In The Supreme Court of Bermuda

CRIMINAL JURISDICTION
Case No. 35 of 2019

BETWEEN:

THE KING

-and-

NANCY VIERA

Before: **The Hon. Mr. Justice Juan P. Wolffe, Puisne Judge**

Appearances: Ms. Nicole Smith for the Prosecution
Mr. Mark Pettingill for the Defendant

Dates of Hearing: 9th May 2023
Date of Sentence: 9th May 2023
Date of Reasons: 21st June 2023

SENTENCE
(Reasons)

Sentencing Guidelines - Obtaining a Money Transfer by Deception – Theft – Defendant was a lawyer and in a position of trust at the time of the commission of the offences

WOLFFE J.

1. On the 27th January 2023 the Defendant was found guilty by way of a unanimous Jury verdict for one count of Obtaining a Money Transfer by Deception contrary to section 346(1) of the Criminal Code 1907 (the "Criminal Code") and two counts of Theft contrary to section 337(1) of the Criminal Code.

2. On the 9th May 2023, taking into consideration the submissions of Counsel, cited authorities and sections 53 to 55 of the Criminal Code, I sentenced the Defendant to 5 years imprisonment for the offence of obtaining a money transfer in the sum of $50,000 by deception (Count 1 on the Indictment); 3 years imprisonment for the theft of $28,615 by means of unauthorized automatic teller machine ("ATM") withdrawals (Count 2); and, 2 years imprisonment for the theft of $7,601.06 by means of unauthorized debit card transactions and an online transfer (Count 3). Set out herein are my reasons for doing so.

Evidence at Trial

3. The Prosecution's case, which each member of the Jury must have fully accepted, was that in November 2014 the law firm of MacLellan and Associates ("M&A") hired the Defendant as a lawyer to assist the sole proprietor Ms. Jacqueline MacLellan with matters related to divorce law. In or around June 2015 (approximately 7 months after the Defendant started working at M&A) the Defendant received a referral for a client who was named Ms. Kirsten Badenduck. At the material time Ms. Badenduck was a 64 year old quadriplegic (meaning that she could not move her body from the neck down) and she needed around the clock caregiving at her residence to keep her alive. Sadly, Ms. Badenduck passed away on the 14th January 2019 and therefore she did not give oral evidence at trial (her recorded police interview was played for the Jury).

4. The Defendant told Ms. MacLellan that M&A had been retained to handle one of the caregivers of Ms. Badenduck who had been accused of stealing money from Ms. Badenduck. Specifically, that Ms. Badenduck needed legal assistance with: (i) legally

terminating the caregiver's employment; (ii) making an application for a Protection Order to make sure that the caregiver did not come back to Ms. Badenduck's residence or try to influence other caregivers; and (iii) assisting police in ascertaining what monies had been stolen by the caregiver with a view to recouping the stolen money and charging the caregiver with any pertinent criminal offences. When giving her oral testimony at trial Ms. MacLellan said that knew that the Defendant began legal work in this regard as the Defendant would discuss the work in monthly meetings and that she would see the work done reflected in the Defendant's monthly timesheets and billings. As far as Ms. MacLellan knew the work that the Defendant was doing for Ms. Badenduck concluded sometime between January and April of 2016 as she stopped getting timesheets from the Defendant in relation to any work being done on behalf of Ms. Badenduck.

5. However, one day in November 2016 Ms. MacLellan received a call from Ms. Badenduck and three days later they met at the offices of M&A. Essentially, Ms. Badenduck made a complaint against the Defendant for not carrying out various pieces of work in a timely fashion or at all between April and November 2016. In particular, work in relation to the renewal of Ms. Badenduck's Canadian passport; renewal of a work permit of one of the caregivers; the payment of caregivers; the payment of social insurance payments; arranging for the repair of an alarm system at Ms. Badenduck's house; and the payment of credit card bills. Ms. MacLellan was also told by Ms. Badenduck that the Defendant and Ms. Badenduck had entered into a payment arrangement whereby the Defendant would be paid $2,000 per month for this aforementioned work. Ms. MacLellan was surprised by all of this as she was not aware that the Defendant was doing any work for Ms. Badenduck during this period as she was not receiving any timesheets from the Defendant in this regard.

6. There was also an issue of the Defendant borrowing $50,000 from Ms. Badenduck. Ms. Badenduck told Ms. MacLellan that the Defendant asked her for $50,000 so that she [the Defendant] could buy into a partnership of M&A. Ms. Badenduck also said that she had signed a Promissory Note with the Defendant in respect of this $50,000. All of this astonished Ms. MacLellan who said that she had never had any discussions whatsoever with the Defendant or gave the Defendant any ideas about any possibilities of the

Defendant having any partnership in M&A. A couple of days later Ms. MacLellan met with the Defendant to discuss Ms. Badenduck's complaints and the Defendant confirmed that she borrowed the $50,000 from Ms. Badenduck but that she gave no other reasons as to why she did so. She asked the Defendant for a copy of the Promissory Note but the Defendant never produced one.

