SUPREME COURT OF QUEENSLAND

CITATION:	*R v Cox* [2010] QCA 262
PARTIES:	**R** **v** **COX, Stephen Brian** (appellant/applicant)
FILE NO/S:	CA No 106 of 2009 DC No 1080 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	1 October 2010
DELIVERED AT:	Brisbane
HEARING DATE:	23 August 2010
JUDGES:	McMurdo P, Chesterman JA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal against conviction dismissed.** **2. Application for leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – OTHER IRREGULARITIES – where appellant was charged with misappropriation and fraud – where prosecution did not disclose a substantial number of documents to the appellant until the ninth day of the trial, contrary to s 590AB(2)(b) *Criminal Code* – where appellant represented himself at trial and was granted a three day adjournment to consider the documents – where appellant elected for the trial to continue – where the documents did not tend to support the appellant's defence that two other persons were responsible for the misappropriation – whether the late supply of the documents amounted to a miscarriage of justice CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where appellant was

charged with 11 counts of misappropriation with a circumstance of aggravation and one count of fraud with a circumstance of aggravation – where appellant convicted of the counts of misappropriation but acquitted of the fraud – where appellant's head sentence was six years' imprisonment, taking into account 10 months spent in custody for other offences – where appellant breached his bail, showed no remorse and did not plead guilty – whether a notional term of seven years was manifestly excessive

Criminal Code 1899 (Qld), s 590AB(2)(b)

R v HAU [2009] QCA 165, considered
R v Lim [2004] QCA 172, followed
R v Spizzirri [2001] 2 Qd R 686; [2000] QCA 469, considered
R v Tindale [2008] QCA 24, followed
R v Wheeler & Sorrensen [2002] QCA 223, followed

COUNSEL: C Reid for the appellant
M J Copley SC, with B J Power, for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **McMURDO P**: I agree with Chesterman JA's reasons for dismissing this appeal against conviction and refusing the application for leave to appeal against sentence.

[2] The sole ground of appeal against conviction concerns the prosecution's non-disclosure, until the ninth day of Mr Cox's trial, of the documents exhibited to the affidavit of Lauren Skarott, sworn and filed in this Court on 12 August 2010. I note that Mr Cox was self-represented from the commencement of his trial, apparently by choice. It is most concerning that the prosecution did not meet its disclosure obligations to the self-represented Mr Cox under s 590AB *Criminal Code* 1899 (Qld) until the ninth day of his trial, well into the prosecution case. The trial prosecutor stated that, both when the documents were originally taken from Mr Cox in the late 1990s by three investigative agencies (the Queensland Police Service, the Australian Federal Police and the Australian Tax Office) and when Queensland police first prepared a brief in respect of Mr Cox's charges in 2003, s 590AB had not been enacted. I note there is no suggestion that either the Queensland Police Service or any prosecuting authorities knowingly withheld the undiscovered documents. That did not, of course, excuse the prosecution in this case from its obligations under s 590AB, but it provided the context of the omission and helped explain it. It was not a deliberate abuse of process.

[3] In my opinion, there are two important distinctions between this case on the one hand, and *R v HAU*[1] and *R v Spizzirri*[2] on the other, that are fatal to Mr Cox's appeal against conviction. The first is that, unlike in *HAU* and *Spizzirri*, in this case the documents which the prosecution failed to provide to Mr Cox in a timely fashion were delivered during the prosecution case. The trial judge offered to adjourn

1 [2009] QCA 165.
2 [2001] 2 Qd R 686; [2000] QCA 469.

Mr Cox's trial and discharge the jury to enable Mr Cox to deal with the lately discovered documents. Mr Cox rejected that course, stating that he believed he had good prospects of an acquittal on all counts. The trial judge adjourned the trial for some days to enable Mr Cox to consider the material. The judge then again offered to adjourn the trial. Mr Cox again rejected that course and the trial continued. Mr Cox had the opportunity to have prosecution witnesses recalled for cross-examination about the documents. Only when convicted of 11 counts of misappropriation of property, did he regret his earlier forensic decision not to have the jury discharged and he now seeks to gainsay it.

