SUPREME COURT OF QUEENSLAND

CITATION:	*R v Yarwood* [2011] QCA 367
PARTIES:	**R** **v** **YARWOOD, Michael Dermott** (applicant)
FILE NO/S:	CA No 59 of 2011 DC No 2770 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	13 December 2011
DELIVERED AT:	Brisbane
HEARING DATE:	24 August 2011
JUDGES:	Fraser and White JJA and North J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Leave to read and file the affidavit of Michael Dermott Yarwood sworn 21 July 2011.** **2. Application to adduce evidence for a limited purpose granted.** **3. Application for leave to appeal against sentence granted.** **4. Appeal allowed and sentence imposed below varied by ordering suspension on 13 December 2011.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where applicant was a solicitor and registered agent for collecting stamp duty and stamping dutiable documents on behalf of Office of State Revenue – where applicant failed to remit funds to Office of State Revenue and deposited into own account and accounts of other entities and persons – where total outstanding tax collected but not paid was $207,027.24 – where offending continued over three years – where applicant sentenced on each count to four-and-a-half years' imprisonment suspended after serving 18 months with operational period of five years, to be served concurrently – where applicant suffered significant psychiatric and psychological illness prior to,

during and after period of offending – where applicant contended, among other grounds of appeal, that primary judge erred in not recognising applicant's mental illness – whether sentence manifestly excessive

Criminal Code 1899 (Qld), s 408C(1)(a)(ii), s 408C2(c)
s 408C(2)(d), s 488(1)(b)
Corrective Services Act 2006 (Qld), s 176, s 194(1)(a)
Penalties and Sentences Act 1992 (Qld), s 9(2)(f)

House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
R v AAN [2010] QCA 313, considered
R v Adams; ex parte A-G (Qld) [2006] QCA 312, considered
R v Allen [2005] QCA 73, considered
R v Anderson [2000] QCA 257, considered
R v Blackhall-Cain; ex parte A-G(Qld) [2000] QCA 380, considered
R v Dunn [1994] QCA 147, cited
R v Goodger [2009] QCA 377, applied
R v Gourley [2003] QCA 307, considered
R v La Rosa; ex parte A-G (Qld) [2006] QCA 19, considered
R v Lather [2011] QCA 143, considered
R v Lory, unreported, Court of Criminal Appeal, Qld, CA No 170 of 1987, 19 August 1987, considered
R v Maniadis [1997] 1 Qd R 593; [1996] QCA 242, cited
R v Marsden; Attorney-General of Queensland [1999] QCA 237, considered
R v Neumann; *ex parte A-G (Qld)* [2007] 1 Qd R 53; [2005] QCA 362, cited
R v Parker [2007] QCA 22, considered
R v Riesenweber; Ex parte Attorney-General of Queensland [1996] QCA 504, considered
R v Robinson; ex parte A-G (Qld) [2004] QCA 169, considered
R v Smith [2001] QCA 430, considered
R v [2009] QCA 204, considered
R v Tacey; ex parte Commonwealth Director of Public Prosecutions [1994] QCA 15, considered
R v Taylor [1994] QCA 574, considered
R v Tsiaras [1996] 1 VR 398; [1996] VicRp 26, applied
R v Verdins (2007) 16 VR 269; [2007] VSCA 102, applied
R v Wheeler & Sorrensen [2002] QCA 223, considered

COUNSEL: The applicant appeared on his own behalf
R G Martin SC, with K J Spinaze, for the respondent

SOLICITORS: The applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA**: I agree with the reasons for judgment of White JA and the orders proposed by her Honour.

[2] **WHITE JA**: The applicant pleaded guilty on 4 March 2011[1] in the District Court at Brisbane to three counts that:

- Count 1 - Between 1 January 2004 and 31 January 2007 with intent to defraud he uttered forged documents purporting to be Queensland Land Registry transfer forms with a circumstance of aggravation that the documents purported to be documents which by law were required for the registration of title to land or an estate in land, (s 488(1)(b) of the *Criminal Code*).
- Count 2 - Between 1 January 2004 and 31 January 2007 he dishonestly applied to his own use property, namely money and bank credits belonging to him subject to a direction that it should be applied to pay stamp duty owing to the Office of State Revenue on the purchase of real property or businesses and the further aggravation that the yield was of a value more than $30,000, (s 408C(1)(a)(ii), 2(c) and (d) of the *Criminal Code*).
- Count 3 – Between 14 December 2005 and 31 January 2007 he dishonestly applied to the use of Busy Group Pty Ltd and others property, namely money and bank credits, in his possession subject to a condition. The circumstance of aggravation was that the property came into his possession subject to a direction that it should be applied to pay the stamp duty owing to the Office of State Revenue on the purchase of real property or businesses and the further circumstance of aggravation that the yield from the dishonesty was of a value more than $30,000, (s 408C(1)(a)(ii), 2(c) and (d) of the *Criminal Code*).

Each offence carried a maximum penalty of 12 years imprisonment.

[3] The applicant was a solicitor. These offences occurred whilst he was acting for the purchasers on the settlement of property transactions. He was sentenced in respect of each count to a term of imprisonment of four-and-a-half years suspended after serving 18 months with an operational period of five years, all sentences to be served concurrently. There was no pre-sentence custody to be declared. The applicant had no prior convictions of any kind.

[4] The applicant seeks leave to appeal his sentences on the ground that they are manifestly excessive by reference to particular errors of the *House v The King*[2] kind. At the hearing of the application the applicant, who appeared for himself by video link from the prison, sought to adduce further evidence which he submitted would support his application for a lesser sentence. The new evidence relates to co-operation with prosecutorial authorities which occurred prior to the sentence but which was not disclosed to his counsel or to the sentencing judge. The second body of material relates to assaults and harassment which he has allegedly been subjected to by other prisoners and the difficulties which he has experienced in managing his mental illness in prison. The respondent objects to the receipt of that further material.

[5] The applicant contends that the sentences which ought to have been imposed are imprisonment of three to four years as a head sentence with immediate suspension or, at the most, after imprisonment for no more than nine months with an operational period of three to four years.

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1 It is likely that he did so on 5 October 2010 but when his sentence came on for hearing on 4 March 2011 it was noticed that his pleas of guilty were not endorsed on the indictment and he was 're-arraigned'.

2 (1936) 55 CLR 499 at 504-505.

Background

[6] The applicant was born in 1972. He was educated at a private school at the Gold Coast where he was school captain. On leaving school he was articled at a Gold Coast firm and completed his law degree part-time. He was admitted as a solicitor in 1996 and continued to work for the firm until 1998. He then worked for a major Brisbane law firm in 1998 but remained only a year and then went into partnership with Geoffrey Rapp. It seems from an early stage in his career, carrying on from his school life, he aspired to political office and was involved in allied activities to further that ambition. He carried out extensive community service and conducted a busy legal practice.