7. There was no dispute at trial that the Defendant borrowed the $50,000 from Ms. Badenduck or that the Defendant initially represented to Ms. Badenduck that the sum was going to be used by the Defendant to buy into a partnership with M&A. There was also no dispute that the Defendant never had any discussions with Ms. MacLellan about any partnership in M&A.

8. Ms. MacLellan also asked the Defendant about the $2,000 payment arrangement and the Defendant confirmed that there was such. However, when Ms. MacLellan asked the Defendant for any invoices in this regard so that they may be put on Ms. Badenduck's client file the Defendant did not provide any.

9. Ms. MacLellan went on to say in her oral evidence that in November 2016 she learned for the first time that the Defendant had a Power of Attorney ("PofA") to manage Ms. Bandenduck's entire affairs i.e. everything to do with Ms. Badenduck's life other than making health decisions. Such as, handling Ms. Badenduck's financial affairs, managing Ms. Badenduck's banking accounts, paying the caregivers and for carrying out all of the other work mentioned earlier. It was discovered that the PofA was signed on the 11th June 2015 i.e. while the Defendant was in the employ of M&A and not long after Ms. Badenduck became a client of M&A. There was no dispute at trial that the Defendant entered into the PofA and that it was because of the PofA that the Defendant had full access to Ms. Badenduck's online banking accounts and that the Defendant had in her possession a banking fob and debit cards that allowed her to make online and ATM transactions.

10. As a result of what she learned in November 2016 Ms. MacLellan terminated the Defendant's employment effective 30th November 2016.

11. In December 2016 the Defendant brought two bank drafts to Ms. MacLellan. One was in the amount of $25,000 which the Defendant said was for half of the $50,000 loan under the Promissory Note. The other bank draft was in the sum of $15,000 which the Defendant said was for disbursements for the Canadian passport, the work permit fees, etc. The total of the two bank drafts was $40,000 and no further sums were received from the Defendant.

12. An accountant named Ms. Janice Bucci was then hired by Ms. MacLellan to deal with Ms. Badenduck's financial affairs. Ms. Bucci gave evidence at trial and she said that she carried out an analysis of Ms. Badenduck's bank statements of her accounts from the time the Defendant had taken over her financial affairs, specifically for the period June 2015 to November 2016. The analysis was to ascertain whether payments made out of those accounts were made with or without Ms. Badenduck's knowledge and in this regard Ms. Bucci made a list of payments made to the Defendant, of cash withdrawals from ATMs, of debit card purchases from various stores, and of other payments. Initially, Ms. Bucci did not know whether these transactions were legitimate or not and so the list was shown to Ms. Badenduck. From the information received from Ms. Badenduck she then compiled a final analysis/report of only the unauthorized payments (which was made an exhibit at trial).

13. In respect of the $50,000 loan amount from Ms. Badenduck to the Defendant (referable to Count 1 on the Indictment), Ms. Bucci stated that the bank statements showed that it came out of Ms. Badenduck's US Dollar Savings account on the 6th January 2016 by way of a manager's check and then went into a Clarien mortgage account belonging to a "Hampshire Trust" on the 27th July 2016 i.e. approximately 6 months later. Enquiries made by police revealed that in May 2004 the Hampshire Trust had borrowed the sum of $1,875,000 to purchase property located at 11 Rosemont Avenue which at the time was the Defendant's residence (it was also the Defendant's residence at the time of the commission of the offences), and, that the Defendant and her sister were trustees of the Hampshire Trust. On the 3rd August 2016 the sum of $109,996 was then withdrawn from this Clarien Account.

14. In respect of the unauthorized cash withdrawals from various ATMs throughout the Island, the entry on the bank statements showed the times and places when the relevant sums were withdrawn from the relevant ATM. For the period 23rd June 2015 to 19th November 2016 the total ATM cash withdrawals from Ms. Badenduck's Current Account was $18,925 and from her BD$ Savings Account the total was $9,690. The overall total unauthorized ATM cash withdrawals from both accounts was therefore $28,615 and this sum was referable to Count 2 on the Indictment.

15. In respect of the unauthorized debit card purchases from various stores and/or companies, and the online transfer payment, Ms. Bucci took the Jury through various debit card and online purchases for various periods from 21st August 2015 to 19th November 2016. The total of the unauthorized debit card purchases was $7,601.06 and this sum was referable to Count 3 on the Indictment.

16. DC Damon Hollis, the police officer in charge of the investigation, gave evidence that $4,320 of the aforementioned $7,601.06 went into the bank account of a company called Just Cleaners Ltd. ("Just Cleaners") on 12th February 2016 by way of an online transfer. Further enquiries by a PC Patrick Rock, who also gave evidence at trial, revealed that the principal of Just Cleaners was a Mr. Herculano Vieira who was the father of the Defendant. Additionally, that the Defendant was the vice-president of a company called "Just Properties" which came under the banner of Just Cleaners, and, that the legal address of Just Properties was "Just Cleaners Building".

17. Apparently, Just Cleaners was in the business of cleaning premises but it was the Prosecution's case that Just Cleaners carried out no cleaning services at Ms. Badenduck's residence at all and that if it did it could not have been to the tune of $4,320. Instead, the Prosecution advanced, the said sum was transferred from Ms. Badenduck's account to wrongly benefit a company which the Defendant had an intimate business and familial connection with.