[4] Mr Cox made a forensic decision not to have his trial adjourned and the jury discharged but to continue with the trial despite the late disclosure of the documents he had been seeking. In these circumstances, I would not be prepared to allow his appeal against conviction on this ground unless he demonstrated that a miscarriage of justice has resulted from the prosecution's late disclosure of the documents.

[5] The second crucial distinction is that in this case, unlike in *HAU* and *Spizzirri*, as Chesterman JA explains, the undiscovered documents did not materially assist Mr Cox's case. Further, the prosecution evidence on the counts on which Mr Cox was convicted was persuasive. Mr Cox did not give or call evidence so that the prosecution evidence was unchallenged. There is no complaint about the trial judge's careful and balanced directions to the jury. His Honour fairly summarised for the jury Mr Cox's defence. The jury acquitted on count 12.

[6] In summary, Mr Cox made a forensic decision not to follow the judge's suggested course of adjourning the trial and discharging the jury so that Mr Cox could consider the documents in his own time. He chose, instead, to continue with the trial and to deal with the lately disclosed documents after an adjournment of some days. He has not demonstrated that this course he chose has resulted in a miscarriage of justice. In other words, I am not persuaded that the jury's guilty verdicts on any counts amount to a miscarriage of justice because of the late disclosure of the documents.

[7] For these reasons as well as the reasons given by Chesterman JA, the appeal against conviction must be dismissed.

[8] Mr Cox was found guilty after a lengthy trial of 11 counts of misappropriation of property with a circumstance of aggravation. The judge sentenced him on the basis that the maximum penalty for the offences at the time they were committed was on counts 2 to 5 and counts 7 to 8 five years imprisonment, and on counts 1, 6, 9 and 11, 10 years imprisonment. The 11 offences occurred over a 18 month period. They involved over $300,000, most of which was not recovered. Mr Cox had no prior convictions but he was a mature man when he offended and was 51 at sentence. He did not have the mitigating benefit of a plea of guilty; he breached his bail; and he showed no remorse or insight into his conduct. His offending warranted a condign deterrent sentence. The 10 months of pre-sentence custody which the primary judge was unable to declare as time served under the sentence meant that Mr Cox's effective global sentence was six years and 10 months imprisonment with eligibility for parole at the half way point. The comparable cases analysed by Chesterman JA demonstrate that this sentence was within the established range for such offending and was not manifestly excessive.

[9] **CHESTERMAN JA**: The appellant was tried on an indictment which charged him with 11 counts of misappropriation with a circumstance of aggravation, and one

count of fraud with a circumstance of aggravation. On 30 April 2009 after a 15 day trial he was convicted of the counts of misappropriation but acquitted of the fraud. He was sentenced to a term of six years' imprisonment on one count of misappropriation, terms of five years' imprisonment on four other counts of misappropriation and two years' imprisonment on each of the others. All sentences were to be served concurrently. A parole eligibility date was fixed two years and eight months into the term of custody.

[10] The appellant appeals against his conviction and seeks leave to appeal against the head sentence of six years, complaining that it is excessive by 12 months.

[11] The appeal raises only one point. The appellant seeks a retrial on the ground that the prosecution did not disclose a substantial number of documents to him until the ninth day of the trial despite earlier complaints that such documents had not been given to him. His complaint on appeal is that the late supply of the documents gave him no proper opportunity to prepare his defence so that there has been a miscarriage of justice.

[12] Mr Copley SC who appeared with Mr Power for the respondent conceded with his customary frankness that documents relevant to the prosecution were in the possession of Queensland Police Service officers prior to trial but were not delivered to the appellant until its ninth day. The late delivery contravened s 590AB(2)(b) of the *Criminal Code* which provides:

> "… in relation to disclosure … the obligation includes an ongoing obligation for the prosecution to give an accused person full and early disclosure of –
>
> (a) …
>
> (b) all things in the possession of the prosecution, other than things the disclosure of which would be unlawful or contrary to public interest, that would tend to help the case for the accused person."

