

IN THE GRAND COURT OF THE CAYMAN ISLANDS
CRIMINAL SIDE

INDICTMENT NO: 0069/2016

THE QUEEN

V

ROBERT NEIL ASPINALL



Appearances:

Ms. Toyin Salako for the Crown

Mr. James Austin-Smith for the Defendant

Before:

The Hon. Mr. Justice Timothy Owen Q.C.

Submissions heard:

29th July 2016

SENTENCE RULING

1. Robert Aspinall, on your appearance before this Court last Friday you entered pleas of Guilty to 6 of 14 counts on Indictment 69/16. That Indictment charged two counts of theft contrary to s.241 of the Penal Code (2010 Revision), two of forgery contrary to s.285 of the Penal Code (2010 Revision), nine counts of transferring/converting/using criminal property (money laundering) contrary to the Proceeds of Crime Law (2014 Revision) and a single count of false accounting contrary to s.255 of the Penal Code (2010 Revision).

2. The counts to which you pleaded Guilty were Count 1 (theft of USD 50,414.20), Count 2 (forgery), Count 3 (theft of USD 445,000), Count 4 (forgery), Count 7 (converting criminal property in the sum of USD 200,000) and Count 10 (converting criminal property in the sum of USD 50,536.58).
3. The Crown had anticipated these pleas and indicated in Ms Salako's very helpful Sentencing Submissions dated 28th July 2016 that they were acceptable to the Crown on a full fact basis. In the circumstances, the Counts to which you have pleaded Not Guilty are directed to lie on the file.
4. Thanks to the co-operation between your legal team and the Crown which has hallmarked this case from the outset, complete agreement has been reached as to the implications of Ms Salako's reference to the "full fact basis" for plea. Accordingly, I am able to incorporate into this Ruling an agreed summary of the conduct, which has brought you before the Grand Court and the subsequent police investigation into it (which I take directly from Ms Salako's written Submissions as amended following input from your legal team).



BACKGROUND

5. In 2009 Robert Aspinall (“RA”) was employed by Deloitte as a Senior Manager. On the 1 October 2012 he was promoted to Director, Financial Advisory. As Director, he had the authority to authorise payments on behalf of Deloitte.
6. In 2012 RA and Managing Partner Stuart Sybersma of Deloitte Cayman were joint Voluntary Liquidators for two connected funds registered in the Cayman Islands. These funds were known as Level Global Overseas Master Fund Ltd and level Radar Master Fund Ltd (“Level”). The funds were to be dissolved through voluntary liquidation as a result of allegations against the investment manager for insider trading. The U.S. Securities and Exchange Commission had initially won a settlement of approximately USD21.5 million against the former investment manager. As Voluntary Liquidators of Level, RA held a fiduciary role and was able to make decisions in the administration of the Level’s assets including authorisation of payments to third parties including creditors and investors.

INCORPORATION OF FREESTYLE FINANCIAL SERVICES LTD

AND THE OPENING OF THE BANK ACCOUNT

7. On the 18 October 2012 RA sent an email to HSBC in which he stated that he was considering opening a company, so as to ensure that he had a level of protection between himself and his assets. He enquired of HSBC whether they would be willing to open an account in the Cayman Islands for a company registered in the BVI with him as the sole director and shareholder. RA assured HSBC that he was able to provide evidence that he was the beneficial owner, shareholder and director of the registered BVI Company.



8. On the 22 October 2012 RA sent an email to HSBC stating that he wanted to call his company Freestyle Fund Services Limited but that BVI regulations prevented him from using the word "Fund" within the company name. He stated that he may have to change the registered name of his company slightly but he wanted the corporate account name with HSBC, Cayman Islands to remain as Freestyle Fund Services Limited.
9. On the 25 October 2012 a company by the names of Freestyle Financial Services Ltd was registered in the BVI. This fictitious company was registered in the BVI 24 days after he was promoted to Director. It is this fictitious company that RA later went on to use to steal client funds and conceal his criminality from Deloitte.