[7] Dr Norman Barling, the applicant's treating psychologist[3], described the events which preceded the offending conduct as follows:

> "Mr Yarwood reported that in August 2001 he received a telephone call from a reporter with the Courier Mail Newspaper regarding allegations of professional misconduct that had apparently been made against him. This became a front page story and Mr Yarwood became extremely distressed.
>
> At that time Mr Yarwood was acting in a professional capacity for a number [of] leading Gold Coast Property Developers, whom [sic] had come under attack by various members of the press.
>
> Mr Yarwood reported that whilst no complaints were made against him, he was investigated by the Queensland Law Society for Professional Misconduct. He reported further, that he was charged with Professional Misconduct and Unprofessional Conduct in 2002 and appeared before the Solicitors Complaints Tribunal in March and May 2003."[4]

The applicant's partnership with Mr Rapp was dissolved in December 2002 and he then operated a sole practice from his home. Dr Barling continued:

> "Despite a unanimous finding by the Solicitor's Complaint Tribunal of there being no case to answer and being cleared of any wrongdoing, Mr Yarwood reported that the negative press, and the stress of the situation in which he found himself, precipitated the forced… sale of his home to pay legal and associated costs in excess of $500,000.00, ruined his chances of being elected to Council and serve his community, destroyed his legal practice and precipitated his divorce from his second wife … who left him in 2004 taking their young sons with her. This combination of adverse events further contributed to his depression and he became suicidal. He saw himself as a 'failed person'."[5]

This account was confirmed in oral submissions before the primary judge. The applicant's counsel, Mr J Hunter, stated, additionally, that costs were awarded to the applicant in the Law Society proceedings on a solicitor and client basis.[6]

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3 He had seen the applicant on 40 occasions over a period of almost three years when he wrote his report; AR 69.

4 AR 71.

5 AR 72.

6 AR 17.

[8] When these events unfolded the applicant experienced great distress and sought assistance from his general practitioner who prescribed anti-depressant medication (Zoloft) and referred him to a psychologist in June 2002. He continued to be treated by that psychologist for approximately four years. The applicant told Dr Barling that he suffered from depression, panic attacks, sleeplessness and severe anxiety, had stopped his medication, and began to drink alcohol excessively. His condition continued to deteriorate; he re-instituted taking his prescription anti-depressant medication at an increased dosage and was prescribed Stilnox to help him sleep. Dr Barling commented that the adverse consequences of the usage of Stilnox for longer than three – four weeks and its interaction with alcohol were not then known. The applicant recommenced legal practice from his home, started to drink more heavily and abused his prescription medication. He began obtaining other drugs such as Valium and Xanax from a Canadian online pharmacy to which he became addicted as well as to alcohol. None of those facts were contested by the prosecution.

[9] It is against that background that the circumstances of the offending may now be considered.

Circumstances of offending

[10] Sentence proceeded on an agreed schedule of facts.[7] The charges relate to 72 transactions. In each case the applicant acted for the purchaser of real property or businesses. He received funds from the purchaser which were to be applied to meet the stamp duty liability on the purchase. Stamp duty is generally payable on an executed contract. The Office of State Revenue collects stamp duty and maintains records in relation to the duty collected. It authorises solicitors to act as its agent to collect stamp duty on its behalf and to stamp the dutiable documents on its behalf. These authorised agents or "self-assessors" are registered and issued with an identifiable user number. The self-assessors are required regularly to submit returns listing the duty collected and remitting that duty to the Office of State Revenue.

[11] The applicant was registered as a self-assessor on 11 August 2006 backdated to 1 August 2006 and issued with the number 13A:BNE:17567. His registration was cancelled on 1 December 2006 due to anomalies uncovered by the investigations. From early in 2004 the applicant collected funds from clients to pay stamp duty but failed to remit those funds to the Office of State Revenue. Most of the transactions, the subject of the counts, involved the purchase of real property by his clients which required the lodgement of a Queensland Land Registry transfer form containing a certificate by a self-assessor that the relevant stamp duty had been paid before the transfer of title would be processed.

[12] Count 1 concerned 72 transactions where the applicant placed onto a Queensland Land Registry transfer form a stamp indicating that stamp duty had been paid on the contract of sale. The stamps were forgeries in as much as they contained the identifying numbers of one of seven self-assessors other than the applicant. Those self-assessors had no knowledge of the use of their numbers and did not authorise their use. Attachment "A" to the statement of facts is a schedule listing those transactions.[8]

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7 AR 9.

8 AR 31-36.

[13] Count 2 concerned 42 transactions where the applicant deposited money received as stamp duty into his own accounts between August 2004 and July 2006 set out in attachment "B".[9] This attachment shows that the applicant received $412,803.58 from clients which he deposited into bank accounts under his control. In some instances the stamp duty was paid to the Office of State Revenue. The outstanding tax collected but not paid to the Office of State Revenue was $177,927.24. Each of those 42 transactions is described in attachment "C".[10] A sample of two of those transactions is sufficient to describe them.

> "Transaction 2 (OSR #78)
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> Michael Yarwood acted for … who was the purchaser of a property situated at…. The vendor of the property was… and the purchase price was $320,000. The purchaser was liable to pay stamp duty of $9,675 on the purchase of the property. The sale settled on or about 23 August 2004 and Yarwood signed the Transfer document on that date as the solicitor for the purchaser. Affixed to the transfer document was a stamp bearing the assessor number 13A:6536 indicating that stamp duty on the amount of $320,000 had been paid on the contract of sale. This assessor number was issued to Geoffrey Rapp who was previously in partnership with Yarwood. Rapp denies any knowledge of this transaction and did not account for the stamp duty to OSR.
>
> On 23 August 2004, the purchaser paid the sum of $10,317.00 to Yarwood by a cheque drawn on the Suncorp Metway account of … to cover the stamp duty, fees and outlays of Yarwood. These funds were deposited to the account of MD & JAT Yarwood numbered … maintained at the Bank of Queensland.
>
> OSR have no record of ever receiving the stamp duty on this transaction.
>
> …
>
> Transaction 8 (OSR #24)
>
> Michael Yarwood acted for … who was the purchaser of a property situated at …. The vendor of the property was … and the purchase price was $1,090,000. The purchaser was liable to pay stamp duty of $38,100.00 on the purchase of the property. The sale settled on 30 November 2004 and Yarwood signed the Transfer document on 29 November 2004 as the solicitor for the purchaser. Affixed to the transfer document was a stamp bearing an assessor number which is illegible indicating that stamp duty on the amount of $1,090,000 had been paid on the contract of sale.
>
> Prior to settlement, Yarwood advised the National Bank that at settlement that he required a cheque for $39,400 payable to himself from the settlement funds that they were providing to the purchaser. A bank cheque for that sum was deposited to the account of MD & JAT Yarwood numbered … maintained at the Bank of Queensland on 30 November 2004.

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9 AR 37-40.

10 AR 41-61.

> OSR commenced an investigation into the transactions involving Yarwood and raised various assessments. An assessment for this transaction was raised on 18 October 2006 seeking payment of the stamp duty of $38,100 and unpaid tax interest of $9,610.95. Payment of these sums was made on 1 December 2006 by a National Bank cheque which he had received at settlement for transaction 76 for $20,700.00, a Bank of Queensland bank cheque for $17,400 which had been acquired from funds in the account of [the applicant's personal partner] and a cheque drawn on the account K P Yarwood & Associates ANZ Bank account for $9,610.95.
>
> The duty had remained unpaid for in excess of 700 days.
>
> …
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> Transaction 55 (OSR #64)
>
> Michael Yarwood acted for … who was the purchaser of a property at ... The vendor of the property was …and the purchase price was $165,000. The purchaser was liable to pay stamp duty of $4,462.50 on the purchase. The sale settled on or about 30 June 2006 and Yarwood signed the Transfer document as the solicitor for the purchaser on 29 June 2006. Affixed to the transfer document was a stamp bearing the assessor number 13A:CONV:16024 indicating that stamp duty on the amount of $165,000 had been paid. This assessor number was issued to Arcuri Lawyers. They deny any knowledge of this transaction and did not account for the stamp duty to OSR.
>
> At settlement, a Westpac Bank cheque was made payable to Yarwood in the sum of $5,461.50 to cover the stamp duty and his costs. This cheque was deposited to the account of MD Yarwood numbered … maintained at the Bank of Queensland on 30 June 2006.
>
> OSR have no record of ever receiving the stamp duty on this transaction."[11]