[13] The test to determine whether there has been a miscarriage of justice by reason of non-compliance with the section is an undemanding one. If the material which was withheld could have made a difference to the verdicts the failure to disclose it will amount to a miscarriage of justice. In *R v HAU* [2009] QCA 165 Keane JA (with whom Cullinane and Jones JJ agreed) said:

> "[36] In *Alister v The Queen*, Brennan J, as his Honour was, said that a trial in which the right of an accused to access to relevant documentation in the possession of the prosecution is denied 'cannot be … a trial according to law'. The resolution of the issue raised by this ground of appeal must be approached on the footing that the obligations of the prosecution under s 590AB of the *Criminal Code* are of fundamental importance to a fair trial of a charge on indictment.
>
> [37] The view has been taken in Queensland that non-compliance by the prosecution with its obligations of disclosure is 'such a serious breach of the presuppositions of the trial as to deny the application of the … proviso', at least where the material not disclosed 'might well have influenced the result of the trial'.

> [38] In *R v Spizzirri* Pincus JA, with whom de Jersey CJ and White J agreed, said that '[u]se of documents or information contained in them in an attempt to discredit the principal Crown witness is a legitimate forensic purpose'.
>
> [39] In this case, as in *R v Spizzirri*, the defence should have been afforded the opportunity to raise with the complainant in cross-examination the differences in her accounts of events. Whether or not that opportunity should be availed of was, as Pincus JA said in *R v Spizzirri*, a matter for decision by 'counsel for the defence'. Pincus JA went on to say:
>
> > 'The real difficulty in acceding to the argument that the verdict should be set aside is that there is absolutely no reason to doubt that the appellant's knife pierced the complainant's abdomen, causing grievous bodily harm, and the appellant's evidence about the way in which this happened is implausible. Nevertheless, it seems to me impossible to conclude that access to and cross-examination on the subpoenaed documents could not have made a difference to the verdict.'
>
> [40] As the decision in *R v Spizzirri* shows, where documents are not disclosed in breach of this obligation, this Court cannot ignore even a relatively slim possibility that the defence has been forensically disadvantaged by the non-disclosure. It is enough that the opportunity which the defence was denied 'could have made a difference to the verdict'."

[14] The appellant appeared for himself on his trial. He had been represented by counsel and solicitors but terminated their retainer on the first day of the trial. He did not seek an adjournment and announced that he was willing and able to defend himself.

[15] The late production of the documents is apparently explained by the fact that the appellant had been separately investigated by each of the Queensland Police Service, the Australian Federal Police and the Australian Tax Office. Each organisation had taken documents from the appellant and/or his companies. On the fifth and eighth days of the trial the appellant complained to the trial judge about the unavailability of documents and of missing documents. Inquiries were made of the Federal Police and the trial proceeded after adjournments and digressions. On 20 April 2009, a Monday and the ninth day of the trial, the prosecution produced a significant number of documents which had been in the possession of the Queensland Police Service for some time. The trial judge allowed an adjournment of about 45 minutes for the appellant to consider the documents and what consequence their late delivery should have for the future conduct of the trial.

[16] When the court resumed there was further discussion about what should happen. The court then adjourned for three days, to resume on Thursday 23 April 2009. The appellant indicated that that interval would be sufficient for him to comprehend the new material and continue with his defence. The prosecutor agreed to recall any witnesses that the appellant wished to cross-examine with the aid of the new documents. When the court resumed on the Thursday the appellant reaffirmed his

desire for the trial to proceed. Four witnesses were recalled for further cross-examination.

[17] The indictment alleged that on various dates, the earliest of which was 16 November 1995 and the latest 20 March 1997, the appellant dishonestly applied for the use of Australian Fund and Property Managers Pty Ltd ("AFPM") sums of money aggregating $262,500. A separate count, count 11 on the indictment, charged the appellant with dishonestly applying to his own use the sum of $50,000, between 7 May and 7 June 1997.

[18] The appellant had been a director of AFPM between 14 October 1993 and 20 March 1995. He was reappointed a director on 29 July 1997 and remained a director until the company went into liquidation in September 1997. He was therefore not a director at the time of the offences. The directors during that time were Deryck Peters and Jean Chappell.