ASLAN CAPITAL MASTER FUND – COUNTS 1 AND 2

10. On the 6th November 2012 HSBC confirmed by letter to RA that the opening of an account in the name Freestyle Fund Services Ltd had been approved. On the very same day by email the Senior Administrator at Deloitte, Elaine Jacqueline Willis ("EJW"), received instructions from RA to arrange a wire transfer of USD50,314.20 from a fund known as Aslan Capital Master Fund ("Aslan") to the account of Freestyle Funds Services Ltd. As with the Level accounts, RA was one of the account signatories for the liquidated funds. The documents or information provided in support of this instruction can be described as follows:

- i. Purported updated bank details for Freestyle Fund Services Company LLC (in fact the bank details provided were for the fictitious company created by RA);

- ii. An Advisory Agreement between Freestyle Fund Services Ltd and Aslan;
 - iii. The agreement provided for commission in the sum of USD50,314.20 to Freestyle Fund Services Ltd on the sale of an investment called Ivaco;
 - iv. Banks statements showing the proceeds of sale; and
 - v. Payment request sheet showing EJW as the preparer, Robert Rintoul (former Manager) as the reviewer and RA as the approver.
11. This payment was characterised in the liquidation records by RA as payment for “investment advisory fee.”
12. In respect of the payment of USD50,314.20 to Freestyle Financial Services Ltd, RA deceived his colleagues into believing that this was a legitimate payment to Freestyle Funds Services Company LLC FS by sending an email dated 6 November 2012. Freestyle Fund Services Company LLC was a legitimate company that had provided legitimate services to the Aslan Fund through Deloitte. This email to his colleagues instructing a payment to Freestyle Funds Services Limited implied that he had spoken to the genuine manager, Adrian MacKay of Freestyle Fund Services Company LLC, who had provided him with updated bank details. The new bank account details were for the account in the name of Freestyle Financial Services Ltd.



13. The Advisory Agreement provided to EJW as support for the payment of USD50,314.20 purportedly bears the signature of Deloitte Managing Partner Stuart Sybersma. Mr Sybersma has reviewed the agreement and has stated that he did not sign the agreement. Mr Sybersma's signature was scanned onto the document without his permission or authorisation.
14. Mr Sybersma also asserts that the Advisory Agreement is based on a genuine Advisory Agreement between Aslan and Freestyle Fund Service Company LLC. The only difference between the two Advisory Agreements is that RA's name has been inserted in the falsified document in place of Freestyle Fund Services Company LLC as the name of the "Advisor" in the Agreement.
15. It was no coincidence that RA incorporated a company in the name similar to Freestyle Fund Services Company LLC. Using a company name similar to a genuine company assisted him in deceiving his colleagues and concealing his criminality.
16. On the 13 November 2012 RA sent an email from his Deloitte email address to HSBC. Within this email he gave the bank instructions to transfer GBP40,000 from the Freestyle Fund Services Ltd account 100-066901-501 to a fixed deposit account. The authorisation signature for this transaction was that of RA.



LEVEL FUND – COUNTS 3 AND 4

17. Five months after stealing USD50,314.20 from the Aslan Fund RA proceeded to provide false instructions for payments from the Level Fund to his fictitious company.
18. During the voluntary liquidation of Level USD453,519.50 was paid to Freestyle Fund Services Ltd from Level's account over a 6 month period. These payments were as follows:

1 March 2013	\$90,000.00
26 March 2013	\$90,000.00
17 April 2013	\$90,000.00
17 May 2013	\$62,500.00
24 May 2013	\$62,500.00
28 June 2013	\$8,519.50
14 August 2013	\$10,000.00
14 August 2013	\$10,000.00
21 August 2013	\$30,000.00



19. On the 18 March 2013, in other words after Freestyle Funds Services Ltd had received into its account USD140,314.20 from two liquidation funds (Level and Aslan), RA registered the domain name of freestylefundservices.com with an Internet domain register. On the date the domain name was registered a test email was sent from RA's Deloitte email address to investment@freestylefundservices.com.

The purpose of registering the domain name, an internet email address and the sending of an email from Deloitte was to legitimise emails that were later to be sent from RA to Freestyle Funds Services Ltd.