[14] Count 3 relates to funds which the applicant deposited into accounts of other entities or persons amounting to $97,950. This occurred with respect to four transactions between January 2005 and January 2007. On the first occasion the funds were deposited to the account of Resimac, a mortgage broker. On the second occasion the funds were deposited into the account of Busy Group Pty Ltd, a company controlled by the applicant's personal partner. The third and fourth transactions were amounts paid to the Office of State Revenue but applied to other outstanding stamp duty owed by the applicant in respect of other clients. Attachment "D"[12] sets out the four transactions. The outstanding duty not paid to the Office of State Revenue was $29,200. Attachment "E"[13] describes those transactions. One will sufficiently illustrate this count:

> "Transaction 66 (OSR #81)
>
> Michael Yarwood acted for … who were the purchasers of a property at ... The vendor of the property was … and the purchase price was

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11 AR 41, 44 and 60.
12 AR 62.
13 AR 64-65.

> $490,000. The purchaser was liable to pay stamp duty of $15,625.00 on the purchase. The sale settled on or about 27 October 2006 and Yarwood signed the Transfer document as the witnessing the signatures of the purchasers on 25 October 2006. Affixed to the transfer document was a stamp bearing the assessor number 13A:CONV:17567 indicating that stamp duty on the amount of $490,000 had been paid on the contract. This assessor number was issued to Yarwood on or about 11 August 2006. He did not include this transaction in any returns that he lodged with OSR.
>
> On 27 October 2006, the purchasers paid Yarwood a cheque drawn on their personal account in the amount of $15,625.00 to pay the stamp duty and fees. This cheque was deposited to the account of the Busy Group Pty Ltd numbered … maintained at the Bank of Queensland on 30 October 2006.
>
> OSR have no record of ever receiving the stamp duty on this transaction."[14]

[15] The Office of State Revenue commenced investigations in early August 2006 after discovering that transactions where the stamp of a self-assessor (Conveyancing Works) had been used on transfer documentation completed not by that self-assessor but by the applicant. The investigations uncovered the extent of the impugned transactions. A letter was sent to the applicant on 28 August 2006 and followed by a visit by investigators to his premises in September 2006. The applicant co-operated with the investigators and identified a number of transactions. Some outstanding assessments were paid in full but the applicant ceased practice due to serious health problems and was unable to continue to make payments. The matter was then referred to police by the Office of State Revenue in March 2007 and a formal investigation commenced.

[16] The total amount lost to the Office of State Revenue was $207,027.24.

[17] The applicant advised the Queensland Law Society that he ceased to operate as a solicitor on 1 December 2006. He did not participate in a record of interview with police but did indicate that he was having difficulties and was seeking help from the Law Society. He was summonsed to appear in 2007. The Queensland Law Society withdrew his practising certificate on 13 April 2007. There was a full hand up committal in 2009 and the indictment was presented in September that year. The matter was originally listed for trial in April 2010 but, as a result of negotiations, a plea was indicated by October 2010. The prosecutor told the primary judge that the applicant had faced more significant charges at the time of his committal hearing and, accordingly, was entitled to the benefit of an early plea.

The prosecutor's contentions below

[18] The prosecutor emphasised that the offending was aggravated because the applicant was a solicitor in whom exacting ethical and professional standards reposed; that public confidence in governmental institutions would be undermined; accordingly deterrence was of particular importance. It seems that the misconduct was undetected for so long because there was little communication between the Office of State Revenue and the Department of Natural Resources. Since the

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14 AR 64.

applicant's activities were revealed, those departments changed their manner of dealing with each other. The prosecutor emphasised the number of transactions – 72, and that the offending had continued for three years. The prosecution did not contend that the applicant engaged at a high level of sophistication; it was accepted that the applicant was able to pay some stamp duty owing by "stealing… Peter to pay Paul"; however, because some funds went to his personal use it was inevitable that enquiries would be made. The prosecutor submitted for a range of five to six years imprisonment.

Applicant's submissions below

[19] The applicant was represented by an experienced criminal counsel. He submitted that the appropriate sentence was "in the vicinity" of four-and-a-half to five years to be suspended rather than a parole eligibility order after nine to 12 months in custody. Counsel tendered reports by Dr Mark Whittington dated 24 February 2011 (who had been treating the applicant) and Dr Norman Barling dated 10 February 2011. Both had stated that incarceration would have serious adverse consequences for the applicant's continuing psychological and psychiatric wellbeing. However, the applicant's counsel submitted:

> "… I don't rely upon the material set out in the reports about the inappropriateness of a term of imprisonment. My client accepts and has accepted for quite some time that these offences were so serious that he had to serve an actual term of imprisonment."[15]

[20] Counsel informed the court of the applicant's significant charitable work from 1996 to 2002, including his pro bono legal work, but that it had ended in 2003; since 2008 he had been involved with a number of community organisations as a researcher and counsellor, for example, the Black Dog Institute and beyondblue; and, although stabilised on his medication, any term of imprisonment would likely have an adverse affect upon the applicant's mental health. Counsel stressed that no individual had lost money as a consequence of the applicant's wrongdoing and all property transfers had occurred. Nothing suggested that the money had been spent on "high living". The applicant contended that a substantial part of the diverted money was taken by a business associate and his former wife. Although the applicant maintains this accusation in his appeal submissions, nothing can be made of it. If it occurred, by his conduct the applicant facilitated it. The primary judge was reminded of the principles outlined in *Goodger*[16] that an offender's moral culpability may be reduced by reason of his mental illness short of insanity.

Grounds of appeal

[21] The applicant has dealt with his grounds of appeal under 11 separate headings reflecting the alleged discretionary errors as set out in his grounds of appeal. Some overlap or are, essentially, repetitive, and some may conveniently be considered together. Without seeking to diminish the detailed and extensive submissions, the applicant's grounds may be summarised as follows:

> The primary judge erred:
>
> (i) in not recognising that the applicant's mental illness
>
> - reduced utility in imposing a deterrent sentence (general and personal);
> - would be adversely affected by actual imprisonment;

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15 AR 19.

16 [2009] QCA 377.

- reduced the significance of the applicant being a solicitor, conversely that no higher standard of tolerance to mental illness ought to be expected of a solicitor;
- was inconsistent with the applicant's true character, and who would be unlikely to re-offend (could not return to being a solicitor);
- meant that the applicant was incapable of functioning at a level to carry out a sophisticated operation of fraud;

(ii) in failing to reflect that the applicant gained no benefit from the money;

(iii) in failing to recognise that the offending was "fraud by omission";

(iv) in failing to recognise the applicant's sale of personal assets to make restitution of funds taken by third parties;

(v) in placing too great a reliance on the prosecution's submissions which contradicted the statement of facts;

(vi) in failing to take account of the applicant's good antecedents pursuant to s 9(2)(f) of the *Penalties and Sentences Act* 1992 (Qld).

Mental illness

[22] The most important issue raised by the applicant concerns his mental illness and the proper approach to it.