[19] The prosecution case was that the appellant's was the controlling mind of AFPM and that Mr Peters and Ms Chappell acted in accordance with his directions.

[20] AFPM was, or was intended to be, an investment and finance broking business. In its first aspect it was to act as an intermediary between those in need of investment funds to further legitimate businesses and those who wished to invest. In the second aspect it carried on business as a buyer of land on which it had houses built and then on sold, as well as mortgage broking. Part of the real estate development business consisted of attempting to induce investors to pool funds into "syndicates". The pooled funds would be used to buy land which would then be developed by building houses or home units, or like structures, upon the land which would then be sold for a profit. AFPM employed telemarketers and canvassers to approach members of the public with a view to persuading them to join a syndicate. These efforts appear to have been largely, if not entirely, unsuccessful.

[21] Mr Peters appears to have been involved in this second aspect of AFPM's business. He had nothing to do with investors or the placement of investment monies. Ms Chappell was little more than a bookkeeper and office administrator. She appears to have had no understanding of the functions or obligations of a company director. Both gave evidence that they acted in accordance with the appellant's commands.

[22] The prosecution called a number of witnesses who testified that they had business ventures or inventions which they needed capital to develop. The appellant told them he would endeavour to raise funds for investment in their businesses. He did not pay any money to any of them.

[23] Other witnesses were called to say that they were approached by the appellant who suggested that they invest in one or other of the ventures. They agreed and paid substantial sums to the appellant. With respect to the charges contained in counts 1 to 10 the monies paid to the appellant by the investors were deposited into AFPM's bank account and then disbursed to meet the company's expenses, and the appellant's. With respect to count 11 the money paid to the appellant was kept by him.

[24] The evidence I have summarised was not contested by the appellant. It seemed to be largely accepted that the moneys the subject of counts 1 to 10 were paid to AFPM but not passed on to the intended recipients. The appellant did, however,

contest his responsibility for its misapplication. His case was that Mr Peters and Ms Chappell, or one of them, were or was responsible for the misapplication. At the least, his argument was, the jury should have had a reasonable doubt that it was he and not Mr Peters and/or Ms Chappell who misappropriated the money.

[25] The appellant did not give evidence. He cross-examined Mr Peters and Ms Chappell with a view to establishing that they had been dishonest in their use of AFPM's monies in order to give rise to the reasonable doubt I have just described. His particular focus was upon the establishment of a company, McKenzie Nicolson Constructions Pty Ltd or, perhaps, McKenzie Nicolson Pty Ltd trading as McKenzie Nicolson Constructions ("MNC"). The point the appellant tried to develop was that MNC was set up by Mr Peters and Ms Chappell to conduct a real estate development and finance broking business, similar to that conducted by AFPM, in competition with it. He also sought to establish that they used AFPM's monies to establish and run MNC.

[26] The evidence about these matters was not clear. The appellant's questioning was prolix, convoluted to the point of rambling, and largely unstructured. Mr Peters, it must be said, was less than co-operative in some of his answers. Sometimes he appeared evasive. Ms Chappell appears to have been largely ignorant of business matters. A genuine source of difficulty was the considerable delay between the events in question and the trial. The former occurred in 1996 and 1997. The trial was in 2009.

[27] Both Mr Peters and Ms Chappell denied that they had used AFPM money in their own business, MNC. Both witnesses testified that MNC only undertook one business venture, the purchase of four blocks of land at Mount Ommaney in the western suburbs of Brisbane on which they intended to build houses for sale at a profit. The land was bought, one house built and one house partly completed when the venture failed through lack of funds. The properties were sold at a loss.

[28] Ms Chappell explained that she and Mr Peters had access to their superannuation monies and they paid those moneys into a bank account to provide initial funding for MNC. As well they obtained bank finance secured by mortgage. According to Ms Chappell, Mr Peters withdrew some of the monies from MNC's account to meet his own living expenses and the depletion of MNC's funds was a cause of the business failure.

