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IN THE COURT OF APPEAL
CRIMINAL DIVISION

CASE NO 202200813/A2



[2022] EWCA Crim 804

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday 20 May 2022

Before:

LORD JUSTICE COULSON

MRS JUSTICE McGOWAN DBE

MR JUSTICE BOURNE

REGINA
V
JASON WRAY

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MS R TANNER appeared on behalf of the Appellant.

J U D G M E N T

LORD JUSTICE COULSON:

Introduction

1. The appellant, Jason Wray, is now 35. On 20 September 2021 in the Crown Court at Sheffield, he pleaded guilty to one count of engaging in an unfair commercial practice, contrary to Regulation 8(1) of the Consumer Protection from Unfair Trading Regulations 2008 (“the Regulations”). On 4 March 2022 he was sentenced by HHJ Kelson QC (“the judge”) to a term of 9 months' imprisonment. He appeals against that sentence with leave of the single judge.
2. The Regulations require a trader to exercise a standard of special skill and care, that was either honest market practice in the trader's field of activity, or by reference to the general principle of good faith. By his guilty plea, the appellant recognised that he had failed to meet that standard.
3. Because of the relatively unusual nature of this offence, and because the judge's sentencing exercise, and therefore our own judgment, can only be understood by reference to the particular facts of these cases, it is necessary to set out those facts in some detail.

The Facts

4. Between February 2017 and October 2018, the appellant provided quotes and subsequently carried out building work for four different customers. All four customers were left with an incomplete job, and all were dissatisfied with the quality and the time that it had taken for the building work to be carried out. Had the customers known that the workmanship would be so poor, and that the works would be so delayed and would be left incomplete, they would not between them have paid almost £35,000 to the appellant. The appellant pursued contracts with these customers by purporting to be a solvent and stable businessman, yet he was aware at the time of his own financial and other instabilities.

5. We deal briefly with each of those four customers.

i) Florence Anne Hillier (Total loss £2,040)

6. Florence Anne Hillier found the appellant via a Facebook group when she was searching for a builder. She met him at her home in February 2017. They discussed her requirements and after some negotiation agreed a contract price of £1,860 for building, plumbing and electrical work with a start date of 20 March 2017. The work stated before that date and much of it was carried out whilst Ms Hillier was at work. She made bank transfers as directed by the appellant in February and March.
7. There were however significant issues with the quality of the work. The most obvious one related to the electrical work. Ms Hillier experienced electric shocks each time she touched the washing machine that the appellant had relocated. In the end Ms Hillier was obliged to engage another electrician. He found that the electric shocks were caused by serious errors on the part of the appellant in the installation of the washing machine. That included the fact that live and neutral wires in the new fuse box had been wired the wrong way round.
8. Ms Hillier sent a list of problems to the appellant in April 2017 but, despite promising to visit her home to carry out those outstanding works, he never did. Ms Hillier never received electrical test or building regulation certificates in relation to the work carried out by the appellant.

ii) Ms Heather Elaine Lonsdale (Total loss £5,340)

9. Heather Lonsdale found the appellant via a Facebook group in the same way as Ms Hillier had done. The appellant visited her home, and they agreed a contract for building, electrical and plumbing works in the total amount of £4,450. The schedule of payment

that the appellant provided two days before the work began asked for £2,670 of that to be paid that day, with the remaining half to be paid on completion. The money was paid. The work started but there were problems from the outset. The appellant removed the existing kitchen and then told Ms Lonsdale that her new worktops were specialist work and would cost another £520 to be fitted. He overpriced the tiles and the grout.