20. In March 2013 RA wrote to investors in his role as Joint Liquidator who held a small amount of shares in the Level liquidation. He wrote to enquire whether they were interested in participating in a secondary market transaction to sell their shares (and it is accepted that there was a genuine secondary market for such trading). Two investors indicated that they were interested in selling their shares and in fact went on to sale their shares. The purchaser of these shares was Freestyle Financial Services Ltd thus making this fictitious company a Level Fund liquidation share holder. The share transfer document lists Freestyle Financial Services Ltd as the buyer with the director listed as Andrew Chan. Andrew Chan is a fictitious name used by RA to conceal the fact that he was the beneficial owner / director of Freestyle Financial Services Ltd. Freestyle Financial Services Ltd paid USD495.64 for the shares. Against the purchase of these shares Freestyle Financial Services Ltd received on 28 June 2013 USD8,519.50 from the Level liquidation.
21. With the exception of the payment received by Freestyle Financial Services Ltd as a shareholder the remaining payments totalling USD445,000 were made by Deloitte following instructions given by RA to EJW to execute the wire transfer to the Freestyle Fund Services Ltd account.
22. The liquidations of Level was finalised in August 2013. As part of the settlement the Level funds paid USD11.4 million. On the 30 August, a month after he stole the final sums from Level, RA resigned his position as Director with Deloitte.



DISCOVERY OF THE MISAPPROPRIATION

23. In January 2016 the United States courts made a decision to reverse the settlement of USD21.5 million and ordered the U.S. Securities and Exchange Commission to return the USD21.4 million to the creditors and investors of the various Level funds. On learning of this decision Deloitte contacted the investors to offer their assistance in securing, collecting and distributing the USD21.5M that was to be returned.
24. In March 2016 Grant Riley, Senior Manager at Deloitte, conducted a review of the file. It was in the course of this review that he identified a number of discrepancies. This ultimately led to the discovery of RA's criminality. It is agreed that had the US courts not reversed the settlement agreement RA's criminality would almost certainly have gone undetected.



FIRST ADMISSIONS

25. On the 6th April 2016 Deloitte contacted RA and requested that he meet with them to discuss the Level Fund and payments made to Freestyle Fund Services Ltd. RA duly attended where he was informed that irregularities had been discovered in the Level liquidation. It was suggested to RA that he was the beneficial owner of a bank account held in the name of Freestyle Fund Services Ltd. During this meeting RA made full admissions, admitting that he had taken funds and said that he was "embarrassed and ashamed." RA was asked whether there was any other matter that he wished to bring to the attention of Deloitte. He said "No."
26. At this meeting RA promised to repay the money that he had misappropriated adding that he would provide a repayment proposal by 12 April 2016.

27. Deloitte have confirmed that there was no legitimate creditor in the name of Freestyle Financial Services Ltd or Freestyle Fund Services Ltd in the Level Fund Liquidation and therefore there was no legitimate reason why sums totalling USD453,519.50 were paid to Freestyle Financial Services Ltd and or Freestyle Fund Services Ltd.
28. On the 9 April 2016 Deloitte contacted RA's attorney to seek confirmation as to whether there had been any other instances of misappropriation on the part of RA. On that same date RA's attorney contacted Deloitte and informed them that there had been a further misappropriation arising out of the official liquidation of another "master feeder" investment fund structure including two Cayman Islands' registered investment funds namely the Aslan Fund LP.



EXPENDITURE

29. From the account of Freestyle Fund Services Ltd the following payments were made:

28 May 2013	USD10,000.00: To an account in his daughter's name
9 July 2013	USD200,600.00: For the purchase of land
26 July 2013	USD30,731.72: To the Cayman Islands Government for Stamp duty
18 October 2013	USD95,481.58: To invest in Intertrust
21 October 2013	USD50,536.58 purchase of a BMW vehicle

30. The current balance on this account is USD140,000 (which represents a mixture of stolen funds and legitimate deposits of USD 120,000).

POLICE INVESTIGATION

31. On the 11 April 2016 Deloitte made a formal complaint to the FCU. RA was formally arrested on the 6 May 2016 in the presence of his attorney. RA's home study was searched and his computer and hard drives was seized. RA was interviewed on the 12 May 2016 in the presence of his attorney. At the commencement of the interview RA read onto the record a prepared statement in which he admitted stealing USD453,520 from the Level Funds and USD50,314 from the Aslan Capital Fund. Within the prepared statement RA gave the following account:

- i. Within an 8-month period he stole money from two companies that were in liquidation;
- ii. He was involved in running the liquidation of the Aslan Funds;
- iii. Deloitte engaged a consultancy company by the name of Freestyle Fund Service LLC ("FFS") to review the Aslan Fund illiquid assets and realise any value that might be remaining;
- iv. FFS made some sizeable cash recoveries;
- v. For the Aslan Fund RA signature limit was USD100,000 for a single transaction;
- vi. Towards the end of the Aslan Funds' liquidation an unexpected cash recovery of USD1,000,000 was received;
- vii. FFS was entitled to 5% of the USD1,000,000 irrespective of whether FFS were involved in the realisation of the USD1,000,000;



