that the National Australia Bank had notified his de facto wife that their mortgage payments were in arrears, as were payments on the 22 Wells Street property owned by Mr Walter Lewfatt.

[23] The appellant then commenced loan negotiations with the Winnellie branch of the ANZ Bank and also with Mr Michael Flynn of the Northern Property Group. The appellant spoke to his co-directors at LTD and advised them that they should deal with the ANZ Bank, falsely stating that the Commonwealth Bank did not like LTD.

[24] As a result of what Smith and Dean were told by the appellant, it was decided that LTD would seek a loan from the ANZ Bank with a view to

consolidating the company loans, as well as paying out the high interest loan from the Northern Property Group. The group was also considering purchasing land in Stuart Park for a future unit development.

[25] In anticipation of the ANZ Bank requiring a business plan for the loan, the three directors compiled a document outlining the assets and liabilities of the company, Territory Sheet Metal, and also their personal financial positions. The appellant falsely listed as his assets properties at 22 Wells Street and at 7 Brayshaw Terrace and claimed they were unencumbered whilst knowing that both properties were heavily encumbered. The appellant also listed the Landcruiser as unencumbered, which he knew was encumbered to Esanda Finance. The appellant falsely detailed stockmarket holdings when there were in fact none. The appellant failed to list his personal loans as liabilities.

[26] The appellant was aware that he would require clear title to use the properties at 22 Wells Street and 7 Brayshaw Terrace as security for any loan proposal with the ANZ Bank.

Count 4

[27] On 22 October 1997 the directors of LTD were each requested by ANZ Bank management to complete a statement of their personal financial position. Those documents, along with the business plan presented by the company, were to be used in the determination by the Bank of the loan proposal. The proposal was for a loan of $850,000. The appellant completed his statement

in which he lied. He listed assets totalling $671,000. He listed no liabilities. The unencumbered assets listed were the property at 7 Brayshaw Terrace which was mortgaged to the National Australia Bank; his Toyota Landcruiser that was encumbered to Esanda Finance; a share investment of $66,000, as well as a superannuation asset of $170,000.

[28] The appellant failed to list the personal loans he had with the National Australia Bank, the loan he had with Mr Wilson or his liability in respect of the $200,000 mortgage obtained by his de facto wife and Walter Lewfatt. In failing to declare encumbrances, the appellant provided a false, misleading and quite deceptive account for the ANZ Bank in respect of his financial position. The ANZ Bank used that document, in part, to approve the loan and also determine the risk to the bank. The appellant was aware, when he signed the declaration on the form, that the document was false in those material particulars.

Counts 5, 6 and 7

[29] In early October 1997, unbeknown to the other directors of LTD and without their authority, the appellant approached Michael Flynn, the director of Northern Property Group, with a proposal to borrow $570,000. The appellant stated to Mr Flynn that the funds would be used to secure a $2m bank bill from the ANZ Bank for LTD. The appellant told Mr Flynn that Mr Flynn's company would become a priority payee from the bank bill and would receive $800,000 plus interest from an earlier loan together with the

return of the $570,000. The appellant stated that LTD would utilise the remaining funds to consolidate company debts into one loan.

[30] It was the appellant's intention to obtain the $570,000 and use it to pay out the mortgages over 22 Wells Street and 7 Brayshaw Terrace, as well as other personal debts. These were properties that he had already declared as being unencumbered. In preparation of his plan, the appellant had Ms Lewfatt sign a mortgage transfer document transferring the title of 22 Wells Street to the ANZ Bank. The appellant told Ms Lewfatt that she could legally do this under the existing power of attorney from her father. Walter Lewfatt had no knowledge of this transfer.

[31] Mr Flynn requested security for the new loan and asked the appellant to provide written authorities for Northern Property Group to register caveats over the landholdings of the LTD directors. On or about 27 December 1997 the appellant had a letter typed on Territory Sheet Metal letterhead listing certain property in Palmerston as being registered in the names of himself and David Smith. The letter stated that the registered proprietors of the land consented to Northern Property Group placing a caveat over the land. The appellant signed his name and forged the signature of his fellow director, David Smith. The appellant was aware that neither himself nor Smith owned the land and could not consent to the placement of a caveat.