18. It is obvious that the Jury accepted the Prosecution's case that the Defendant obtained the $50,000 by deceiving Ms. Badenduck into believing that it was to buy into a partnership at M&A when it was not, and that the Defendant made unauthorized cash withdrawals, debit card purchases, and an online transfer purely for her own benefit or that of her family members i.e. they were not for the benefit of Ms. Badenduck.

19. The Defendant elected to give evidence in her own defence and she said that:

- In a meeting in June 2015 Ms. Badenduck's brother Mr. Tore Badenduck ("Tore") told her that he would be giving her a Power of Attorney to facilitate the closure of Ms. Badenduck' bank accounts at the Bank of N.T. Butterfield and to open bank accounts with Premier Banking at HSBC, and that he instructed her to terminate the employment of the caregiver who was suspected of stealing from Ms. Badenduck. She stated that she discussed this with Ms. MacLellan the next day and that in a conference call with Tore Ms. MacLellan was made aware that she would have a PofA to carry out the work on behalf of Ms. Badenduck. Further, the Defendant said, all of this was on her timesheets, the PofA was discussed in the weekly meetings, and, that in late June 2015 she physically showed the PofA to Ms. MacLellan.

- She said that at all times Ms. Badenduck and Tore had access to the online banking and that in a meeting with herself, Ms. Badenduck, Tore, and a Ms. Susan Borque (a friend of Ms. Badenduck) it was discussed that until such time that a permanent caregiver was arranged that she [the Defendant] would be responsible for purchasing groceries and bulk items, purchasing items from the pharmacy or Gorhams, doing the payroll, and opening charge accounts at retail places such as Terceira's, Lindo's, etc. She said that Ms. Badenduck and Tore gave her authorization to use the debit card to do all of this, and that she was given authorization to withdraw cash to pay certain members of staff who were not full time employees of Ms. Badenduck.

The Defendant adduced into evidence notes, emails (some of which were sent to her work email address at M&A), text messages, notations on calenders etc. which she said supported her defence that she was given instructions to make purchases and enter into transactions on behalf of Ms. Badenduck.

- In respect of the cash withdrawals from the ATM, the Defendant said that these were for: salary for the part-time caregiver and another caregiver, petrol for Ms. Badenduck's car which was used by the caregivers to transport Ms. Badenduck, reimbursement to caregivers and the maintenance men for monies spent by them for groceries for Ms. Badenduck and supplies for the residence, Christmas bonuses for Ms. Badenduck's employees, Ms. Badenduck's driver, a ceiling fan for the premises, the opening of an account at Bank of N.T. Butterfield ("BNTB"), cleaning services by an individual cleaner, and for the payment for a caregiver's work permit (it was not in dispute that this work permit was never obtained by the Defendant and the Defendant stated in evidence that no amounts were paid out for the work permit).

- In respect of the debit card purchases she said that they were for the purchase of Wifi extenders for the premises, medical supplies and bulk items for Ms. Badenduck, meetings with caregivers, building supplies for the premises, stationary for Ms. Badenduck's printer, and for her [the Defendant] to stay at the Fairmont Princess Hotel for two nights for "personal reasons" (which she said the card was used in error).

- In respect of the online payment to Just Cleaners she said that this was for cleaning services carried out by them at Ms. Badenduck's residence.

- In respect of the $50,000 loan from Ms. Badenduck she said that in or around November/December 2015 Ms. Badenduck said that she would loan her the $50,000 to buy into a junior partnership at M&A and that in January 2016 Ms. Badenduck sent her an email to tell her that the funds were in the account.

However, she said, she told Ms. Badenduck that she was going to withdraw the funds via a manager's check but that she was still wavering as to buying into the junior partnership at M&A and that she would return the funds if she does not proceed with the junior partnership. She said that Ms. Badenduck said that if she returned the funds then she [the Defendant] should put it into an investment fund at Clarien. To this, the Defendant said that this is why she [the Defendant] went to HSBC and had the manager's check made out to Clarien (this is where the Hampshire Trust mortgage account was located).

She stated that in June 2016 she discussed the $50,000 with Ms. Badenduck and she adduced into evidence emails in which Ms. Badenduck is asking her if she was able to pay back the $50,000, and, also saying that a new wheelchair for her [Ms. Badenduck] cost $54,000. She said that on the 16th June 2016 she met with Ms. Badenduck about the $50,000 loan and that she told Ms. Badenduck that she was not in a position to repay the $50,000 as she had not received any percentages of her "billables" from Ms. MacLellan. She said that she also told Ms. Badenduck that she was not going to use the $50,000 for a junior partnership and that she was going to be using the $50,000 to help her family and put the money towards the mortgage on the property at 11 Rosemont Avenue (the Defendant's residence). She said that Ms. Badenduck agreed to this and that Ms. Badenduck did not have a problem with her paying the money back in December 2016.