- viii. RA was instructed that if FFS submitted an invoice for the USD1,000,000 then the invoice would be paid but he was not to notify FFS formally of the recovery of USD1,000,000. The onus was on FFS to make a request for payment;
- ix. FFS did not make a request for payment;
- x. RA was considering setting up an offshore company to protect his personal assets;
- xi. Contacted Hunte & Co in the BVI to facilitate the setting up of a BVI registered company;
- xii. RA realised that if he set up an entity with a virtually identical name to FFS then it would be straightforward to make the 5% payment to that entity and claim that FFS had belatedly submitted their invoice request for 5% of the US1,000,000 recovered;
- xiii. Hence the creation of Freestyle Financial Services Ltd;
- xiv. RA was the sole director and shareholder;
- xv. In November 2012 RA opened an account for Freestyle Financial Services Ltd in the name Freestyle Fund Services Ltd;
- xvi. RA managed the liquidation for the Level Funds;
- xvii. The Level fund received USD845,000 more cash in its reserve than expected or accounted for;



- xviii. RA created a story that Freestyle Financial Services Ltd was an investor which had not been issued with Class R shares and that they should have been entitled to an interest in the Reserve;
 - xix. Created a payment plan that would “return” the funds to Freestyle Financial Services Ltd structuring it in such a way that each payment would be under USD100,000;
 - xx. Purchased shares through Freestyle Financial Services Ltd; and
 - xxi. As a Level shareholder Freestyle Financial Services Ltd upon completion of the liquidation a final distribution of the remaining Reserve was made to Freestyle Financial Services as shareholders.
32. RA also provided FCU with a document purporting to show how the misappropriated funds had been spent. RA thereafter answered all questions asked of him.”

AGGRAVATING FEATURES OF YOUR CONDUCT

33. I am satisfied that the motive for your offending is easy to describe – sheer avarice. Despite working in a senior position as a Director in the Financial Advisory department of Deloitte, with the legitimate financial rewards that went with that position, you dishonestly embarked on a scheme to acquire even greater wealth. I find the aggravating features of your conduct to be as follows:





- i. As Joint Liquidator to the two Cayman registered Funds from which you stole, you owed a fiduciary duty to those Funds. It follows that the breach of trust and responsibility which your actions represent is very significant.

- ii. Your actions were sophisticated and required considerable thought and advance planning. They were plainly not dreamed up on the spur of the moment. Within a month of being appointed a Director, with consequent authority to authorise payments on behalf of Deloitte, you sought to conceal your criminal conduct from your employer and the wider world by setting up a fictitious company and incorporating it in a different offshore jurisdiction. You deliberately chose a company name that was similar to a genuine company with a legitimate connection to Aslan so that suspicion might be averted. You falsely represented that you had received banking instructions from a Mr Adrian Mackay, you created a false Advisory Agreement using the forged signature of Mr Sybersma, and you issued false invoices so as to justify a sequence of payments from the two Funds. But for the reversal of the settlement resulting from the US Court's decision in January 2016 and the consequent order to the US Securities and Exchange Commission to return the USD 21.4M to the creditors and investors of the Funds, it is all but certain that you would have got away with your criminal scheme.

- iii. You stole from two Funds over a period of some 10 months so your dishonesty was sustained rather than a brief, one off "moment of madness".

MITIGATING FEATURES OF YOUR CONDUCT

34. Having identified the aggravating features, I make clear that I find the mitigating factors in this case to be exceptional and compelling. They can be summarised as follows:

- i. You gave full co-operation to the police investigation prior to arrest in the form of the voluntary provision of books, records and computer disks. You gave the police all relevant passwords to facilitate access to your computer. Full typed admissions were provided in statement form before interview and you answered all questions posed after reading your prepared statement into the record. It is accepted that you have continued to offer co-operation since your arrest.
- ii. In relation to counts 1 and 2, you confessed your criminality *before* Deloitte and the police were aware that any offences had been committed. And acceptable pleas of guilty were offered at the earliest opportunity.
- iii. Until you voluntarily surrendered to custody last week, you used your time of bail to liquidate assets to ensure that full restitution can be made to Deloitte. You instructed your Counsel to liaise with the Crown to vary the restraint order to allow assets to be sold and the proceeds placed into restrained accounts for eventual restitution. These accounts now hold sufficient sums to repay in their entirety the total amount stolen together with interest and a contribution to Deloitte's legal costs and expenses.