10. At the same time, the work fell behind schedule. Ms Lonsdale met with the appellant to discuss her concerns. He admitted that he had miscalculated the cost of the tiling. Ms Lonsdale was concerned but wanted to keep the appellant on-side, so the work would continue. However, she then discovered that the new boiler which the appellant's employees had installed was not working. He sent one of his men back to take a look. Ms Lonsdale quickly realised that the man was drunk and he did not know what he was doing.
11. The work should have been completed by the end of February but not only was it incomplete at that stage, but Ms Lonsdale then discovered that the appellant had not applied for building regulation approval for the structural work that he had done to the chimney breast. He had expressly allowed for obtaining such approval in his quotation. He then changed his position, and said that she did not require that consent. She maintained that she did. There were also no completion certificates for the electrical work.
12. Despite all of these difficulties the appellant then sought the outstanding balance for the work and said that she could withhold £100 for all that remained outstanding. She refused and wanted the certificates before she paid any more money. The argument continued for a couple of weeks. In the end Ms Lonsdale provided a further £1,000, but again the problems with the works were not sorted out. Eventually, Ms Lonsdale was driven to

proposing that she pay somebody else to finish the work and provided estimates for this. The appellant refused to agree. He said he would return but he did not.

iii) Claire Bingley (Total loss £12,650).

13. Claire Bingley contacted the appellant when she got the keys for her new property, which required extensive remodelling and renovation work. She spent some time negotiating a price with the appellant. They eventually agreed a contract for £14,360.
14. As the appellant knew, Ms Bingley had a tight budget. The appellant said that he would get the price of the work down if she paid him in cash to avoid VAT. He set that out to her in an email. Work then started. Ms Bingley complied with the payment schedule that the appellant had given her. There were delays to the work and it became apparent to Ms Bingley that all of the works were behind, and she was having to constantly chase the appellant for updates.
15. By the time that the appellant had applied to liquidate the relevant company, Ms Bingley had paid him £12,650 in cash (in other words some 90% of the agreed contract sum) but her house was totally uninhabitable. There was no running water, gas, electric or working sanitation. She and her two children were left homeless. She then had to provide a further £14,000 to another builder to undo all that the appellant had done and to put the house straight. She thought that eventually it would cost another £5,000 to achieve that.

iv) Daniel Newlove and Charlotte Cooper (Total loss £14,547).

16. The appellant quoted Mr Newlove and Ms Cooper £15,300 plus VAT to erect a single-story extension with some associated internal building work. The quote was dated 21 May 2018. Although it was promptly accepted, the work did not start until July. The

appellant said that he had merged his two companies so that Mr Newlove no longer needed to pay VAT. The work commenced, but then followed a very similar pattern to the works at Claire Bingley's house. Payments totalling over £14,000 were made within the first 4 weeks, but Mr Newlove and Ms Cooper had very little to show for it. Work then stopped altogether. The last time the appellant did go to the site he was aggressive towards Ms Cooper before leaving. After that he never returned.

17. Mr Newlove and Ms Cooper instructed an expert who advised them that there were “considerable and significant faults in the building work and errors with roof construction, in particular displaying an ignorance and inadequacy in workmanship and construction”.

The Sentencing Exercise

18. The judge correctly noted that, during the interview that formed the basis of the pre-sentence report ("PSR"), the appellant seemed to deny many of the more important allegations made by the prosecution. As the judge said during the hearing, if the appellant maintained those denials, a Newton hearing would be required. However, following useful discussions between Ms Tanner (the appellant's counsel) and the judge, it was accepted that everything that the prosecution had opened to the judge (and which we have summarised above) was accepted by the appellant.
19. The PSR made a number of criticisms of the appellant's lack of insight and said that he had put his own needs above that of his victims. There was also a regrettable tendency to blame those who worked for him. However, the writer assessed the appellant as posing a low risk of re-offending and a low risk of causing harm to the public.
20. When he came to sentence the appellant, the judge noted that there were no Sentencing Guidelines for this specific offence. He approached the sentencing exercise, he said, by

reference to the structure on which most Sentencing Guidelines are based, namely a consideration of culpability and harm, any aggravating and mitigating features, and finally the discount for a guilty plea.

