

IN THE COURT OF APPEAL

[1997] QCA 014

SUPREME COURT OF QUEENSLAND

Brisbane

[A-G v. Heiser and Cook]

C.A. No. 507 of 1996

THE QUEEN

v.

ALAN WOODROW HEISER

Respondent

ATTORNEY-GENERAL OF QUEENSLAND

Appellant

C.A. No. 506 of 1996

C.A. No. 513 of 1996

THE QUEEN

v.

MAXWELL LEONARD COOK

Applicant/Respondent

ATTORNEY-GENERAL OF QUEENSLAND

Appellant

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Fitzgerald P.  
Davies J.A.  
McPherson J.A.

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Judgment delivered 4 March 1997

Judgment of the Court

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**APPLICATION FOR LEAVE TO APPEAL AGAINST SENTENCE BY COOK  
REFUSED.**

**THE ATTORNEY-GENERAL'S APPEALS AGAINST SENTENCES ALLOWED.**

**THE SENTENCES IMPOSED BELOW SET ASIDE AND IN LIEU COOK IS SENTENCED TO NINE YEAR'S IMPRISONMENT IN RESPECT OF EACH COUNT OF MISAPPROPRIATION TO BE SERVED CONCURRENTLY AND THREE YEARS' IMPRISONMENT IN RESPECT OF EACH COUNT OF INDUCING MONEY TO BE DELIVERED BY WILFULLY FALSE PROMISES WITH INTENT TO DEFRAUD TO BE SERVED CONCURRENTLY BUT CUMULATIVELY UPON THE SENTENCES IMPOSED FOR MISAPPROPRIATION.**

**HEISER IS SENTENCED TO SEVEN YEARS' IMPRISONMENT IN RESPECT OF EACH COUNT OF MISAPPROPRIATION AND THREE YEARS' IMPRISONMENT IN RESPECT OF EACH COUNT OF INDUCING MONEY TO BE DELIVERED BY WILFULLY FALSE PROMISES WITH INTENT TO DEFRAUD; ALL SENTENCES TO BE SERVED CONCURRENTLY.**

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**CATCHWORDS: CRIMINAL LAW - sentence - Attorney-General's appeals against sentences for multiple offences of wilful false promise and misappropriation - secretary of Friendly Society dishonestly received \$300,000 sentenced to three years' imprisonment with recommendation after nine months - chairman of Society received balance of \$3,000,000 sentenced to nine years' imprisonment - disparity between sentences of co-offenders - whether sentences manifestly inadequate.**

Counsel: Mrs. L. Clare for the appellant.  
Mr. T. Rafter for the applicant/respondent Cook.  
R. O'Regan Q.C. for the respondent Heiser.

Solicitors: Queensland Director of Public Prosecutions for the appellant.  
Legal Aid Office for the applicant/respondent Cook.  
Poteri Woods for the respondent Heiser.

Hearing Date: 13 February 1997

## **REASONS FOR JUDGMENT - THE COURT**

### **Judgment delivered 4 March 1997**

On 22 October 1996, Maxwell Leonard Cook was convicted of 39 offences of inducing money to be delivered by wilful false promises with intent to defraud and two offences of dishonestly applying money the property of the Trustees of the Family Security Friendly Society while an employee of that Society. The total amount involved was in excess of \$3.3 million. On the following day, Alan Woodrow Heiser was convicted on 34 of the 39 offences of inducing the delivery of money by wilful false promises with intent to defraud and the two offences of dishonestly applying money the property of the Society while an employee of the Society. On 29 October 1996, Cook was sentenced to imprisonment for three years for each of the 39 offences of inducing the delivery of money by wilful false promises with intent to defraud to be served in three cumulative periods totalling nine years, and nine years' imprisonment for each of the offences of misappropriation to be served concurrently with each other and with the imprisonment for the other offences. On 12 November 1996, Heiser was sentenced to two years' imprisonment for each of 22 of the offences of inducing the delivery of money by wilful false promises with intent to defraud and one year's imprisonment for each of the other 12 such offences to be served by a cumulative period of imprisonment for three years, and to imprisonment for three years for each of the offences of misappropriation, to be served concurrently with each other and with the imprisonment for the other offences; an order was made that Heiser be eligible for consideration for parole after serving nine months' imprisonment. Cook applied for leave to appeal against his sentences on the basis of the disparity between his sentences and those of Heiser, and the Attorney-General appealed against the sentences of both Cook and Heiser on the ground that the sentences are manifestly

inadequate.

The Society was registered in 1987 and commenced trading in 1988. The offences occurred in 1990, and the Society subsequently collapsed. Cook was aged about 58 years and the Chairman of the Society. Heiser, who was aged about 48 years, Cook's accountant, and the Secretary of the Society, dishonestly received about \$300,000.00 of the money involved in the offences. The balance, about \$3 million, ended with a company which Cook controlled of which Heiser was either the Secretary or Accountant. Neither Cook nor Heiser has a relevant criminal history.

The Registrar of Friendly Societies commenced investigations by about November 1990 and appointed himself Administrator in January 1991. Cook and Heiser continued to practice deception. Investors in the Society, many of them retirees, lost substantial sums of money, and some are still pursuing litigation in an effort to recover losses. The criminal trial at which Cook and Heiser were convicted occupied about three weeks. There was no restitution, no cooperation, and no indication of remorse by either.