[32] The appellant prepared a further document for the Northern Property Group stating that the registered proprietors of 22 Wells Street, and also of

7 Brayshaw Terrace, consented to Northern Property Group placing a caveat over those two properties. The appellant signed the document and also obtained the signature of his de facto wife. The appellant further offered the land upon which the 8 units were being constructed, as security. This was done without the knowledge or authority of either Smith or Dean.

[33] The appellant handed the letters to Mr Flynn, who advised that he would have his legal people register the caveats on the properties. Mr Flynn prepared a letter to the manager of the Winnellie branch of the ANZ Bank, giving notice of the Northern Property Group's interest in the properties by way of a charge over the company, LTD, and of the caveatable interest in the nominated properties provided by the appellant. The letter was given to the appellant to deliver. The appellant did not do this. Consequently the bank had no knowledge of this dealing between the appellant and the Northern Property Group. The bank was aware of the proposed loan to LTD and Territory Sheet Metal of $850,000 in which the appellant had offered securities over the Wells Street and Brayshaw Terrace properties. The ANZ Bank was waiting for the appellant to produce the title deeds to the properties. Of course he could not do that as the properties were mortgaged to the National Australia Bank.

[34] On or about 30 December 1997 the appellant attended at the Land Titles Office. He was supplied with the necessary forms to lodge a caveat and was advised that legal firms normally performed the procedure.

[35] The appellant approached the new bookkeeper of Territory Sheet Metal, who had previously been employed by a law firm and, at the appellant's request, she completed four caveat forms. The appellant took the forms to Mr Flynn, who signed and sealed them with the Northern Property Group seal.

[36] On or about 30 December 1997 the appellant attended at the Land Titles Office in Darwin. He completed four dealing lodgment forms, one for each property. The lodgment fee for each caveat was $165. He completed a personal cheque for $660 payable to the Receiver of Territory Monies which was given to the cashier. The appellant received an imprint from the cashier on each form showing that payment had been made. That is a requirement before any registration of the dealing can be effected. The appellant then presented the caveat forms, signed and sealed by the Northern Property Group, and the lodgment receipts to a Land Titles officer. The officer entered the details from each form into the computer, generating a dealing registration number for each. The officer recorded the respective numbers on the lodgment receipt for each property, making this document complete. After the appellant obtained the completed lodgment receipts he told the officer that he had to check on some matters and he asked that they not transfer the actual caveats to the title. The officer agreed to this and placed the caveat forms to one side.

[37] The appellant then left the Land Titles Office with the four completed caveat dealing lodgment receipts, each bearing a registered caveat number. Before leaving the office he attended at the cashier's office and told the

cashier that the lodgments had been made in error and he cancelled the cheque payment. He then attended at the office of Michael Flynn and presented him with the four dealing lodgment forms. He falsely told Flynn that the caveats were in place and that they were registered. He requested the $570,000.

[38] On 2 January 1998 Flynn prepared a letter to John Baylis, the manager of the Winnellie branch of the ANZ Bank. The letter was to confirm with ANZ management the arrangement for the Northern Property Group to be paid $1,394,712 from the LTD $2m bank bill. An invoice to this effect was attached to the letter. The letter stated that Mr Baylis was to accept the cheque for $570,000 on condition that he signed the letter as acceptance of the terms. Mr Flynn then completed a Westpac cheque for an amount of $570,000 payable to the ANZ Bank. He handed the cheque and letter to the appellant, requesting the letter be returned upon receipt of the bank manager's signature. The appellant did not produce the written instructions to the ANZ Bank. Instead, he forged the signature of the ANZ Bank manager, Mr John Baylis, on the letter and returned the letter to Mr Flynn. Mr Flynn was deceived and believed that he had in place caveat documents and also that Baylis would not accept the cheque unless Flynn's arrangements were met and the Northern Property Group would receive priority payment from the bank bill.

[39] The appellant took the cheque for $570,000 and arranged for it to be deposited to the account of Territory Sheet Metal at the ANZ Bank,

Winnellie. The account at the time was in debit in the sum of $40,000. As a result of the deposit of $570,000, the Territory Sheet Metal account had a substantial credit balance.