I have read the draft Restitution and Settlement Agreement whereby you agree to the payment to Deloitte of the sum of USD 623,144.99. Mr Austin-Smith invited the Court to order compensation in that sum (i.e. *greater* than the sum requested by the Crown) and but for the fact that Ms Salako was constrained by her instructions not to accede to that request, I would have so ordered.

- iv. You have expressed genuine remorse for your dishonesty and this is reflected in the prosecution statements, your interviews with the police, the numerous character references I have read and, most clearly of all, in your actions since your criminal behavior was first detected by Deloitte.

- v. You are now aged 38 and of good character. I have read the letters of reference from Derek Mendez, Simon Watson, Jenny Suto, The Reverend David Wippell, Mr T E Hulme and Mark Pulvirenti. I have also read the powerful letter from your wife, Ciara, who speaks to your qualities as father to your two young daughters. What comes across from these letters is the deep sense of shock and bewilderment of close friends upon learning what you have done. Your conduct is properly to be described as wholly out of character as you were regarded as a valued member of the Cayman community. You stayed on the island after the devastation of Hurricane Ivan and helped to rebuild when the majority of your firm were evacuated. You are a talented sportsman who captained the Cayman Islands at rugby and have been active in fundraising for the local youth rugby charity.



- vi. You have two young daughters aged 2 and 4 and the impact on them will be great as you will be absent from their day to day lives during a key period of their development. Of course this is entirely your fault as is the fact that you have destroyed years of education, training and hard work and will never be able to return to work in the financial services industry again. But as a person of good character, the impact of the inevitable custodial sentence on your family and you are relevant mitigating factors to be borne in mind by the Court and I intend so to do. As I indicated in the course of the hearing on Friday, I suspect that nothing that the Court imposes by way of a custodial sentence will be greater punishment than the shame, sorrow and disgust you will always feel about your actions in betraying the trust that Deloitte placed in you as a senior employee and colleague and that family and friends placed in you as a father, a husband and a friend.
- vii. The Court has been provided with two medical reports from Dr John Addleson and Dr Meera Balraj. They confirm that since your arrest you have been suffering with severe anxiety, insomnia and depression for which you have been receiving treatment.



RELEVANT SENTENCING GUIDELINES AND CASE LAW

35. Before explaining my conclusion on the combined impact of Guidelines and case law, I wish to make some observations about the Indictment and, in particular, the decision to charge 14 separate Counts when, in my view, the two counts of theft would properly have reflected the essence of your proven, admitted criminality.
36. The nature of your criminal conduct is not complicated to state. Although you adopted a careful and sophisticated plan to achieve your goal, the simple reality is that you stole a total of USD 495,414.20 from two connected funds registered in the Cayman Islands over a period of 10 months. You forged documents in executing your plan (counts 2 and 4) and having stolen the money you then set about spending your ill gotten gains in various ways, including paying a deposit on the purchase of a property (count 7) and buying a BMW X3 (count 10). But in my view the additional counts of forgery and money laundering to which you have pleaded guilty are frankly unnecessary as a means of reflecting the proper basis for sentence. In making this observation, I bear in mind what the Supreme Court of England and Wales recently said on the prosecutorial practice of overloading Indictments with unnecessary money laundering charges. In *R v. GH*¹ the Supreme Court considered the issue of whether it was a pre-requisite of the money laundering offences under ss.327-329 of the Proceeds of Crime Act 2002 (“POCA”) that property should be criminal property at the time of the offence. Their Lordships held that it was and in the unanimous Judgment of the Court, Lord Toulson commented on the practice of adding money laundering counts in circumstances where the true criminality of the proven conduct was properly reflected by substantive, predicate offences:

¹ [2015] 1 WLR 2126



“47.A thief is not guilty of acquiring criminal property by his act of stealing it from its lawful owner, but that does not prevent him from being guilty thereafter of an offence under one or other, or both, of [ss.327 and 329 POCA] by possessing, using, concealing, transferring it and so on. The ambit of those sections is wide. However, it would be bad practice for the prosecution to add additional counts of that kind unless there is a proper public purpose in doing so, for example, because there may be doubt whether the prosecution can prove that the defendant was the thief but it can prove that he concealed what he must have known or suspected was stolen property, or because the thief’s conduct involved some added criminality not just as a matter of legal definition but sufficiently distinct from the offence that the public interest would merit it being charged separately. *Brink’s-Mat Ltd v Noye* [1991] 1 Bank LR 68 provides a notorious example of the laundering of the proceeds of the theft of gold bars from a warehouse, but the conduct of thieves in laundering property stolen by them would not have to be on such a grand scale to merit them being prosecuted for it.