21. As to culpability, the judge concluded that, on the facts noted above, the appellant's culpability was high. He said:

"As to culpability, between February 2017 and October 2018, you provided quotes and subsequently carried out building works for four different customers, the four customers in this case. You pursued contracts with those customers by purporting to be a solvent and stable businessman yet being fully aware of your financial instability. In all four instances, the contract ran over with decreasing communication from yourself until you left all four jobs unfinished, having secured the majority of the money."

Then, having identified the salient features of each of the four victims, the judge went on:

"I hope that it is clear from that brief summary that your culpability in this case must be regarded as high. This was not just a single example of falling below the requisite standard in committing the offence; it was four separate customers, some of their work overlapping, all being strung along, all being grossly misled, all being made false promises, all whose concerns were simply ignored, all being asked for more money, at least one being asked for cash to avoid VAT, and at least one being dealt with aggressively. And this was a persistent course of conduct involving several victims over a period of 21 months."

22. As to harm, the judge described that too as "high". He referred to the particular experiences of Florence Hillier and Heather Lonsdale. Unsurprisingly, he referred in some detail to the victim impact statement of the third customer, Claire Bingley. As the judge noted, she suffered so badly at the appellant's hands that her house became uninhabitable and she and her children were forced to live with her ex-husband in a very small house for 7 months, and she had to spend the entirety of her life savings to get her house back into some sort of order. The victim impact statement from Ms Bingley highlights the emotional and personal impact upon her of the appellant's conduct of his

construction business. The judge also referred to Mr Newlove and Ms Cooper and the large sum they had paid and the little they had to show for it.

23. The judge found that there were no aggravating factors. He found that there were mitigating factors, including the appellant's effective good character, the very positive references that had been provided and the various other mitigation arguments put forward on the appellant's behalf. Taking all those factors into account, the judge took a 12-month starting point, gave credit for the mitigating factors and the guilty plea, for which he had separately identified a discount of 20%, and imposed a term of 9 months' imprisonment.
24. The judge was aware that an important question was whether the sentence could be suspended. As to that he said this:

"... the factors in favour and against are well known to the courts and are set out, and I acknowledge that -- of the factors indicating that it might be appropriate to suspend the sentence are the suggestion there's a realistic prospect of rehabilitation, strong personal mitigation, and that immediate custody will result in impact on others. I don't say significant harmful impact, but I acknowledge there will be an impact on your family."

25. In respect of factors indicating that it would not be appropriate to suspend a custodial sentence he said, by reference to the Sentencing Guidelines as to the Imposition of Custodial Sentences ("the applicable guidelines"), that some did not apply. The question, he said, was just this: is this a case where appropriate punishment can only be achieved by immediate custody? He said that he had arrived at the conclusion that this was such a case.

Grounds of Appeal

26. One important ground of appeal, as the single judge noted, was the argument that the judge was wrong not to suspend the sentence, having regard to the factors set out in the

applicable guidelines. That was the focus of Ms Tanner's helpful oral submissions this morning. But it is also said that the sentence was manifestly excessive in any event. Moreover, both submissions are based on the underlying criticism made by Ms Tanner, to the effect that the judge failed to have any or any adequate regard to the applicant's previous good character, working history and personal mitigation along with the low risk of re-offending.

27. It seems to us, therefore, that it is appropriate to take those points in reverse order, and to deal with the appropriate sentence on the particular facts of this case, before considering any question of suspension.

Was the custody threshold passed and, if so, what was the appropriate term?