Count 8

[40] On 24 December 1997 the appellant completed an ANZ cheque drawn on the Territory Sheet Metal account made payable to himself for an amount of $460. He approached the Territory Sheet Metal work foreman, who was also a signatory to the account, to countersign the cheque. After the cheque was counter-signed the appellant added the word "thousand" and a number of zeros. By this alteration the cheque became payable to himself for $460,000.

[41] The appellant obtained the $460,000 from the Territory Sheet Metal account and arranged payment to the National Australian Bank to discharge the $203,849.42 mortgage over the Wells Street property; the $159,474.84 in respect of Brayshaw Terrace mortgage; and $39,111.29 to pay out his personal loan. He kept the remaining $57,564.45 for personal spending.

[42] When he obtained the money from Mr Flynn the appellant was aware that the Northern Property Group would not receive entitlements from the ANZ Bank. He was aware the caveats were not in place over the nominated property. On paying out the mortgages over Wells Street and Brayshaw Terrace, the appellant obtained title deeds from the National Australia Bank for the Brayshaw Terrace property. The bank contacted Mr Lewfatt and

advised him the mortgage was paid out and he was presented with the title to the Wells Street property. Mr Lewfatt was advised to register the unencumbered title at the Land Titles Office.

Count 10

[43] On or about 5 January 1998 the appellant approached Mr Lewfatt and told him he had arranged for the unencumbered title of 22 Wells Street to be registered at the Land Titles Office. Mr Lewfatt believed that the appellant was going to register that title and handed the document to him. The appellant had no intention of doing this. Instead, he presented it to the ANZ Bank as part security for the $850,000 loan to Territory Sheet Metal.

[44] The appellant had previously arranged for his de facto to utilise the power of attorney document, given to her by her father, in order to sign over that property to the ANZ Bank. Mr Lewfatt had no knowledge of this and never authorised the transfer. Mr Lewfatt believed that the power of attorney was only effective for the period he had been overseas.

[45] On 9 January 1998 ANZ Bank staff attempted to register a mortgage over the titles which had been presented by the appellant as part-security for the loan to Territory Sheet Metal. On ANZ staff attending at the Land Titles Office, Land Titles Office people recalled the appellant's previous interest in the caveat lodgments. The appellant was notified of the ANZ Bank's intention and he attended at the Land Titles Office. He advised the ANZ and Land Titles Office staff that the caveats were an error. He assured the

bank staff that this was the case and told them he would formally obtain this in writing from the Northern Property Group. In anticipation of the documents being signed by Michael Flynn, the Land Titles Office registered the mortgages to the ANZ Bank.

[46] An ANZ officer spoke with the appellant the following day and was advised that Mr Flynn had completed the paperwork. This was not true. Mr Flynn was still of the belief that his company had the caveats in place from the earlier dealings. After the lodgment by the ANZ Bank, the loan monies were passed to Territory Sheet Metal. There were no arrangements to make any payment to the Northern Property Group.

[47] At this time Mr Flynn was heavily involved in his business in Katherine, which had been affected by the floods in the town. He did not realise that he had not received payment in the nominated time frame. On his return to Darwin, Mr Flynn made contact with the ANZ Bank manager, Mr Baylis, and learned of the deception when Mr Baylis told him he was unaware of the dealings, nor had he signed any acknowledgment making the Northern Property Group a priority payee on the loan to Territory Sheet Metal.

[48] The Crown did not proceed with counts 2 and 9.

MANIFESTLY EXCESSIVE

[49] The primary contention of the appellant was that the sentence imposed upon him was manifestly excessive. Caught up in that submission were the

submissions that the sentence infringed the totality principle, error occurred in that insufficient weight was given to the plea of guilty, insufficient weight was given to the appellant's remorse and insufficient weight was given to his prospects for rehabilitation. Although separate argument was presented in relation to each of these matters, the impact of each was to direct attention to a basis upon which the appellant asserted the learned sentencing judge may have erred, causing him to impose a sentence that was manifestly excessive. Given the way in which the arguments were put, it is appropriate to deal with each of these issues and to then consider whether the sentence was manifestly excessive.