She explained that in April/May 2016 Clarien called to say that they were calling in the mortgage on her 11 Rosemont Avenue residence but that this was not because the mortgage was not being paid. She said that her father attempted to pay the mortgage but that Clarien denied the payment and told her father that the account was closed. Therefore, the Defendant said, the mortgage became outstanding for a month. She said that her family no longer owns the property, that the Hampshire Trust no long exists, and that the house was foreclosed on and was sold in 2019.

- In respect of her involvement with Just Cleaners and/or Just Properties she said that she was secretary of Just Properties but that Just Properties was not a company. She also said that she was the Finance and Marketing Manager of Just Cleaners in 2017 and 2018 but not in 2015 or 2016 i.e. not when the offences were said to have taken place.

  She said that Just Cleaners went out of business in 2019 because in December 2016 and then again in 2017 her father suffered strokes. She said that in 2015/2016 Just Cleaners was not having any issues and that it was not being investigated for social insurance fraud. She said that she could not say much about this as she was not working for Just Cleaners.

- She said that the check of $25,000 that she gave to Ms. MacLellan in December 2016 was to partly pay back the $50,000 loan, and that the $15,000 was for the following: the fee for Ms. Badenduck's Canadian passport (she could not remember the amount); $1,800 for a caregiver's work permit (although she also stated in evidence that she withdrew cash from the ATM to pay for this work permit); $2,500 to open up a BNTB account to facilitate payment to another caregiver; $798 for the Fairmont Hamilton Princess stay; and the remaining amount, approximately $10,000, was to go towards the loan repayment.

  She explained that she had all the amounts for the Canadian passport, the work permit and the BNTB account in cash in her desk drawer at the offices of M&A. She further explained that she was not able to process these applications because she was very busy at work. Further, that Ms. MacLellan did not give her the opportunity on the 30th November 2016 to give her the cash that was in her drawer and that she only had one hour to leave the offices of M&A.

- All the work that she did for Ms. Badenduck were reflected in timesheets that were submitted to Ms. MacLellan. She said that she did not keep copies of her timesheets for herself and she did not have anything else other than the emails.

- The receipts for the cash withdrawals and the debit card purchases that she made were kept at Ms. Badenduck's residence.

20. Ms. Smith for the Prosecution extensively challenged and cross-examined the Defendant on the vast majority of her defence and in doing so questioned the veracity and accuracy of crucial areas of the Defendant's testimony, particularly as to the basis upon which she acquired the $50,000 from Ms. Badenduck and as to any supposed mutual discussions between the Defendant and Ms. Badenduck about any changes in the purpose for which the money was to be used i.e. from buying into a partnership at M&A to the sum being used to pay on a mortgage on the Defendant's residence. There was also comprehensive cross-examination as to the ATM withdrawals, the debit card purchases, and the online transfer carried out by the Defendant. By their unanimous verdict it is patently clear that the Jury totally rejected an overwhelming chunk of the Defendant's defence.

Sentencing Guidelines

21. In respect of the offence of obtaining a money transfer by deception (Count 1) section 346 of the Criminal Code provides that a person convicted of the offence is liable to receive maximum sentences of a fine of $100,000 or 10 years imprisonment or both.

22. In respect of the theft offences (Counts 2 and 3) section 337(1) of the Criminal Code provides that a person convicted of the offence is liable to receive maximum sentences of a fine of $100,000 or 10 years imprisonment or both.

23. By virtue of the considerable sentences which could potentially be meted out for the offences of obtaining a money transfer by deception and theft the Legislature clearly intended to send an unambiguous message to offenders and would-be offenders that they will be treated harshly by the Courts if they commit such offences. My recent authority of *R v. Diedre Woolgar, Case No. 25 of 2018, The Supreme Court of Bermuda (10th September 2020)* is reflective of the spirit and intent of sections 346 and 337 of the Criminal Code to

deal with those who commit these types of offences with a healthy dose of seriousness, especially when they are in a position of trust when they commit the offences.

24. The Defendant in *Woolgar* pleaded guilty to one count of false accounting and one count of theft. The case involved circumstances where the defendant was employed as an office manager for a company that sold electrical materials. As office manager the defendant was the person solely responsible for handling and reconciling cash receipts and depositing cash into the company's bank account. She carried out her duties without any direct supervision from anyone. The defendant exploited this lack of checks and balances on her daily duties, and presumably the trust which the owners of the company had in her, by stealing cash which came into the company on multiple occasions over a period of about a year. To conceal this theft of cash the defendant (a) falsely inputted into the accounting software of the company that cash amounts had been deposited into the company's bank account when they had not been; and (b) then deposited the exact amount of the sums that she stole from the company's other bank account into the bank account where the cash she stole should have been deposited. In total the defendant was able to steal the sum of $110,759.93 from the company over time.

25. In sentencing the defendant in *Woolgar* to 12 months imprisonment with 6 months of the imprisonment suspended for 2 years (for both offences) I took into consideration the mitigating features of a guilty plea, no previous convictions, genuine expression of regret and remorse, restitution made by the defendant, the defendant's low risk of reoffending, and the defendant's mental health condition at the time of the commission of the offences and at the time of sentencing (the defendant had been diagnosed with a bipolar disorder). I also had regard to the aggravating circumstances of the nature and seriousness of the offences, the quality and degree of trust reposed in the defendant, the damage or loss caused by the defendant, and the use to which the money stolen by the defendant was put.