Cook, who was sentenced first, did not seek to disturb his sentences except by reference to the difference between his sentences and those of Heiser. It is necessary to leave that point to one side initially, since any disparity might vanish if Heiser's sentences are too low. It was submitted for Cook that the offences which he committed constituted a single transaction or enterprise over an extended period of about ten months, and that there was no justification for a sentence in excess of the statutory maximum for each of the two offences of misappropriation, namely, imprisonment for ten years; the sentence of nine years imposed was close to the

maximum and a sound exercise of the sentencing discretion.

However, there is no principle that no matter how many offences are committed, how long the period over which they are committed, or how much is involved cumulative sentences exceeding the maximum permissible for a single offence should never be imposed. It is necessary to ensure that the punishment imposed is proportionate to the total criminality, and it is permissible to achieve this by requiring some sentences to be cumulative upon others. Such a course was correctly upheld in Ollis and Andersen (1986) 21 A.Crim.R. 256, in which Ollis was sentenced to a total of 12 years imprisonment for 19 offences of obtaining money or goods by wilfully false promises, 23 offences of misappropriation of property, and one offence of attempting to obtain money or goods by a wilfully false promise. Even allowing for inflation over the period between the offences committed by Ollis and those committed by Cook, the offences by Cook involved considerably more money than those committed by Ollis.

Our attention was directed to a number of cases,<sup>1</sup> which we do not think necessary to discuss. Cook's total sentence fails to adequately reflect the gravity of his offences or the importance of deterrence in such cases. The first of the misappropriation offences involved nearly \$2 million and the second \$1.4 million. While the sentence imposed in respect of each, nine years' imprisonment, is adequate, as is the sentence of three years' imprisonment in respect of each of the 39 offences of inducing money to be delivered by wilfully false promises with intent to defraud, the total sentence of imprisonment is manifestly inadequate. The position should be

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<sup>1</sup> R. v. Campbell and Brennan (1981) Qd.R. 516; R. v. Weber (C.C.A. 187 and 220 of 1985); R. v. Henderson (C.C.A. 85 of 1987); Hoad (1989) 42 A.Crim.R. 312; R. v. Tyson (C.A. 272 of 1992); R. v. Corrigan (C.A. 184 of 1993); R. v. Palmer (C.A. 441 of 1993); R. v. Griffiths (C.A. 146 of 1994); R. v. Crooks and Harvey (C.A. 206 and 207 of 1994); R. v. Chapple (C.A. 461 of 1994); R. v. Geertz (C.A. 121 of 1995) and R. v. Viola (C.A. 134 of 1996).

corrected by ordering that the two sentences for misappropriation be served concurrently and the 39 sentences for inducing money to be delivered by wilfully false promises with intent to defraud be served concurrently but cumulatively upon the sentences imposed for misappropriation.

In arriving at that conclusion, Cook's disparity argument has not been overlooked. However, it is plain that Heiser's sentences are manifestly inadequate and must be increased substantially.

Indeed, the sentences imposed upon Heiser are incomprehensible unless a specific error made by the trial judge is noticed. Heiser's sentencing was delayed to enable a pre-sentence report to be obtained from a psychiatrist, Dr Peter Mulholland. Based on a theory advanced by Dr Mulholland, but without any evidentiary basis, his Honour concluded that Heiser, whom he described as "educated, cultured, articulate, urbane", was a comparatively minor participant, "a backroom boy", who because of depressive illness and alcohol abuse, was unable to resist Cook's domination. Emphasis was also placed upon Heiser's public and professional disgrace, and his lack of prior criminal offences or legal representation at his trial. Further, Heiser received substantially less than Cook from the proceeds of their offences, and was considered to have extremely good prospects of rehabilitation.

While the latter points have some validity, the trial judge's assessment of the relationship between Cook and Heiser and Heiser's role lacks any substantial foundation. Even if Cook was the instigator, Heiser's skill, qualifications and perhaps reputation as an accountant were essential to the offences. Taking all these factors into account, including Heiser's potential for rehabilitation, the minimum term to which he could properly have been sentenced in respect of

each of the misappropriation offences was imprisonment for seven years. Further, in our opinion, Heiser should receive the same sentences as Cook in respect of each of the offences of inducing money to be delivered by wilful false promises with intent to defraud of which he was convicted, namely imprisonment for three years. All sentences should be served concurrently. There is no possible justification for a recommendation that Heiser become eligible for consideration for parole earlier than would otherwise be the case. The factors in his favour are already accommodated in the head sentences.

The sentences which it is proposed be substituted for the sentences imposed below take into account the need to avoid such a disparity between the sentences imposed on Cook and Heiser respectively that Cook might have a legitimate sense of grievance.

In summary, we would refuse Cook's application for leave to appeal against sentence, but grant the Attorney-General's appeals against the sentences imposed upon each of Cook and Heiser. To the extent necessary to give effect to what we have stated, the sentences imposed below should be set aside and the sentences which we have indicated should be substituted. The result will be 12 years' imprisonment for Cook and seven years' imprisonment for Heiser.