[50] In relation to the plea of guilty, his Honour observed that: "This case cannot be regarded as an early plea". The trial of the matter was due to commence on 10 December 2001. When it was mentioned before the sentencing judge in June 2001 the appellant, who then appeared for himself, indicated that he would plead not guilty to counts 1, 2, 3, 6 and 8 and would plead guilty to counts 4, 5, 7, 9 and 10. In relation to the counts to which he indicated a plea of guilty, he informed the court that the facts would be disputed. The matter was mentioned again on 8 November 2001 at which time the appellant was represented by senior counsel. On that occasion the court was informed that the matter "may" be resolved by way of plea, but that the parties intended to undertake further negotiations. On 10 December 2001 the appellant pleaded guilty to all counts save for counts 2 and 9 which were not pursued.

[51] In those circumstances this could not be said to be an early plea. The agreement to plead guilty to all counts came after the committal hearing and within a month of the date set for trial. The view expressed by the learned sentencing judge was clearly open on the evidence.

[52] The appellant complained that the reasons for sentence do not disclose the extent to which, and the manner in which, the plea of guilty was given any weight as a mitigating factor. Reference was made to *Kelly v The Queen* (2000) 10 NTLR 39. Whilst his Honour did not identify the manner in which he dealt with the plea, and it would have been helpful had he done so, it is clear that he took it into account as a mitigatory factor. He referred to the plea along with other matters of mitigation such as a finding that the appellant demonstrated some remorse, that he had publicly apologised, that there were "some prospects of rehabilitation" and that he had voluntarily spent time in custody.

[53] Following the decision of the Court of Criminal Appeal in *Kelly v The Queen* (supra), it is acknowledged in the Northern Territory that it is desirable that a sentencing court should indicate the extent to which, and the manner in which, a plea of guilty has been given weight as a mitigating factor. However, as the court observed in that case, it is not possible to lay down any tariff and the weight to be given to a plea will vary according to the circumstances. It was not suggested that a failure to identify the manner

in which a plea had been taken into account would amount to an error in law. In the present matter it is clear that his Honour took the plea into account. The real issue is whether, bearing that in mind, the sentence imposed was manifestly excessive.

[54] In the course of his sentencing remarks the learned sentencing judge addressed the issues of remorse and the appellant's prospects for rehabilitation. He observed that the appellant had "demonstrated some remorse" and his Honour made specific reference to an apology made by the appellant in the course of the plea in mitigation. That apology was directed to a wide range of people affected by the actions of the appellant and acknowledged that at least one of those people, Mr Flynn, had rejected the apology. His Honour referred to the fact that the appellant voluntarily placed himself in custody and then, in light of all of those matters, concluded "there were some prospects of rehabilitation".

[55] The complaint that his Honour failed to consider those matters cannot be sustained. The alternative submission by the appellant was that his Honour failed to accord the matters proper weight. Put another way, the appellant submitted that the sentence was manifestly excessive and his Honour may have been led to impose such a sentence because he failed to accord adequate weight to the plea, the remorse of the appellant and his prospects for rehabilitation.

[56] The major thrust of the submissions of the appellant was that the sentence imposed by his Honour was in all the circumstances manifestly excessive. The principles applicable to such a ground of appeal are well known. In the absence of identified error, an appellant seeking to establish that a sentence was manifestly excessive must show that the sentence was not just arguably excessive but that it was so "very obviously" excessive that it was "unreasonable or plainly unjust": *Raggett, Douglas & Miller* (1990) 50 A Crim R 41 at 47; *Salmon v Chute & Anor* (1994) 94 NTR 1. The presumption is that there is no error in the sentence. It is not enough that this Court would have imposed a less or different sentence. There must be some reason for regarding the sentencing discretion as having been improperly exercised: *Cranssen v The King* (1936) 55 CLR 509 at 519-520. An appellate court will interfere only if it be shown that the sentencing judge was in error in acting on a wrong principle or in misunderstanding or in wrongly assessing some salient feature of the evidence. The error may appear in what the sentencing judge said in the proceedings or the sentence itself may be so excessive as to manifest error.