26. In *Woolgar* I was guided by the UK authority of *R v. Barrick (1985) 7 Cr.App.R.(S) 142* and because the principles of *Barrick* are equally applicable to the case at bar it is fitting to have had regard to this authority in sentencing the Defendant. Indeed, the facts of *Barrick*

are probably more aligned with those of the case at bar than *Woolgar* is. In paragraphs 19 and 20 of *Woolgar* I set out the facts of *Barrick* as follows:

> *"The fourty-one (41) year old appellant in Barrick was employed to manage a finance company so that the owner could concentrate his attention on other business ventures. The attractive credentials of the appellant was that he was a former police officer and a security guard employed by a Government Department. Once employed the appellant had a clear run of the company as to how the finance company should be managed, and, the owner allowed the appellant to have money as the appellant so required. The owners implicitly trusted the appellant. However, after some time it became clear that the appellant was misappropriating funds from the company's accounts, and, upon closer scrutiny it was revealed that a great number of the accounts were bogus. An accountant examined the books and discovered that the company lost about £9,000 (and possibly more). The money was stolen from private individuals who could not afford to take the loss.....*
>
> *The appellant was charged with false accounting, theft, and obtaining property by deception offences and after a trial before a jury he was convicted of the offences. At his sentencing hearing his lawyer, in mitigation, pointed to: his good character; his age at the time of the offence; no previous convictions; and, that he served as a police officer and that any term of imprisonment would be extremely deleterious and unpleasant for him. The appellant was sentenced to two (2) years' imprisonment on each count to run concurrently and he subsequently appealed this sentence to the Court of Appeal."*

27. In dismissing the appellant's appeal Lord Lane CJ said that the offences committed by appellant were *"...in short, mean offences"* and he went on to say that:

> *"The type of case with which we are concerned is where a person in a position of trust, for example, an accountant, solicitor, bank employee or postman has used that privileged and trusted position to defraud his partners or clients or employers or the general public of sizeable sums of money. He will usually, as is in this case, be a person of hitherto impeccable character. It is practically certain, again in this case, that he will never offend again and, in the nature of things, he will never in his life be able to secure employment with all that that means in the shape of disgrace for himself and hardship for himself and also his family."*

and,

> *"In general a term of immediate imprisonment is inevitable, save in very exceptional circumstances or where the amount of money obtained is small.*

> *Despite the great punishment that offenders of this sort bring upon themselves, the court should nevertheless pass a sufficiently substantial term of imprisonment to mark publicly the gravity of the offence. The sum involved is obviously not the only factor to be considered, but it may in many cases provide a useful guide. Where the amounts involved cannot be described as small but are less than £10,000 or thereabouts, terms of imprisonment ranging from very short up to about 18 months are appropriate.....Cases involving sums of between £10,000 and £50,000 will merit a term of about two to three years' imprisonment. Where greater sums are involved, for example those over £100,000, then a term of three and a half years to four and a half years would be justified."*

28. I noted in *Woolgar* that the above sentencing parameters laid out by Lord Lane CJ in *Barrick* were in relation to contested cases (such is the case at bar). I also repeated the factors which Lord Lane CJ said should be taken into consideration when assessing the correct sentence for these types of offences. Lord Lane CJ instructed that:

> *"The following are some of the matters to which the Court will no doubt wish to pay regard in determining what the proper level of sentence should be: (i) the quality and degree of trust reposed in the offender including his rank; (ii) the period over which the money or property dishonestly taken was put; (iii) the use to which the money or property dishonesty taken was put; (iv) the effect upon the victim; (v) the impact of the offence on the public and the public confidence; (vi) the effect on fellow-employees or partners; (vii) the effect on the offender himself; (viii) his own history; (ix) those matters of mitigation special to himself such as illness; being placed under great strain by excessive responsibility or the like; where, as sometimes happens, there has been a long delay, say over two years, between his being confronted with his dishonesty by his professional body or the police and the start of his trial; finally, any help given by him to the police."*

29. There were a slew of cases which followed the reasoning of *Barrick*, such as the UK authority of *R v. Clark [1998] 2 Cr.App.R. (S.) 95* and the Bermuda Court of Appeal authority of *R v. Clayton Albert Busby [2004] Bda L.R. 29*. *Clark* was a case in which the appellant was a bursar of a charitable body and a treasurer of a local church and he stole £400,000 from his employer and £29,000 from the church over a period of 4 years. In reducing his initial sentence of 5 years imprisonment to one of 4 years imprisonment Rose LJ said that:

> *"The offences were aggravated by the degree of trust reposed in the appellant, by both his employers and the church, by the period of four years over which the*

> *offense were committed, and by the fact that the proceeds were spent on personal expenditure, partly of an extravagant kind. The appellant's good character, to which three written references before the Court speak, and his frankness, co-operation and pleas of guilty at the first available opportunity, all mitigate sentence in this case. It is also significant that he has repaid some £120,000 to those who have suffered from his depredations. We bear in mind that the appellant's family are now living in much reduced circumstances, and that there have been other reasons for distress in the family."*