[29] Mr Peters was adamant that MNC did not compete with AFPM. There were, however, some letters which the appellant put to Mr Peters and which the prosecutor tendered which strongly suggested otherwise. The evidence does not show whether these letters were among the documents produced on 20 April 2009. There were two letters both dated 20 June 1997. One was addressed to "Barnes Mortgage Management" and the other to "AAA Financial Corporation". They were in identical terms:

> "As you are aware from our conversations, A.F.P.M. is going through some changes and at this point we would like to formally advise our Mortgage Finance section as from 1/7/97 will now operate under the name of 'MCKENZIE NICOLSON'.
>
> Our construction company, MNC CONSTRUCTIONS PTY LTD has also now been finalised and we are awaiting the issue of our 'Gold Card'.

> Richard Daniel, previously of Miranda Homes, has joined our team and is responsible for ensuring our product meets Investors needs and importantly is 'Good Value'.
>
> A.F.P.M. will continue to manage special projects as they arise.
>
> MAIN CHANGES – Direct phone number of McKenzie Nicolson:-
> 07 38081858
> Fax:- 07 32094512
> Postal Address:- Unchanged
> Office Location:- Unchanged.
>
> Please also arrange for all future commission payments to be made payable to MCKENZIE NICOLSON.
>
> This is an exciting change for both of us as we have become more involved in Property Development and we look forward to our continued association … .
>
> Kind regards,
>
> JEAN E CHAPPELL
>
> DERYCK PETERS"

[30] Miranda Homes was a company with which AFPM dealt in its "house and land package" business. Mr Daniels had been an employee of that company.

[31] The letters do suggest that Mr Peters and Ms Chappell were intending to set up their own business and take from AFPM that part of its activities which Mr Peters had conducted, mortgage broking and minor real estate development. Despite that, the evidence elicited in cross-examination was that the only venture which MNC in fact undertook was the one I have described.

[32] Mr Peters denied adamantly that MNC had ever undertaken the syndication or attempted the syndication of real estate development. The attempts to secure investors to pool funds to form a syndicate which would buy land for development had only ever been undertaken by AFPM. There is no evidence that I can see to the contrary.

[33] The documents produced late, which are said to be relevant to the appeal, fell into five categories. The first is a computer generated index of the documents, or some of them, which were produced. Its only relevance is to indicate the date of some of the documents in other categories.

[34] In the second category is a letter of offer from Westpac Banking Corporation to Mr Peters and Ms Chappell dated 31 July 1997. It announced "the bank's approval of a Business Equity line of credit" in the sum of $304,000 to be made available "subject to the following broad conditions", the first of which was "security … being completed to the Bank's satisfaction."

[35] The third category of documents consisted of 12 letters addressed to various individuals in the same terms:

> "It has been some time since our last meeting and assessment of your financial position.

> We are now looking to set up a group of investors into a 'Syndicate' to invest in selected Residential Properties.
>
> If you would like more information on the benefits of this type of project please give me a call.
>
> Kind regards,
>
> DERYCK PETERS"

There was a thirteenth letter in essentially the same terms but slightly more personal in its tenor. A fourteenth letter was addressed to the Goodna Bowling Club advising the possibility that loan funds could be got to assist with its operations. The letters are not dated but the index, category one, suggests they were written in February 1997.

[36] The fourth category of documents consists of a schedule of "prepaid commissions" payments to Leif Bremermann and Christopher Dailey, together with a number of statements from Metway Bank recording cheque transactions and account balances for AFPM.

[37] The fifth category consists of one document, apparently an instruction manual to those engaged in telemarketing and cold calling investors.

[38] The appellant's point was that the documents supported his contention that Peters and Chappell were dishonestly funding their own business with AFPM money prior to organising their own finance. As a corollary the documents are said to establish that those witnesses were untruthful in their denials of that fact, and so should not have been believed when they said it was the appellant who directed the misapplication of monies.

[39] An examination of the documents reveals that they do not have the asserted tendency and could not have assisted the appellant to demonstrate dishonesty in Mr Peters or Ms Chappell.

[40] The bank approval was said to show that prior to the offer MNC had no funds so that Mr Peters and Ms Chappell must have used AFPM money in their business. The letter of offer proves no such thing. It is merely a letter of offer of finance. It says nothing about what monies were available to Mr Peters and/or Ms Chappell beforehand. The submission overlooks Ms Chappell's evidence that she and Mr Peters put their own superannuation monies into an account to fund MNC before they obtained mortgage finance. Moreover there is no evidence that MNC was operating, or in need of finance, prior to 31 July 1997.