[23] In *R v Tsiaras*[17] the Victorian Court of Appeal observed:

> "Serious psychiatric illness not amounting to insanity is relevant to sentencing in at least five ways. First, it may reduce the moral culpability of the offence, as distinct from the prisoner's legal responsibility. Where that is so, it affects the punishment that is just in all the circumstances and denunciation of the type of conduct in which the offender engaged is less likely to be a relevant sentencing objective. Second, the prisoner's illness may have a bearing on the kind of sentence that is imposed and the conditions in which it should be served. Third, a prisoner suffering from serious psychiatric illness is not an appropriate vehicle for general deterrence, whether or not the illness played a part in the commission of the offence. The illness may have supervened since that time. Fourth, specific deterrence may be more difficult to achieve and is often not worth pursuing as such. Finally, psychiatric illness may mean that a given sentence will weigh more heavily on the prisoner than it would on a person in normal health."[18]

These propositions have been applied regularly since.

[24] A decade later the same court restated those propositions in *R v Verdins*:[19]

> "Impaired mental functioning, whether temporary or permanent ('the condition'), is relevant to sentencing in at least the following six ways:
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> 1. The condition may reduce the moral culpability of the offending conduct, as distinct from the offender's legal

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17 [1996] 1 VR 398.

18 At 400.

19 (2007) 16 VR 269; [2007] VSCA 102.

responsibility. Where that is so, the condition affects the punishment that is just in all the circumstances; and denunciation is less likely to be a relevant sentencing objective.

2. The condition may have a bearing on the kind of sentence that is imposed and the conditions in which it should be served.

3. Whether general deterrence should be moderated or eliminated as a sentencing consideration depends upon the nature and severity of the symptoms exhibited by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending or at the date of sentence or both.

4. Whether specific deterrence should be moderated or eliminated as a sentencing consideration likewise depends upon the nature and severity of the symptoms of the condition as exhibited by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending or at the date of the sentence or both.

5. The existence of the condition at the date of sentencing (or its foreseeable recurrence) may mean that a given sentence will weigh more heavily on the offender than it would on a person in normal health.

6. Where there is a serious risk of imprisonment having a significant adverse effect on the offender's mental health, this will be a factor tending to mitigate punishment."[20]

[25] The court explained:

> "The sentencing considerations identified in *R v Tsiaras* are not - and were not intended to be - applicable only to cases of 'serious psychiatric illness'. One or more of those considerations may be applicable in any case where the offender is shown to have been suffering at the time of the offence (and/or to be suffering at the time of sentencing) from a mental disorder or abnormality or an impairment of mental function, whether or not the condition in question would properly be described as a (serious) mental illness."[21]

[26] In this court in *R v Goodger*[22], after setting out the above propositions, Keane JA said:[23]

> "This Court has accepted the proposition that, generally speaking, a mental disorder short of insanity may lessen the moral culpability of an offender and so reduce the claims of general or personal deterrence upon the sentencing discretion."[24]

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20 At [32].
21 At [5].
22 [2009] QCA 377.
23 At [21].
24 *R v Dunn* [1994] QCA 147; *R v Neumann; ex parte A-G (Qld)* [2007] 1 Qd R 53.

[27] The applicant's psychological and psychiatric symptoms manifested themselves after he was accused in August 2001, in front page reports in a newspaper which circulated throughout the State, of professional misconduct. He became extremely distressed and sought assistance from his general practitioner who prescribed anti-depressant medication and referred him to a psychologist, Craig Holt, in June 2002, who treated him until May 2006. Dr Barling spoke with Mr Holt in May 2010. Mr Holt reported that the applicant "was devastated and traumatised" by the allegations made against him and developed severe anxiety, depression and "Post-traumatic Stress Disorder". Mr Holt reported that the depression was severe and displayed characteristics of Bipolar Disorder such as, excessive spending, unrealistic risk taking, poor decision-making, heightened activity and periods of depression. It was Mr Holt's opinion that the post traumatic stress disorder was as a result of the disciplinary action against the applicant.

[28] The applicant's marriage came to an end in 2004 in challenging circumstances and contact with his young sons was fraught with problems. When the disciplinary hearing concluded, successfully for the applicant, the applicant ceased taking his medication but began drinking heavily to control his continuing depression and anxiety. As has been mentioned above, he became addicted to a range of pharmaceuticals in an effort to manage his depression, sleeplessness and anxiety. The applicant reported to Dr Barling that:

> "… he lost all professionalism, dignity and self-respect. He reported attending numerous clients dressed only in his underpants and a T-shirt … he needed more and more Stilnox and alcohol in order to overcome his sense of failure and humiliation."[25]

[29] Dr Barling considered the applicant's psychological and behavioural status in the period 2004-2006 from self-reporting by the applicant, the administration of a number of tests, and discussions with his general practitioner and Mr Holt, who were treating him at the time. In Dr Barling's opinion:

> "During this time there is no doubt his memory and concentration were severely affected. He spent his days in a hazy world, drug affected and drunk.
>
> By his own report he regularly forgot settlements, forgot to lodge documents, missed crucial time commitments, dealing with files on an ad hoc basis, doing whatever was needed just to get by and felt the best he could do was 'try to put out bushfires', usually without success.
>
> His inability to work effectively can be attributed directly to his addiction to prescription drugs, and the combination of drugs and alcohol he was consuming, which rendered him psychologically and physically impaired. Indeed, it is amazing that he was able to function at all, and that he did not complete his suicide."[26]

[30] Dr Barling concluded that during 2004 - 2006 the applicant met the diagnostic criteria as reported in the Diagnostic and Statistical Manual of Mental Disorders[27] for the following disorders:

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25 AR 72.
26 AR 73.
27 DSM-IV-TR, 2000.

- Primary Insomnia;
- Major Depressive Disorder, Single Episode, Severe, Without Psychotic Features;
- Substance Dependence (Hypnotics and Benzodiazepine), (Stilnox, Valium, Xanax) (with physiological dependence);
- Alcohol Dependence (with physiological dependence);
- Post-traumatic Stress Disorder, Chronic.

[31] Dr Barling concluded that the applicant suffered "pathological depression for a number of years" and psychologically "has been very unwell since he was first vilified in the press", was "severely mentally impaired" [28]. The prosecution did not challenge any of these conclusions. Mr R Martin SC, for the respondent, in his written submissions suggested that the medical reports are overstated

> "and asserts disabilities in the applicant's capacity to practise which are not reflected by the manifest fact that he had a significant number of clients who, but for the frauds, seem otherwise to have been adequately served."[29]

The appeal hearing is not the time to challenge the opinion evidence which was received below without reservation.[30] The applicant in his oral submissions wanted to give evidence, refuting Mr Martin's submission, to the effect that his practice was the subject of numerous professional negligence claims.[31] There is no evidence to support the respondent's contention – the evidence, as reported by Dr Barling, is to the contrary.

[32] *Tsiaris, Verdins* and *Goodger* and many other decisions recognise that a sentence which involves imprisonment actually to be served may often weigh more heavily on an offender suffering from psychiatric ill health just as an offender who suffers from physical deficits will experience more difficulty in prison than a person of normal robust health. It is usual for a sentencing court to moderate a sentence to balance this factor. Both Dr Whittington and Dr Barling expressed concern that the applicant's mental health would be compromised by incarceration – "extremely damaging psychological affect on him".[32]

[33] The court in *Tsiaras*[33] observed that:

> "[A] prisoner suffering from serious psychiatric illness is not an appropriate vehicle for general deterrence …"

Where a person holds a position of significant trust, such as a solicitor, who abuses that position and offends criminally there is an important public interest in deterring others similarly holding positions of trust. Solicitors are given important privileges which necessarily demand a high standard of conduct in return, both as to professional competence and ethical conduct. Accordingly, where a solicitor departs from those standards in the practise of the profession and in a very public way, the public and fellow practitioners ought not be scandalised by an excessively lenient sentence. However, deterrence in the sense of deterring other practitioners

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28 AR 82.
29 Written submissions p 5.
30 Save as to penalty which was not relied on by defence counsel. AR 19 ll 18-22.
31 Transcript of hearing 1-3, l 10.
32 Dr Mark Whittington at AR 67.
33 [1996] 1 VR 398 at 400.

and vindicating the community's need to punish wrongdoing, particularly if the offender is a member of a privileged group, has limited application where the offender suffers from a mental disorder. Such a person is much less able than others not so afflicted to make sound judgments about conduct.