48. *The courts should be willing to use their powers to discourage inappropriate use of the provisions of POCA to prosecute conduct which is sufficiently covered by substantive offences, as they have done in relation to handling stolen property. A person who commits the offence of handling stolen property contrary to section 22 of the Theft Act 1968 is also necessarily guilty of an offence under section 329 of POCA, but the Court of Appeal has discouraged any practice of prosecuting such cases under POCA instead of charging the specific statutory offence under the Theft Act (see *R (Wilkinson) v Director of Public Prosecutions* [2006] EWHC 3012 (Admin) and *R v Rose* [2008] EWCA Crim 239, [2008] 1 WLR 2113, para 20).”*



37. I see no necessary public purpose in proceeding with counts of money laundering on the facts of this case in circumstances where your conduct is fairly covered by the allegations of theft. You have admitted that you are a thief. Your actions in spending the proceeds of your theft are not so separate or distinct from your actions as a thief as to amount to added criminality which might justify the pursuit of discrete money laundering counts. All thieves tend to spend the proceeds of their theft if they can before they are apprehended. Alleging that they are also money launderers because they manage to spend some or all of the proceeds of their predicate crime generally adds nothing to the gravity of their conduct.

Equally, the fact that they fail to spend the property they have stolen before they are apprehended does not diminish their guilt. Accordingly, I intend to sentence you by reference to the Guidelines and relevant case law relating to theft in breach of trust rather than applying the UK Sentencing Council's Fraud, Bribery and Money Laundering Offences Definitive Guidelines effective from, 1st October 2014 to the sentencing exercise.

38. The joint bundle of Authorities contains a wealth of helpful material to assist me in deciding the appropriate sentencing range and whether this is a case where it is necessary to pass consecutive sentences in order fairly to reflect the gravity of your criminality. I have carefully reviewed all these materials and the contrasting arguments that have been advanced by Ms Salako and Mr Austin-Smith in light of the Chief Justice's 2002 Statement on Tariffs and Guidelines, the Cayman Islands Sentencing Guidelines, the UK Sentencing Council's Definitive Guideline for Theft Offences effective from February 2016 and all the Cayman and UK cases referred to by Counsel (in particular the rulings in *Clark*², *Fyne*³, *Schultz*⁴, *Levitt*⁵, *Glasgow*⁶ and the recent first instance decisions in *Bouchard*⁷ and *Self*⁸).

39. In relation to the theft charges, the Crown submits that I should apply the UK Sentencing Council Guidelines on Theft offences (which expressly include cases of theft in breach of trust) and that having regard to the level of culpability and harm in this case I should conclude that this is a category 1 offence with a starting point of 3 years and 6 months custody and a range of 2 years 6 months to 6 years custody.

² (1998) 2 Cr App R 137

³ [2007] CILR 176

⁴ (Criminal Appeal No 27 of 2012)

⁵ CICA (Crim) 20/2013

⁶ (Indictment 21/2013)

⁷ (Indictment 5/2014)

⁸ (a 2012 sentencing decision of Henderson J.).



I agree with Ms Salako that this is plainly a Category 1 case involving high culpability as it involves the theft of almost USD 500,000 and a gross breach of trust/responsibility in the context of sophisticated planning.