30. Clark also represented an inflationary increase in the guidelines enunciated by Lord Lane CJ in Barrick and to this Rose LJ in Clark, noting the increased scale and complexity of white-collar theft and fraud, commented that:

> *"In light of all these circumstances, we make the following suggestions. We stress that they are by way of guidelines only and that many factors other than the amount involved may affect sentence. Where the amount is not small, but is less than £17,500, terms of imprisonment from the very short up to a 21 months will be appropriate; cases involving sums between £17,500 and £100,000 will merit two to three years; cases involving sums between £100,000 and £250,000, will merit three to four years; cases involving between £250,000 and £1 million or more will merit between five and nine years; cases involving £1 million or more, will merit 10 years or more. These terms are appropriate for contested cases. Pleas of guilt will attract an appropriate discount. Where the sums are exceptionally large, and not stolen on a single occasion, or the dishonesty is directed at more than one victim or group of victims, consecutive sentences may be called for."*

31. In Busby the appellant pleaded guilty to 10 counts of theft totaling $159,493.37 from the Bermuda Government when he was employed as a Medical Claims Assessor in the Accountant General's Department. In essence the appellant facilitated the payment of fraudulent claims to himself over a period of 15 months. Ward JA found that the sentence given to the appellant was unduly lenient and in doing so commented that the guidelines of Barrick *"still carry much weight and substantial terms of imprisonment are still required to mark the gravity of certain offences"*.

32. My upshot of Barrick, Clark and Busby at paragraph 28 of Woolgar was as follows:

> *"What the authorities of Barrick, Clarke, and Busby (including the cases cited by Ward JA) have shown is that cases of theft and fraud committed by persons in a*

> *position of trust and authority have been on an evolutionary path towards harsher sentences. We are currently thirty-five (35) years on from Barrick, twenty-two (22) years on from Clark, and sixteen (16) years on from Busby. One may therefore persuasively argue that in consideration of the prevalence of offences of this type, increased intolerance for white-collar crime, and inflation, that the sentencing guidelines in the cited authorities (not the legal principles which underpin them) should be lengthened to longer sentences. A more modernized approach to sentencing offences of this nature should probably be in the making. Accepting that a term of imprisonment is inevitable in these types of cases, and in consideration of the upward trajectory of sentences imposed over the years, it is suggested that the appropriate sentencing starting points and/or bands for theft and fraud offences, on a guilty plea and after a contested trial, should be increased. This is a sentiment which it appears Ward JA was expressing in Busby when he emphasized that the sentences imposed in certain cases were "lenient" or "on the low side".*

33. I repeat those words for the purposes of sentencing the Defendant in the case at bar, especially bearing in mind that over 2 years had elapsed since my decision in *Woolgar* and that there has been no abatement of white-collar crimes being committed in Bermuda. I would therefore suggest, in the Bermuda legislative context, the following guidelines for contested cases for offences of the nature that the Defendant has been convicted and where the offender is in a position of trust:

Less than $20,000	6 months to 2 years' imprisonment
$20,000 to $50,000	2 to 4 years' imprisonment
$50,000 to $100,000	4 to 6 years' imprisonment
$100,000 and over	6 to 10 years' imprisonment

34. With the above paragraphs in mind I will now turn more specifically to the mitigating and aggravating features which underpinned my reasoning to sentence the Defendant to 5 years imprisonment for the offence of obtaining a money transfer in the sum of $50,000 by deception (Count 1 on the Indictment); 3 years imprisonment for the theft of $28,615 by means of unauthorized ATM withdrawals (Count 2); and, 2 years imprisonment for the theft of $7,601.06 by means of unauthorized debit card transactions and an online transfer (Count 3).

Sentencing Decision

35. It would be an understatement to describe the offences committed by the Defendant as "mean offences" as did Lord Lane CJ for the offences committed by the appellant in *Barrick*. What the Defendant did to Ms. Badenduck over a seventeen (17) month period was immeasurably cold and callous. It is obvious from the oral evidence given by the caregivers at trial and from the Victim Impact Statements ("VIS") produced by the Prosecution at the sentencing hearing that Ms. Badenduck had a kind, trusting and beautiful soul. This was despite the fact that she was tragically stricken with a life-altering disability as a result of a road traffic collision. This is what makes the Defendant's victimization of Ms. Badenduck even more egregious.

36. By virtue of the Defendant's "privileged and trusted position"[1] as a lawyer called to the Bermuda Bar, and as someone who had a fiduciary duty under a PofA to look after Ms. Badenduck's affairs, Ms. Badenduck must have seen the Defendant as someone whom she could trust implicitly to relieve the emotional and financial pain that she must have suffered by being victimized by one of her caregivers. However, rather than being the savior that Ms. Badenduck desperately needed the Defendant turned out to be even more predatory and exploitative than the delinquent caregiver. It is obvious to me that when the Defendant descended upon Ms. Badenduck's residence in June 2016 that she saw the good nature and physical limitations of Ms. Badenduck, as well as the chaotic state of Ms. Badenduck's financial affairs, as fertile ground upon which she [the Defendant] could benefit handsomely.