[57] The appellant submitted that a comparison of his sentence with the sentence imposed in *Bird* (1988) 91 FLR 116 leads to a conclusion that the present sentence was outside the range of sound discretionary judgment. It is not often instructive to compare one sentence with another in the way suggested by the appellant. Rather it is appropriate to seek a range of similar offences to determine whether a tariff emerges.

[58] In any event, a comparison between the two matters does not reveal an unacceptable inconsistency. In both cases the offender undertook a sustained course of serious dishonesty involving substantial sums of money. In the case of *Bird* the gross amount stolen was over $2m. However the net loss was a little under $620,000. In the present case the gross amount taken is not able to be determined on the available information although it would be less than the amount stolen in *Bird's* case. The net loss was in excess of $570,000. In the case of Mr Bird the money stolen was largely lost to his gambling addiction. In the present case there is no adequate explanation for the conduct of Mr Godwin, other than the suggestion that he wished to make money and he did not baulk at doing so by resort to deceit and dishonesty. There is no basis for concluding that the appellant's conduct arose out of need. In *Bird* the sentence was imposed on the basis that he exhibited "extreme remorse", he co-operated fully with the authorities, he was of prior good character and there was no need for personal deterrence. The sentence imposed in that case was imprisonment for a period of 10 years. That sentence was imposed in the context of a Crown appeal where the court observed that "the sentence we now impose is more lenient than it would otherwise be" because of that circumstance.

[59] Viewed in that light it cannot be said that the two sentences are so disparate as to violate "the principle of equal justice" as is submitted by the appellant.

[60] In support of the submission that the sentence was manifestly excessive, the appellant referred the Court to a wide range of sentences imposed over many

years. Some of those sentences had been referred to in the proceedings below. In our opinion, a review of those cases shows that the sentence in the present matter should be seen as being at the top of the range for similar offending. However we are not convinced that the sentence was outside that range, or that it was manifestly excessive. In relation to the non-parole period fixed by the learned sentencing judge, it is to be noted that s 54 of the Sentencing Act requires the imposition of a non-parole period of not less than 50 per cent of the period of imprisonment that the offender is to serve under the sentence. The minimum period was allowed in this case.

INADEQUATE REASONS

[61] The appellant submitted that the reasons provided by his Honour were inadequate in that he failed to "remark on, analyse or quantify a sentence for any individual count". In particular it was submitted that there was no analysis of the principles in *Bird* (supra) or reference to comparative sentences. It was argued that the reasons did not provide a basis for understanding why the appellant received a higher sentence than was received by Mr Bird.

[62] A review of the sentencing remarks of his Honour reveals that his Honour made reference to *Bird*. His Honour described that as "the leading case in the Northern Territory" and he quoted extensively from it. He set out the principles that the court in *Bird* referred to as being "reasonably clear" and which were restated in that case. There is no dispute that these are the

principles which were to be applied in the case of the appellant. His Honour also referred to and quoted from the English case of *Barrick* (1985) 81 CAR 78. He referred to other cases in Australia including *Pantano* (1990) 49 A Crim R 328, *Carreras* (1992) 60 A Crim R 402 and *Birch* (1993) 69 A Crim R 181. The appellant acknowledged that reference was made to the relevant authorities. The complaint was that the principles identified in those cases were not expressly related to the facts in the present case.

[63] The submission of the appellant cannot be sustained. Reference to the sentencing remarks reveals that, not only did his Honour set out the principles applicable to the sentencing exercise that he was to undertake, but he then went on to list those matters in the present case that were relevant to those principles. The fact that he did not compare and contrast the circumstances of the offending of the appellant with those of the prisoner in *Bird* or any other case is not to the point. The learned sentencing judge identified the principles and proceeded to apply them.

[64] Whilst his Honour has not provided a detailed description of the reasoning process he undertook, the path he followed is clear. His Honour identified the relevant principles and then identified the factual matters applicable to the application of those principles in this particular matter. The sentence imposed reflects the product of the weighing process his Honour undertook in the application of those principles to the circumstances of the offending and of the offender as his Honour identified them. The serious nature of the offending, the substantial sums of money involved, the substantial losses to

innocent and trusting people were referred to. On the other hand, matters relevant to mitigation such as the plea, expressions of remorse and the appellant's prospects for rehabilitation were also identified. The reasons for decision provided by his Honour in our view are sufficient for the parties and this court to understand the basis of the sentence.