40. Having been urged by the Crown to apply the 2016 UK Definitive Guidelines on theft, it seems to me that reliance on case law from the UK and the Cayman Islands which pre-dates (in some cases by 31 years) the very recent Guidelines are of limited assistance unless it be suggested that sentencing for theft in the Cayman Islands should be subject to a general uplift above the UK Guidelines because of the difference in the maximum sentence between the two jurisdictions or because breach of trust cases in the Cayman Islands should be punished more harshly than such offences when committed in the City of London. No such submission was made to me by Ms Salako and indeed paragraph 54 of her submissions rightly observes that although the cases of *Barrick* and *Clark* “are still of some assistance, the UK Guidelines have in essence incorporated these judgements into the sentencing exercise.” It is also to be noted that in *Schultz*, a breach of trust case as grave as the facts of the instant case and with fewer mitigating factors, the Court of Appeal of the Cayman Islands quashed a sentence of 5 years imposed by Quin J. on the basis that he had erred in adopting a 5-9 year sentencing range for the theft of some USD 289,660 over a two-year period from a Government approved pension scheme. Factoring in a 25% reduction for a plea of guilty as opposed to a full one third, the Court of Appeal imposed a sentence of 4 years. The ruling in *Schultz* was of course made without the benefit of the 2016 UK Guidelines and it may be that the Court’s approach to the various sentencing bands as set out in paragraph 4 of the Judgment may require adjustment in light of the impact of those Guidelines.



41. In all the circumstances, I agree that this is a case which merits a starting point of 3 years and 6 months with a category range of 2 years 6 month to 6 years in custody. Taking into account the aggravating and mitigating factors to which I have referred in paragraphs 5 and 6 of this Ruling, I consider that the totality of your offending as represented by Counts 1 and 3 merits a sentence of five and a half years. In light of your plea of guilty and the truly exceptional nature of your co-operation with the police investigation and your efforts to ensure complete restitution of the money stolen, the sentence of the court is therefore as follows:

- i. Count 1 – 2 years
- ii. Count 2 – 18 months
- iii. Count 3 – 3 and a half years
- iv. Count 4 – 18 months
- v. Count 7 – 3 years
- vi. Count 10 – 2 years



42. All sentences will be served concurrently thereby amounting to a total sentence of three and half years – with time spent in custody to be deducted.

43. I have of course taken into account the principles applicable to the imposition of consecutive, as opposed to concurrent, sentences as set out in s.6 of the Cayman Islands Sentencing Guidelines but concluded that although the offences of theft did not constitute a single act, they represent a single course of conduct against a single victim. As with the rolled up plea recorded in *Schultz*.

I am of the view that counts 1 and 3 are properly to be considered together and that the total sentence imposed in this case properly reflects the gravity of your offending as a whole.

44. I also order compensation in the sum of USD 495,414.20 and that the restraint order of the 8th July 2016 be varied so as to enable the release of the aforesaid sum – with the restraint order thereafter discharged, so that you may pay the balance of the sum which you have agreed to pay to Deloitte by way of restitution.

POSTSCRIPT

45. Mr Austin-Smith's written submissions on sentence contained a section that addressed the likely conditions of imprisonment that Mr Aspinall will endure at Northward Prison in light of the Report of Her Majesty's Chief Inspector of Prisons published in 2015 and the fact that only recently it was reported that the prison is operating in excess of its certified normal occupancy and was understaffed. The submission was that conditions are not merely appalling but unconstitutional and unlawful, in breach of the Cayman Constitution and the European Convention on Human Rights ("ECHR"). In oral argument, Mr Austin-Smith explained that he was relying on the likely conditions of imprisonment as an additional mitigating factor.

46. I drew Counsel's attention to the Judgment of Lord Justice Thomas (as he then was) in the English Court of Appeal case of *R v Qazi and Hussain* in which guidance was given as to the proper approach of a sentencing court when faced with evidence that an individual might face detention in breach of Article 3 of the ECHR (see in particular paragraphs 31-35).



In light of that guidance and the fact that it would plainly be wholly wrong for the Court to give Mr Aspinall a special individual discount on sentence because he might find the likely conditions at Northward to be especially unpleasant, I take the view that although the Chief Inspector's Report plainly raised issues of grave concern concerning the compatibility of incarceration at Northward with minimum standards of decency and humanity, the remedy for such illegality (if it exists) must lie elsewhere in the form of a judicial review application.

In response to any such application, the Executive branch of Government would have an opportunity to respond to allegations of illegality with a view to justifying the continuing detention at Northward not just of Mr Aspinall but indeed all those detained therein.

47. I am grateful to both Counsel for the clarity of their submissions and the assistance they have provided to the Court.

Dated this the 1st day of August 2016



**Honourable Mr. Justice Timothy Owen Q.C. (Actg.)
Acting Judge of the Grand Court**