[41] Mr Peters seems to have been questioned about some of the letters which comprise category three. The letters about which he was questioned were not tendered so it is difficult to be confident, but he was asked about "marketing" letters and "syndications". He denied that MNC was ever involved in attempts to syndicate investors for real estate development. AFPM was involved in such activities. The letters do not contain anything which contradicts Mr Peters' assertion. They do not show that MNC was engaged in such activities. There is no indication that they emanated from MNC. Their date, early 1997, is some indication that they predate the establishment of MNC.

[42] The appellant's counsel placed most reliance upon the documents in category four. These in conjunction show that at least some of the payments made to

Mr Bremermann came from AFPM's bank account. This is said to be evidence that AFPM's funds were being used to pay commission to employees of MNC.

[43] To make good the submission the appellant had to demonstrate that Mr Bremermann and/or Mr Dailey were employed by MNC so that their payment from AFPM funds involved misuse of the latter. Both Mr Bremermann and Mr Daley were witnesses. They both said that they were employed by AFPM and were paid by that company. Mr Bremermann said he was employed to perform "administration duties, as well as telemarketing duties." He was not asked, in evidence in chief or cross-examination, whether he had ever worked for MNC. The appellant was aware of that business and of his suspicions about it when he questioned Mr Bremermann so the omission is significant. Mr Bremermann was not one of the witnesses whom the appellant asked to be recalled for further cross-examination after the additional material was supplied to him.

[44] The same comments apply to Mr Dailey. He was employed by AFPM "to get leads from telemarketing and then go out and see those people at night, get their asset and liability statements and bring them back in to give to (Mr Peters)." There is no evidence that Mr Dailey ever worked for MNC. He was not asked about the point, nor was he recalled.

[45] There is therefore no basis for thinking that there was anything inappropriate about the payment of commission by AFPM. The payments were made to its own employees.

[46] The documents in category five are utterly irrelevant. Even if it could be demonstrated that they were generated by MNC and not AFPM (which was not attempted) they say nothing about the misuse of AFPM money or property.

[47] Despite the test being an undemanding one the appellant has not shown that the documents which he was given late could have made a difference to the verdicts. They could not have assisted him in his cross-examination. They do not show, or tend to show, dishonesty on the part of Mr Peters or Ms Chappell with respect to AFPM monies.

[48] The appeal should be dismissed.

Sentence

[49] The appellant had been held in custody for about 10 months before he was sentenced. That period could not be declared as time already served under the sentence imposed because he was detained for offences other than those in this case. To make allowance for that incarceration the trial judge imposed a sentence of six years' imprisonment on the basis that the appellant's criminality deserved a term of seven years' imprisonment.

[50] The appellant complains that a notional term of seven years would have been manifestly excessive. Six years, he submits, was the appropriate sentence from which the year's detention should have been deducted. The only question for the application is whether seven years was too high.

[51] In *R v Tindale* [2008] QCA 24, a 42 year old woman without prior criminal history was sentenced to seven years' imprisonment for dishonestly obtaining money. The sum involved was $426,804.87 obtained by a series of frauds perpetrated over four

and a half years. Tindale was employed as an accountant in a small family business in which she was regarded as a friend. She pleaded guilty but made no restitution.

[52] Her application for leave to appeal against sentence was dismissed. Fraser JA noted that:

> "There is no precise sliding scale of head sentences according to the sum involved in the offence … [though] the amount taken is … a very relevant circumstance."

[53] In *R v Lim* [2004] QCA 172 I said, with the agreement of Williams and Jerrard JJA:

> "The judgment in that case analysed a number of similar cases, which it is not necessary to mention in more detail. They were summarised as showing that general deterrence is important in these kinds of cases and that sentences of six or seven years' imprisonment are common when large sums of money are involved."