28. In our view, there is no doubt that the custody threshold was passed. The litany of wreckage and disaster which the appellant left behind him plainly justified that conclusion. Ms Tanner accepted that in her realistic submissions this morning.
29. One of the main points put forward by Ms Tanner in her written grounds, to persuade us that the 9-month term was too long or should have been suspended, was to the effect that the appellant was a victim of his own success and that, as his business mushroomed, he was unable to keep pace with his commitments. We should say that we do not accept that as a mitigating factor; indeed on a proper analysis, we consider that it is a point against the appellant.
30. Stories of builders suddenly becoming too busy to meet their commitments are commonplace in the construction industry. When work increases, a sole trader such as the appellant must decide whether to keep his operation small, and so to turn away some new business until he is confident that he can provide a proper service, or to enlarge his business and take on extra staff to meet his expanding commitments. What a sole trader

must never do and what, as this case shows, can amount to potentially criminal behaviour, is to take on new work, and to take hefty deposits from new customers in anticipation of that work, knowing that he will not be able to perform the work properly or within a reasonable time scale, and then continually to fob off one customer after another as the problems multiplied.

31. No one should be in any doubt that this method of running a small construction business amounts to a criminal offence. It compounds the original dishonesty of taking money for work that the contractor has little or no prospect of carrying out properly or at all, by not coming clean with those customers or returning the deposits they have paid, and instead plunging further into lies and obfuscation. It is not, as Ms Tanner put it, a case of a businessman getting out of his depth: it is instead a businessman who gets too greedy and is only interested in the money that he can take from his victims, and not in the services that he is supposed to be supplying.
32. However, all of that said, we readily accept that, in this case, there were a number of other very strong mitigating factors. Those included the appellant's previous good character. He had one caution which was 12 years old and for an unrelated event and the judge rightly said he was going to treat him as a man effectively of good character. There were also the numerous positive references that were provided on his behalf. There was his charity work. There was his sound working history and the effect of a custodial sentence on his children.
33. There are some, albeit limited, expressions of remorse in the pre-sentence report. We note in particular that the appellant no longer wishes to run his own construction company. That we consider, on the facts of this case, to be a wise decision. Finally, Ms Tanner also referred to the delays which had occurred, and which would also amount to a mitigating

factor.

34. Did the judge properly take into account all those mitigating factors? Ms Tanner said he did not. We are bound to agree: indeed, we think that is demonstrable from the judge's own sentencing exercise. The judge started at 12 months and reduced that by 25%, (ie to 9 months) to take into account all the mitigating factors and the discount for plea. But he had promised a discount of 20% for the guilty plea on its own. That must mean that all the rest of the appellant's mitigation gave rise to no more than a further 5% discount. In this case, for the reasons we have given, that was plainly and obviously inadequate.
35. Accordingly, redoing that part of the sentencing exercise ourselves, and taking the judge's 12 months starting point, we would reduce that to around 8 months to reflect all his strong personal mitigating factors outlined above. In addition there is then the 20% discount for his guilty plea. Rounding down, that would reduce the sentence to one of 6 months' imprisonment. That is, we consider, the correct sentence in this case.

Suspension?

36. Should that sentence have been suspended? Whether or not a sentence should be suspended is primarily a matter for the sentencing judge. It is a matter of discretion, although of course that discretion has to be exercised by reference to the applicable guidelines. The only way in which this Court could interfere with such a decision is where the judge erred in principle or failed to take into account an important relevant matter.
37. In our view, although it might be regarded as stern, there was no error of law or principle in the judge's decision not to suspend the sentence. The judge had express regard to the applicable guidelines, and he considered all the relevant factors. We consider that he was entitled to conclude that, in the particular circumstances of this case, only an immediate

custodial sentence was appropriate; that the misery that he inflicted on his victims needlessly, and over many months, necessitated such an outcome. In our view, any suggestion that the failure to suspend the sentence was disproportionate is immediately dispelled on a reading of Ms Bingley's victim impact statement. We do not consider, therefore, that Ms Tanner is right to say that this sentence should have been suspended.

38. Accordingly, we quash the term of 9 months' imprisonment in this case and we replace it with a term of 6 months' imprisonment. For the reasons we have given, we do not suspend that sentence. We note that the appellant has served almost half that sentence already and is now on home detention curfew. It would therefore appear that the adjustments necessary to put into operation the new 6-month term will be relatively easy to achieve.