37. But it was not just the considerable sum of $86,216.07 which the Defendant clandestinely extracted from Ms. Badenduck that was terrible. The manner in which the Defendant, with seeming reckless abandon and without any semblance of care for the welfare of Ms. Badenduck, went about repeatedly withdrawing monies from the ATMs and making debit card purchases all for her selfish benefit was outstandingly bad. As the Prosecution rightly said, the Defendant used Ms. Badenduck's money as if it was her own. The Defendant's

[1] As per the words of Lord Lane CJ in *R v. Barrick (1985) 7 Cr.App.R.(S) 142*

frivolous jaunt at the Fairmont Hamilton Princess (one of the most expensive and luxurious hotels in Bermuda) on Ms. Badenduck's dime was beyond the pale. However, the fact that the Defendant continuously stole Ms. Badenduck's money and also refused to pay back the $50,000 in a timely fashion well knowing that Ms. Badenduck needed the money and the loan repaid so that she could purchase a new wheelchair makes the Defendant's conduct infinitely distressing.

Mitigating Circumstances

38. On this basis, I struggle to see how there are many mitigating circumstances that would assist the Defendant in reducing any sentence that she may receive. There is of course the fact that the Defendant was of good character prior to the commission of these offences i.e. she did not have any previous convictions. However, I find that the extent to which I should take this into consideration is minimal. As I stated in paragraph 36 of *Woolgar*:

> *"....it could be said that it is by reason of the appearance of such erstwhile good character that offenders such as the Defendant and the appellant in Barrick are placed in a position of trust and authority and are then able to carry out their criminal acts. To be clear, the Defendant having no antecedent conviction history is a factor to which I will have due regard, but not to the extent that heavy weight would be applied to it given the nature of the offences committed."*

39. I repeat those words in the case at bar and I accordingly factored the Defendant's previous good character and the absence of previous convictions into the sentence which I did give her. However, as I said, the extent to which I did was minimal. This is because when one commits offences whilst in such a trusted position as a lawyer then their previous good character should have less weight than if they were not a lawyer. It is most likely due to their positions as lawyers, and the public's ingrained perception and expectation that lawyers will always act with honesty and in accordance with the Bermuda Bar Code of Conduct when representing their client's, that corrupt lawyers are able to have access to confidential information, such as bank accounts. It is then that they have the means and the opportunity to effectively carry out their nefarious deeds on their clients. It would therefore be grossly unfair for offending lawyers to rely heavily on their previous good

character during sentencing when it was their "supposed" good character which allowed them in the first place to commit offences upon their unsuspecting and trusting clients.

40. Of course, the Defendant cannot enjoy any discount in sentence which she may have received had she pleaded guilty, and because the Defendant elected to put the Prosecution to strict proof of their case against her then this is something that I am obliged to consider when sentencing the Defendant. The history of this matter however requires further consideration which in my view justifiably may lead to an additional increase, albeit slight, in any sentence for the Defendant. I am referring to the fact that the Defendant called upon the Prosecution to prove its case at two separate trials.

41. To be clear, it is the constitutional and legal right for an accused person to plead not guilty to any offence and the burden should always be on the Prosecution to prove its case against an accused person at a fully ventilated and contested trial. These rights are sacrosanct and should never, under any circumstances, be disturbed. However, there are two sides of the same proverbial coin when it comes to sentencing someone who has pleaded guilty and someone who is eventually found guilty after a contested trial. On one side of that coin are circumstances where a lesser sentence is given to an accused person who has pleaded guilty because by doing so the expense of a trial and the witnesses having to come to Court to give potential stressful oral evidence is avoided. The other side of that same coin are circumstances where a greater sentence is given to an accused person who pleaded not guilty thereby compelling potentially distressed witnesses to come to Court to give oral evidence and which also leads to the incurrence of expenses for the trial to be conducted.

42. Essentially, the Defendant had her day in Court twice. More specifically, in May 2022 a trial commenced in relation to the same offences for which the Defendant was convicted of at the second trial which commenced in December 2022. Granted, the first trial was aborted after approximately four (4) weeks due to COVID-19 related issues but by the time this had occurred the Jury had already heard evidence from crucial Prosecution witnesses. In particular, two primary caregivers of Ms. Badenduck, Ms. MacLellan (the Defendant's employer), and partly from Ms. Bucci (the accountant). In respect of the caregivers the

experience of giving evidence at both the first and second trials was clearly upsetting to them as on both occasions they both shed tears whilst giving evidence (especially when they were talking about Ms. Badenduck whom they obviously had an emotional attachment with).

43. Regarding the expense of both trials, the first trial was stopped after four weeks and the second trial, due to health issues of the Defendant and the Christmas break, lasted over six weeks (of actual Court time). I confess that I am not aware of what level of expenditure was required for both trials but I do not think that I would be contradicted if I were to say that it would have been substantial.