[34] The courts in Australia, as discussed in *Verdins*[34], have readily accepted that moral culpability for an offence as distinct from the offender's legal responsibility for it might be reduced by mental illness. There seems little doubt that the applicant's diagnosed psychological and psychiatric conditions contributed directly to his offending. His ability to exercise appropriate judgment, think clearly, and fully appreciate the wrongfulness of his conduct seems to have been grossly impaired. That is not to say (as the applicant comes close to submitting in some places in his written submissions) that he was not criminally responsible for his conduct. But if fellow practitioners and the public were aware of the extent of his illness they would not require condign punishment to be imposed, rather the punishment should be ameliorated.

Good character

[35] The applicant contends that the primary judge failed to give due regard to his favourable antecedents and that he would be unlikely to re-offend. The primary judge had many references from well-known and respectable people who had known the applicant for many years. His Honour acknowledged the applicant's previous good character, describing him as "a man who has a background of significant achievement and of community contribution".[35]

"Sophisticated" wrongdoing?

[36] The applicant submits that the primary judge characterised the criminal conduct as "sophisticated" when such a descriptor was unwarranted. The sentencing judge described the applicant's conduct as involving "some measure of sophistication". He added, "although I accept that it did not have that level of sophistication that one sometimes sees with offences of this sort."[36]

Restitution

[37] The applicant complains that his Honour did not give sufficient weight to the applicant's use of personal monies and assets to make repayments to the Office of State Revenue, and that third parties had benefited from his offending conduct, not himself. The restitution argument was not overlooked by his Honour. But he did note, correctly, a loss in excess of $200,000 to the Office of State Revenue and that it was unlikely that it would be recovered. The applicant had attempted to stave off any further proceedings by disposing of his assets. That meant that the quantum of the loss was less than if he had not.

"Robbed Peter …"

[38] The applicant objects to the expression "robbed Peter to pay Paul" but that was a shorthand expression used by both the prosecutor and defence counsel to reflect what occurred, at least, in relation to some transactions.

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34 [2007] VSCA 102 at [23]-[26].
35 AR 25.
36 AR 25.

New evidence

[39] Before discussing the above contentions further it is now necessary to consider the application to admit new evidence.

[40] The affidavit of the applicant deals with three areas:

- An earlier report of Dr Whittington dated 10 May 2010.
- Assistance provided to law authorities in respect of criminal activity.
- Mental illness, its treatment within the prison system and matters concerning an assault arising from information provided to the authorities.

[41] The applicant seeks to tender the first report obtained from Dr Mark Whittington dated 10 May 2010 – that received by his Honour was dated 24 February 2011. The applicant deposes that his counsel was instructed also to provide a copy of the first report. He contends that the first report would provide a more accurate description of his mental illness and needs to be read in conjunction with the second report, because it would give

> "a more defined and accurate professional opinion as to both the influence of my mental illness at the time of the offending as well as my ongoing battle and sufferance of the major depressive episodes and the stressors and needs associated with my recovery."[37]

[42] The applicant also wished to adduce evidence relevant to his sentence, potentially available at the time of sentence, concerning his provision to Queensland Police and the Australian Tax Office of information about serious criminal offending. In para 8 he sets out the assistance which he deposes he gave to Queensland Police. He did not tell the officer at the Australian Tax Office nor the relevant police officers about his pending criminal sentence proceedings "mistakenly believing that they were well aware of it due to the significant publicity I was receiving".[38] Nor did he tell his lawyers who were appearing for him on sentence that he had provided this significant information as he had been advised that it was essential while investigations were being carried out that it should be kept confidential.

[43] The only support for his assertions is a letter of acknowledgment from the Australian Tax Office which thanks the applicant for contacting the office with information to assist in administering the tax law and adds:

> "In regard to the email's final paragraph, we have received no information from you in regard to … and … and their associated companies and their deliberate schemes established to avoid GST and income and capital gains tax."

[44] The third area concerns the manner in which the applicant has been treated in the prison system. He asserts that he was the subject of a violent, unprovoked assault by a named prisoner in which he was king hit to the right side of his head and suffered brief unconsciousness. He understood that being vulnerable, he is an easy target for violence for those prisoners seeking "to earn their stripes" within the prison gang system. The applicant provides some support for these assertions by reference to his prison file. The applicant was placed in the detention unit for his own safety and was transferred to Numinbah Correctional Centre. The applicant deposes that he was the subject of a number of threats and harassment there and has suffered significant mental anguish as a consequence of this harassment.

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37 At para 7.

38 At para 10.

He complains of the rigid way in which his pharmacology is managed within the prison leading to further mental distress.

[45] The court has a discretion to admit further evidence on an application for leave to appeal against sentence if it is in the interests of justice to do so.[39] Davies JA and Helman J noted in *Maniadas*:[40]

> "That is not to say that the discretion to admit new evidence in an appeal pursuant to sub-s.(3) [of s 668E(3) of the *Criminal Code*] will be commonly exercised by an appellate court. But a court of appeal will admit new evidence on such an appeal, notwithstanding that it is not fresh in the above sense, if its admission shows that some other sentence, whether more or less severe, is warranted in law; … Evidence of events occurring after the date of sentence is generally unlikely to show this unless it shows what the state of affairs was at the time the sentence was imposed.
>
> There will no doubt be cases in which, notwithstanding that, if such evidence were admitted some other sentence would be warranted, the evidence should nevertheless be excluded. Where the evidence was known to the appellant at the sentence hearing and deliberately withheld that will generally be so." (footnotes omitted)

- **The first report of Dr Whittington**

[46] Much of this report recounts the applicant's history as reported by the applicant to Dr Whittington. The applicant did not commence treatment with Dr Whittington until 2006. That history is also contained in Dr Barling's report of 10 February 2011 which was before the sentencing judge. Notwithstanding the applicant's contention that it adds to a better understanding of his condition, in fact it adds little to the known facts which were relevant on sentence, and that was, no doubt, why the applicant's counsel did not burden the sentencing judge with it in addition to the lengthy report from Dr Barling. No good reason has been shown for receiving this report.

- **Co-operation with prosecutorial authorities**

[47] Courts regularly discount an otherwise appropriate sentence where an offender has co-operated with prosecutorial authorities.[41] Depending on the circumstances, evidence of assistance which has come to light after the sentence but which could have been provided at the sentence may be admitted and acted upon to reduce a sentence, the governing principle being the interests of justice.[42] The facts in *R v AAN*, upon which the applicant relies, do have similarities to the present in this sense - that offender deposed that about three months before his sentence hearing he had contacted interstate police and provided them with significant information about serious criminal offending. He did not tell them about his pending criminal proceedings in Queensland as he mistakenly believed they knew of it, nor did he advise his lawyers who represented him at the sentence that he had provided this assistance. This, he explained, was because the interstate police officers had told him it was imperative that their dealings were kept confidential. That offender's

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39 *R v Maniadis* [1996] QCA 242.
40 At p. 5-6.
41 *R v AAN* [2010] QCA 313.
42 *R v Maniadis* [1996] QCA 242.

assertions were supported by his legal representative's affidavit as to conversations she had had with the responsible police officer and the respondent DPP's employees had also independently confirmed the offender's account. The court accepted, and the concession was made by the respondent DPP, in those unusual circumstances, that that evidence be received.