[65] The appellant complained that his Honour did not in his reasons address the issues of the amount of money obtained by the appellant, the use to which the money obtained was put and the actual loss involved. The circumstances in which the offending occurred were such that no clear picture of the loss could be reached. The submissions made to the learned sentencing judge and the submissions made to this Court did not identify a precise amount that was lost. There was a finding by his Honour that Northern Property Group Pty Ltd lost $570,000 and that finding was not challenged on appeal. Others suffered loss however, on the information now available it is not possible to determine with accuracy just what that loss may have been. The conclusion of his Honour that the appellant "caused not only substantial financial loss but the costly disruption, inconvenience, anguish and heartbreak that has followed" is, in our view, a fair summation of the evidence before him. Along with the other available information this provided an acceptable basis upon which to proceed.

[66] Similarly, it is not possible to determine with any precision the amount of money obtained by the appellant. Once again the submissions made to his Honour and the submissions made to this Court failed to resolve that

issue. It is known, as his Honour observed, that the appellant used money obtained from the mortgage over 22 Wells Street to pay out at least some of his own debts. He also obtained the sum of $60,575 from the LTD account to purchase a Toyota motor vehicle which he then gave to Ms Lewfatt. Although he did not retain the vehicle himself, he gifted it to another. From the sum of $460,000 obtained by the appellant from the Territory Sheet Metal account when he dishonestly altered a cheque, it was acknowledged that he retained $57,564.45 for "personal spending". All of these matters were referred to by his Honour in the course of his reasons for sentencing. The submission that the sentencing remarks were inadequate because they did not refer to these matters is not made out.

[67] In the course of submissions it was suggested on behalf of the appellant that the learned sentencing judge should have identified the relevant sentence in relation to each particular charge and then addressed the totality principle in relation to the sentences identified. Whilst it was open to his Honour to proceed in the way suggested by the appellant, it was not necessary for him to do so. Pursuant to s 52 of the Sentencing Act the court was entitled to impose one term of imprisonment in respect of all of the offences and that is how his Honour chose to proceed. It may be that in circumstances where an indictment contains a large number of counts which "differ markedly in degrees of seriousness and criminality" it is more appropriate to proceed with individual sentences or sentences related to groupings of offences of a similar kind rather than impose an aggregate sentence under s 52 of the Act.

In *Bishop v The Queen* (unreported Northern Territory Court of Criminal Appeal 29 August 1997) the Court of Criminal Appeal said in relation to difficulties that may arise under s 52 of the Sentencing Act:

> "Such difficulties are likely to increase where, as here, an indictment contains a large number of counts which differ markedly in degrees of seriousness and criminality. In such cases a sentencing judge may wish to consider carefully the wisdom of using the procedure provided by s 52. In the event that s 52 is relied upon to impose an aggregate sentence, it would be of great assistance if an indication was given of the proportions of the aggregate sentence which are attributed to offences of disparate seriousness and criminality, together with an express indication that the totality of the sentence has been given due consideration."

[68] We endorse those remarks. In the present case the appellant pleaded guilty to 8 offences, all of which arose out of the same course of conduct which occurred over the period from August 1997 to January 1998. The offences did not differ markedly. They were all very serious examples of their kind and displayed a high degree of criminality. They were offences which arose out of the same ongoing activity involving deception and dishonest conduct designed to deceive. This is to be contrasted with the circumstances found in *Bishop v The Queen* (supra) where the court was confronted with an offender who had pleaded guilty to one count of aggravated robbery and 12 counts of aggravated unlawful entry and 10 counts of stealing. The offences of unlawful entry and stealing were substantially less serious in terms of criminality than the aggravated robbery and it was in that context that the remarks were made.

CONCLUSIONS

[69] We dismiss the applications for leave to appeal in relation to the grounds identified in paragraph 3(a), (b), (d), and (e) above. We allow the application for leave to appeal in respect of the ground identified in paragraph 3(c) above but dismiss the appeal.

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