Lim was sentenced after a lengthy trial to six years' imprisonment on several counts of fraud. The dishonest conduct spanned almost two years during which Lim pretended to be a successful developer who induced a number of people to give him money to invest in projects which Lim did not intend to undertake. He obtained money and services to a value of $500,000.

[54] The case I referred to in *Lim* was *R v Wheeler & Sorrensen* [2002] QCA 223. The analysis undertaken in that case was:

> "[25] In *R v Reischl* [2000] QCA 215 an effective sentence of 7 years imprisonment with a recommendation for release on parole after 2 ½ years was imposed for offences of stealing as an agent. Some of these were committed while the applicant was on bail for others, for which 5 years imprisonment was imposed. He had a minor criminal history. He used the moneys received from selling boats (about $600,000) to pay business debts over an 18 month period. He hoped to eventually repay the creditors. There was no evidence of extravagant lifestyle. There was initial cooperation although he absconded for a period before sentence. Leave to appeal was refused.
>
> [26] In *R v Baunach*, CA88/99, a Commonwealth DPP appeal, a tax agent had by fraud misappropriated clients' taxation payments or refunds. He received 6 years imprisonment for misappropriation of $800,000 of which $92,000 was restored to the victims. There was a plea of guilty and limited cooperation in other respects. There was some evidence of using money to fund an acceptable lifestyle. The court said that 6 years imprisonment was at the lower end of the appropriate range but since it was a DPP appeal a conservative approach should be adopted. In the end the appeal was allowed only to the extent of increasing the non-parole period from 1 year to 2 years.
>
> [27] In *Taylor* CA 406 of 1994, 7 years imprisonment without a recommendation for parole was imposed for dishonest application of moneys he had received for investment in

> insurance company financial products. The amount involved was $650,000. The moneys were spent to keep his business running and were not used for high living. There was a plea of guilty and it was conceded by the prosecution that there was no evidence that his cooperation had been reflected in the sentence. The appeal was allowed only to the extent that a non-parole period of 2 ½ years was added.
>
> [28] In *Anderson* 2000 QCA 257, upon which the applicants particularly relied, the applicant disposed of assets which had the effect of reducing the value of securities available to creditors. The reduction in value was $1.5m but the judgment states that the actual loss was not stated in the record. The Court, however, accepted that it should approach the matter on the basis that $1.5m was involved, irrespective of that. It involved an attempt by a man of otherwise good character to keep a failing business alive. He hoped to be able to repay his creditors, not to enrich himself. The sentence of 6 years with a recommendation for release on parole after 2 years was held to be not manifestly excessive. It was said that lesser sentences than those imposed could perhaps have been defended but it was impossible to conclude that the sentencing judge went beyond the bounds of a proper discretion. The tentative nature of the qualification does not suggest that the sentence imposed was necessarily at the top of the range."

[55] The cases do not support the appellant's submission. They bear out the respondent's proposition that a seven year term was within range for the appellant's offending. *Tindale* provides a good comparison. Her offending netted her more money than the appellant received and occurred over a longer period, but her seven year sentence was imposed on a plea of guilty. The appellant, of course, went to trial.

[56] As well there are several features of the appellant's offending which makes it serious. The prosecution submissions on the sentence included the following:

> "The defendant has been convicted of eleven fraud offences against ten individuals or couples.
>
> … a common theme for most complainants was that they were unsophisticated investors, who could ill afford the loss they suffered.
>
> … the defendant's motivation in committing these frauds was to maintain his lifestyle and the appearance of financial success … .
>
> … he would seek repayment of his expenses in amount of up to $3,000 per week … ."

[57] The appellant was arrested and charged with the present offences on 31 July 2002. He was released on bail but after the committal hearing on 11 September 2003 he absconded. He was not found and rearrested until 28 June 2008. In the meantime he had changed his name and taken up residence at the Gold Coast. The delay in bringing him to trial created difficulties for the prosecution. Two of the complainants had died in the meantime. It is obvious that the appellant showed no

remorse. It is also noteworthy that he attempted to transfer responsibility for his frauds onto Mr Peters and Ms Chappell.

[58] The sentence imposed was not excessive. The application for leave to appeal against sentence should be refused.

[59] **MULLINS J**: I agree with Chesterman JA.