[48] The only support for the applicant's assertions is the letter from the Australian Tax Office mentioned above. Unlike *AAN* there is no real confirmation of assistance, its nature nor any assessment of its value. In the absence of anything more it is too vague to be acted upon.

- **Assault in the prison**

[49] It may be accepted that the applicant has sustained physical injury and emotional and mental harm in the Queensland prison system. There is supporting evidence in the prison records of the physical assault. Anecdotally, any perception, true or not, that a fellow prisoner is an informer bodes ill for that person. It is a matter of grave concern that if a prisoner is punished by the State for criminal conduct by the deprivation of his liberty he cannot be kept reasonably safe from retaliatory harm by other prisoners. The management of the prisons is not, generally speaking, the province of the courts. In an appropriate case a prisoner may seek to avail himself of the "exceptional circumstances" parole provisions in the *Corrective Services Act* 2006 (Qld)[43] as mentioned by Mr R Martin at the hearing.

- **Difficulties associated with enduring mental illness in a corrections institution**

[50] The applicant contends that management of his pharmacological regime is rendered very difficult within the strict prison system. It is unnecessary to set out the details of how those difficulties are experienced by the applicant. There is no reason to doubt what he says. The sentencing judge recognised, broadly, that incarceration would be more onerous for the applicant than an offender of ordinary fortitude and resilience. The medical reports made that abundantly clear. Again, these are management issues for the prison authorities. It might be expected that the health personnel attached to the prison would be alert to this prisoner's needs and would not wilfully, consistently with the proper conduct of the prison, obstruct him from obtaining the optimum benefit from his prescription medication. Since the sentencing judge directed that the reports of Dr Whittington and Dr Barling should be provided to the prison authorities, it should be assumed that they have been read and acted upon.

Conclusion on new evidence

[51] Since it has been necessary to consider in some detail the applicant's affidavit and annexures to dispose of his application to adduce that evidence, the appropriate course is to give leave to read and file the affidavit, but to decline to act upon it.

Manifest excess?

[52] The applicant, as mentioned, seeks a head sentence of 3 - 4 years wholly suspended or, after serving nine months. The respondent submits that the applicant's sentence

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43 Sections 176 and 194(1)(a).

for this level of offending on a plea of guilty without regard to any mental impairment is six years. When the applicant's mental illness is taken into account, the sentence imposed of four-and-a-half years suspended after 18 months was correct.

[53] The applicant has referred to numerous decisions to demonstrate that the sentence imposed on him was manifestly excessive. Not all need be discussed. Some are factually too different or the offences and their maximum penalties too removed from the present to offer any true assistance. The decisions most relied upon by the applicant are unsuccessful Attorney-General's appeals against the excessive leniency of the sentence imposed.

[54] In *R v Blackhall-Cain; ex parte Attorney-General of Queensland* [44] the respondent pleaded guilty to 23 offences of dishonesty involving an amount in excess of $50,000. He was sentenced to two years imprisonment wholly suspended with an operational period of three years. The offender was 36 and the offences committed over a six week period in mid-1998. He had no prior criminal history. The offender was employed as a securities representative which involved buying and selling shares for clients of the firm by which he was employed. It appears that no one was out of pocket because of his dishonesty. The frauds were carried out in various ways involving share sale transactions including withholding commissions for his firm, paying them to himself, and fraudulently endorsing clients' cheques. There was evidence that prior to the commission of the offences the respondent had been receiving psychiatric treatment because he was depressed, suicidal, drinking heavily and on anti-depressant medication. After the offences he continued to be treated by a psychiatrist. The psychiatric opinion was that the offender was suffering from reactive depression and might temporarily have met the criteria for a diagnosis of major depressive disorder. His psychiatric deficits were thought by the psychiatrist to have adversely affected his judgment at the time of offending. What was described as an unusual feature of the case was that commissions were to become due to the offender by his employer so that he expected to repay the sums misappropriated when he obtained the commissions (which occurred). The Attorney's appeal failed because the significant psychiatric condition had a connection with the offences, the offender had no criminal history, and the unusual "anticipation" factor.

[55] In *R v Goodger*[45] the offender was sentenced to four-and-a-half years imprisonment with eligibility for parole after serving 18 months for dishonestly obtaining property owned by her employer. The offender was aged between 54 and 56 and was employed as a bookkeeper in a business. She had been employed for four years before she commenced misappropriating and over the period of almost two years effected 94 transactions involving the misappropriation of just under $100,000. Her depredations contributed to the failure of the business as a result of which 17 other employees lost their jobs. She had a relevant criminal history, having twice previously been convicted of fraudulent acts as an employee. An examining psychiatrist considered that she had been chronically depressed for many years. Her early plea of guilty was taken into account. In sentencing the court was asked to apply the principles in *Tsiaras*[46] and confirmed in *Verdins.*[47] Keane JA, with

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44 [2000] QCA 380.
45 [2009] QCA 377.
46 [1996] 1 VR 398.
47 (2007) 16 VR 269.

whom Fraser JA and Atkinson J agreed, observed that it was not evident from the psychiatric report

> "how the applicant's depression could have contributed to her fraudulent conduct. As a matter of ordinary human experience one can say that those who suffer depression are not known to be given to defrauding their employers."[48]

The application was refused.

[56] The applicant also relies on *R v Riesenweber; Ex parte Attorney-General of Queensland*.[49] That offender was secretary/receptionist for a dentist who misappropriated an amount in the vicinity of $40,000. She was sentenced to three years imprisonment wholly suspended with an operational period of four years. She had been steadily stealing fees from her employer over many years but had destroyed the receipts so that her past activities had been covered. She had started taking money when her husband lost his job. Ultimately the amount taken was repaid by raising a loan on her family home. The maximum penalty was 10 years imprisonment. What dictated the sentencing judge's decision not to require the offender to serve any actual time in prison was a serious physical injury to the offender's ankle which confined her to a wheel chair. The outcome, dismissing the Attorney's appeal, was described as "marginal" by the court.

[57] In *R v Robinson; ex parte A-G (Qld)*[50] the offender pleaded guilty to dishonestly obtaining some $33,000 from the Queensland Police Credit Union over approximately a year. He was sentenced to six months imprisonment suspended immediately with an operational period of two years and ordered to pay compensation. The offender was employed as an insurance consultant with the Queensland Police Credit Union and used his position fraudulently to transfer members' funds on their home loan policies into his own bank account. He performed 101 transactions and covered his tracks with false records. His fraud was detected during an external audit. He had used the money to fund his poker machine gambling habit and to buy personal items. He was 49 and had no criminal history. A report of a clinical psychologist was tendered which suggested that he was vulnerable. He had attempted suicide in the past and after being placed on anti-depressants began to gamble. Although it had been said at sentence that he was in a position to access his superannuation to make restitution, at the appeal he still had not done so. The court reviewed a number of sentences noting that in *Blackhall-Cain* that a heavier sentence could have been imposed and observed the breach of trust which demanded, ordinarily, an actual period of imprisonment. The court substituted a term of two-and-a-half years imprisonment suspended after six months with an operational period of three years.

[58] The offender in *R v La Rosa; ex parte A-G (Qld)*[51] pleaded guilty to stealing just over $50,000, the property of her employer, over an 18 month period. The maximum penalty was 10 years imprisonment. She was sentenced to three years imprisonment wholly suspended with an operational period of three years and ordered to make partial restitution. That offender was stealing money on almost a daily basis from the cash register of the business where she worked. She was aged

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48 At [22].
49 [1996] QCA 504.
50 [2004] QCA 169.
51 [2006] QCA 19.

20 to 21 at the time of offending, had no prior criminal history and suffered from the psychiatric condition, bulimia. She was said to have taken the money to buy food and clothes. Kean JA observed that where an offender has abused a position of trust in order to steal a substantial amount of money over a lengthy period of time "a non-custodial sentence can only be justified in the most exceptional cases."[52] His Honour commented of the submission that the offender's condition should have led to a wholly suspended term of imprisonment: "it must be emphasised that even a genuine psychiatric condition is not necessarily a reason to impose a lenient sentence."[53] The court allowed the appeal and imposed a head sentence of three years with a recommendation for post-prison community release after nine months to take account of the mitigating circumstances.

[59] The offender in *R v Allen*[54] pleaded guilty to dishonestly applying to his own use over nearly four years a quantity of cheques, credit cards and goods belonging to the company of which he was the general manager. The amount was just under $70,000. He was sentenced to imprisonment for four years suspended after 15 months with an operational period of five years. That offender was otherwise of good character and had good prospects of rehabilitation and had made full restitution to his employer. Because restitution was seen as demonstrating true remorse, a significant reduction in the actual term of imprisonment imposed was required and the sentence was varied to suspend it after nine months instead of 15.

[60] In *R v Parker*[55] the offender pleaded guilty to six counts of fraud and two counts of stealing as a servant and other lesser offences for which she was sentenced to five years imprisonment suspended after 21 months with an operational period of five years. The offender was employed in an administrative capacity by an automobile dealership and had access to her employer's computer systems and records. Her fraud took a variety of forms including transfer of funds into her own accounts. In all, the offender took a total of just under $230,000 in approximately 96 separate fraudulent transactions. She made no restitution. She had no relevant previous criminal history. The money was used to fund her gambling habit. The crime was described as persistent and self-indulgent. The court interfered in the sentence to correct an error but did not alter the actual penalty.

[61] In *R v Tacey; ex parte Commonwealth Director of Public Prosecutions*[56], a decision which is not of assistance save with respect to the offender's health. The offender failed to bring into account cash takings in the income tax returns of her family company. She was given a fine. The loss to the revenue was made good by the company selling property. The evidence demonstrated that the offender had serious physical ill health problems with a significantly increased risk of a cerebro-vascular accident including a heart attack were she to be imprisoned. Davies JA and I observed in our joint judgment:

> "It should not be thought that a sentence of imprisonment may be avoided by an offender merely because she or he has a serious illness, even one involving some risk of death."[57]

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52 At [24].
53 At [26].
54 [2005] QCA 73.
55 [2007] QCA 22.
56 [1994] QCA 15.
57 At p 6 of the joint reasons.

[62] In *R v Gourley*[58] the offender pleaded guilty to dishonestly obtaining money from her employer, the Defence Force Credit Union. She was sentenced to six years imprisonment with parole eligibility after two years and three months. The defrauding occurred over a four-and-a-half year period when she was in her mid-forties. She defrauded her employer by opening a series of loan accounts in other names and drawing down most of the available funds and gambling them away. Eventually when she could no longer conceal her wrongdoing she went to the police and confessed. The actual loss was over $213,000. In reviewing comparable authorities the court concluded that:

> "… a head sentence of six years falls within the pattern for the sum of this kind and the provision for early release after two years and three months is not outside a proper exercise of discretion …"[59]

[63] One of the few cases cited concerning a solicitor is that of *R v Marsden; ex parte Attorney-General*.[60] That offender pleaded guilty to a charge of stealing over $500,000 for which she was sentenced to four years imprisonment with a recommendation for parole after one year. The maximum penalty for the offence at the time was seven years imprisonment. The offender was a solicitor practising on her own account. She was 50 years of age and had no prior criminal history. The money which she stole was the property of one client. Over a number of years the offender had taken money from an estate of which the client was a beneficiary. She used the money to invest in a group in the Bahamas with the intention that the investment would be successful, money returned with interest and that she herself would take part of the profit. The result was a complete loss of the funds entrusted to her. The report of a clinical psychologist suggested that the offender had personal problems but there was no suggestion of any psychiatric disorder. The offending was devastating for the client and her husband who had trusted their solicitor implicitly with all their legal and investment affairs. It was apparently not clear that the funds could be recovered from the Fidelity Fund. The offender had expressed remorse, undertaken voluntary work and had the care of two young children, one of which had serious medical problems. Davies JA observed:

> "All the cases to which I have referred, involved professional people, either solicitors or in the last case, an accountant, from whom the public are entitled to expect a very high degree of integrity. The maintenance of public trust in such persons demands substantial deterrent sentences for offences of this kind."[61]

While the sentence was said to be towards the lower end of the appropriate range, it was not considered manifestly inadequate.

[64] In *R v Lather*[62], another case concerning a solicitor, the offender pleaded guilty to two counts of dishonestly applying money belonging to him subject to a trust which should have been paid to the beneficiaries of a deceased estate. He was sentenced to six years imprisonment with eligibility for parole after serving one-third. The facts of the fraud are particularly complex and it is not fruitful to canvas them. There were difficulties with the fact finding exercise undertaken at first instance. The court, therefore, had to re-sentence the offender. The court found that there was

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58 [2003] QCA 307.
59 At p 4. per Mackenzie J.
60 [1999] QCA 237.
61 At p 8.
62 [2011] QCA 143.

no evidence from which it could be concluded that the offender intended permanently to deprive the estate of the capital which he had applied to unauthorised investments. He was sentenced on the basis that no financial loss was caused by his offending. Wilson AJA observed:

> "The applicant's conduct involved a gross breach of trust by a solicitor. It was dishonest and reprehensible in the extreme … [T]he public are entitled to expect a very high degree of integrity from solicitors, and the maintenance of public trust in them demands substantial deterrent sentences for offences of this kind. The sentence imposed on him must involve a substantial term of imprisonment as condign punishment, as an expression of the community's condemnation of this sort of conduct by a professional person, and by way of general deterrence."[63]

[65] Her Honour referred to *R v Lory*[64] which concerned a 61 year old solicitor who pleaded guilty to misappropriation as a trustee. That offender had monies entrusted to him by clients with instructions to invest in a particular way which he failed to observe. The investments which he selected failed. There was no loss to the clients because of payment from the offender and from the Fidelity Fund. He was sentenced to four years imprisonment. The court in *Lather* imposed a head sentence of five years and in recognition of a plea of guilty and other personal circumstances recommended parole eligibility after about a third.

[66] The offender in *R v Adams; ex parte A-G (Qld)*[65] pleaded guilty to one count of stealing as a servant and was sentenced to four years imprisonment suspended after nine months with an operational period of five years. She was employed as a bookkeeper by a company which sold metal products and her duties included invoicing and the payment of bills. Over a period of almost 12 months she had stolen approximately $240,000 by altering details on the company's cheques and depositing the monies into her bank account on 36 occasions. When confronted she admitted her dishonesty. The money was spent mainly on holidays for herself, her family and friends. A letter from a psychiatrist who had treated her said that she was under acute stress at the time of the offences and had developed an adjustment disorder with depressed mood. She was described by another psychiatrist as suffering from a "most severe Borderline Personality Disorder". Holmes JA, in responding to the submission that the statement in *Tsiaras*[66], that serious psychiatric illness short of insanity was relevant to sentencing, observed that there was no psychiatric illness only a personality disorder "a not uncommon feature of those who commit criminal offences, reflecting more a pattern of functioning than illness".[67] Her Honour observed that while personality problems and unhappy circumstances are relevant in mitigation, they did not bring the offender within the class of case discussed in *Tsiaras*. The sentence was altered only to one of suspension after 15 months.

[67] The respondent referred to *R v Henry William Smith*[68] for a consideration of the appropriate weight to be given where psychiatric factors intrude into the moral

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63 At [27].
64 CA 170 of 1987.
65 [2006] QCA 312.
66 [1996] 1 VR 398.
67 At [17].
68 [2001] QCA 430.

culpability of an offender who pleads guilty to dishonesty. That offender pleaded guilty on ex officio indictment to dishonestly applying to his own use money belonging to various persons. The offending was committed over many years involving a little over $6.5 million, $1.8 million of which had not been recovered. The offender was a solicitor. His dishonesty occurred in 72 individual transactions involving 31 victims or sets of victims. Chesterman JA said "[i]t is impossible to imagine a more reprehensible course of conduct or a more disgraceful contravention of the trust he enjoyed as a solicitor".[69] Clearly, that offending is not at all comparable to the present situation. However, it is useful for observations about the offender's psychiatric condition. There was some evidence that he was severely depressed during some part of the period in which he offended. It was said by one psychiatrist that his major depression was such as to affect his discriminative judgment which was involved in his criminal behaviour. Chesterman JA observed:

> "… a serious psychiatric illness, such as major depression, is relevant to sentencing in a number of ways. Mental illness which partially explains offending conduct reduces the moral culpability of the offender. As well it becomes inappropriate to impose a sentence as a means of deterring others from similar criminal conduct when the conduct is, by definition, the product of special circumstances. Similarly, there is less need for specific deterrence because, if successfully treated, the partial cause of the offences will dissipate without punishment."[70]

[68] The respondent also referred to *R v Peter Richard Smith*.[71] The offender in that case pleaded guilty to one count of fraud and seven counts relating to the fraudulent passing of cheques. He was sentenced to four years and six months imprisonment suspended after serving 18 months for an operational period of four-and-a-half years. That was an application for an extension of time and the facts were dealt with briefly by the court. It appears that the offender and another were directors of a company involved in the purchase and development of land. A signature of both directors was required on cheques and over a period of seven months the offender fraudulently drew seven cheques, applying his own signature and forging that of his co-director on four occasions, and on three occasions presenting cheques which bore his signature only. By those means he dishonestly obtained $184,000. He declined to be interviewed by police but ultimately pleaded guilty. He was aged 50 with no prior criminal history. The court concluded that the sentence was within range for fraud of that magnitude.

[69] Finally, the respondent referred to *R v Wheeler & Sorrensen*.[72] Each of the offenders was a director of a company which dealt in the auction and selling of motor cars. When an administrator was appointed at the behest of the directors there was found to be a general deficiency of over $600,000. The business received vehicles from customers for sale on consignment. The proceeds of sale, less commission and expenses, were to be paid into a statutory trust account and disbursed to the consignor of the vehicle. At a time of financial stress in the business the offenders withdrew monies from the trust account and paid that money into the general account from which withdrawals were made to cover business costs

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69 At [13]. The sentence imposed was the maximum, 10 years, but was complicated by transferred New South Wales parole eligibility.

70 At [16].

71 [2009] QCA 204.

72 [2002] QCA 223.

including salaries of the staff and the offenders. Book entries were falsified to conceal that the monies had been paid to the general account. For some time sufficient sums of money were returned to the trust account so that the consignors could be paid but when that could not occur the administrators were appointed. There was some difficulty about the actual losses that were sustained. Substantial claims (less some worth $180,000) were paid out of the relevant Fidelity Fund. Each offender was sentenced to six years imprisonment with parole after two years. The offender, Wheeler, suffered from reactive depression associated with the collapse of the business as well as other family pressures.

[70] In *Wheeler & Sorrensen* the court referred to a number of authorities of which two may be mentioned. In *R v Taylor*[73], the offender was sentenced to seven years imprisonment for dishonest application of monies received for investment in insurance company financial products. The amount involved was $650,000. The monies were spent to keep his business running and not used for high living. The offender pleaded guilty. It was conceded that the plea had not been reflected appropriately in the sentence. The appeal was allowed only to the extent of a non-parole period of two-and-a-half years being ordered. In *R v Anderson*[74] the offender disposed of assets which had the effect of reducing the value of securities available to creditors. $1.5 million was involved. It was described as an attempt by a man of otherwise good character to keep a failing business alive. He had hoped to repay his creditors not to enrich himself. A sentence of six years with a recommendation for release on parole after two years was held not to be manifestly excessive. The applications of Wheeler and Sorrensen were refused.

Discussion

[71] The head sentences imposed in *Gourley*, *Lather* and *Wheeler & Sorrensen* tend to support a head sentence of five to six years for these offences before consideration of the *Tsiaras* principles. The Attorney-General's appeals would suggest six years is too high but they must be regarded as each having particular features which did not call for interference for excessive leniency on an Attorney-General's appeal.

[72] I am of the view that insufficient recognition was given by the primary judge to the applicant's mental illness, the role it played in his offending and that it was brought on by events external to himself and which were, eventually, held to be unfounded. By then the damage had been done. The applicant had sought treatment before his offending commenced but it was not successful. That combined with the applicant's co-operation with the authorities and the extra suffering that prison imposes means that the sentence was manifestly excessive. The applicant must be re-sentenced.

[73] The nature of the offending itself by the applicant as a solicitor is of relevance. He did not plunder the funds of his clients in the sense considered in *Marsden*, who received only a four year head sentence and was without serious psychiatric illness. Nor did the applicant deal speculatively with the funds entrusted to him as in *Lather* who had no psychiatric problems. The failure to remit tax, having been entrusted with that task as a consequence of his privileged status as a solicitor was, of course, a serious offence, but the illness directly contributed to the chaotic state of the applicant's legal practise. At the time of sentence the applicant still required

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73 [1994] QCA 574.

74 [2000] QCA 257.

medication and psychotherapy. Even if the medical reports went further than was entirely appropriate, speaking against incarceration, there could be no doubt that the applicant was particularly vulnerable. A long period in prison was not called for and the necessary punishment could have been reflected by a period of imprisonment before suspension of about nine to 10 months. The "visibility" of general deterrence will be satisfied if the head sentence remains at four-and-a-half years. The many mitigating features can be reflected in a moderate, but not trivial, period of actual incarceration. The applicant has served his time in prison with greater hardship than many and may be appropriately released when judgment in this appeal is delivered.

[74] These are the orders which I would propose:

1. Give leave to read and file the affidavit of Michael Dermott Yarwood sworn 21 July 2011.
2. Grant the application to adduce evidence for a limited purpose.
3. Grant the application for leave to appeal against sentence.
4. Allow the appeal and vary the sentence imposed below by ordering suspension on 13 December 2011.

[75] **NORTH J**: I have read the reasons of White JA. I agree with her Honour's reasons and with the orders she proposes.