44. Having seen and heard the evidence unfold in the first trial, and having seen how long the first trial took without even the Prosecution's case finishing, the Defendant and her then lawyers could have assessed the likelihood of the Prosecution proving its case beyond a reasonable doubt and hence considered whether she wished to maintain her not guilty plea and take advantage of any discount which she may have been entitled. As was her right to do, she remained adamant in her not guilty stance, but in doing so she ran the risk of being convicted by a Jury and then receiving a higher sentence than what she would have received had she pleaded guilty.

45. As it turned out, at the second trial the two caregivers, Ms. MacLellan, and Ms. Bucci gave evidence which was virtually consistent in content and demeanour with the evidence that they gave in the first trial. Basically, there was little or no differences or discrepancies. The fact that the Jury in the second trial returned unanimous guilty verdicts on all counts on the Indictment indicated a comprehensive repudiation of the Defendant's defence and a pellucid acceptance of the evidence of all of the Prosecution's witnesses. While I am reluctant to cast my mind back in time one can safely reach the conclusion that there is a likelihood that the Jury in the first trial may have delivered similar unanimous guilty verdicts.

46. As for the Defendant unequivocally expressing genuine regret and remorse for committing the offences there simply was no such expression made in her Social Inquiry Report dated 1st March 2023 ("SIR") or in her allocutus to the Court at the sentencing hearing. It is correct that the Defendant was genuine in her apology to Ms. Badenduck and to her own family for what they have been through as a result of the criminal proceedings but there was no doubt in my mind that the Defendant steadfastly maintained her innocence. That is her right however the consequence is that the lack of any expression of genuine regret and remorse for what she did to Ms. Badenduck is a factor to be considered when arriving at the proper sentence for the Defendant.

47. In relation to the $40,000 which the Defendant paid back to Ms. Badenduck in December 2016 i.e. before she was charged with the offences, this is something that I only slightly take into consideration. My reasoning for this is extracted from my words on page 16 in *Woolgar* where I stated that:

> *"……persons who have committed offences of theft and fraud whilst in a position of trust should disabuse themselves of the notion that by simply paying back the money which they have stolen that their likely sentence, whatever it may be, will be significantly reduced. Restitution should not be used as a significant restorative tool to evade a far less [sic.] harsh sentence than that which the offender would have received had they not made the restitution. This is because while restitution may refill the coffers emptied by the offender, it does nothing to restore the breach of trust by the offender."*

48. I apply those words to the case at bar and I add that the fact that the Defendant paid back $40,000 to Ms. Badenduck should not be seen as any expression of sorrow for what she did. Because the Defendant paid the money back in December 2016 i.e. prior to being charged, I see the payment of the money more as an attempt by the Defendant to avoid being investigated and then charged for the offences. Quite frankly, this possible strategy by the Defendant may have worked as it is clear from her police interview that Ms. Badenduck, although acknowledging that the Defendant received the $50,000 by deception and that the Defendant made unauthorized transactions on her bank accounts, did not wish for the Defendant to even face criminal prosecution. Whilst restoring that which an offender has stolen can be a mitigating factor to be considered when sentencing, at the

same time offenders must be disabused of the notion that any reduction in sentence will be significant or that they would automatically dodge receiving a term of imprisonment.

49. The Defendant's low risk of reoffending and her low need for rehabilitative services as stated in the SIR tells me that there is no need to protect the community from the Defendant upon her release from custody. This is a factor which I take into consideration.

Aggravating Circumstances

50. As for the aggravating features of this case, they overwhelmingly dwarf the mitigating ones. I have already commented on a couple of them but they require further elucidation.

The nature and seriousness of the offences: Through the enactment of the maximum sentences of sections 346 and 337(1) of the Criminal Code Parliament has already ordained that the offences of obtaining a money transfer by deception and theft should be treated at the higher ends of the seriousness spectrum. Further, as shown in *Barrick* and *Woolgar* when such offences are committed by a person who is in a position of trust then any sentence meted out should be a reflection of the utmost severity.

I commented in *Woolgar* that "white collar" crimes should be seen as more serious than the garden variety thefts that come before the Courts.[2] I have also stated in another place and at another time that while white collar crimes do not capture the headlines of the print and electronic they can be as serious or even more serious than violent offences which are often splashed on the front pages of the media. What the Defendant did to Ms. Badenduck was horrific both emotionally and financially given the physical vulnerabilities of Ms. Badenduck. With the prevalence of white collar crime on the rise, and with the devastating emotional and financial effects which such offences will undoubtedly have on the victims, the offences committed by the Defendant, who was in a position of trust, should occupy a spot at the most severest end of the seriousness spectrum.

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2 Paragraph 41 of *R v. Diedre Woolgar, Case No. 25 of 2018, The Supreme Court of Bermuda (10th September 2020)*

The quality and degree of trust reposed in the Defendant: Essentially, Ms. Badenduck handed over the reins of her life and household to the Defendant. Other than medical decisions pertaining to her health Ms. Badenduck relied very heavily on the Defendant to manage everything that pertained to her residence and her care. It was unclear from the evidence at trial as to whether it was Ms. Badenduck, or Tore, or the Defendant herself who initiated the conversation about the Defendant having a PofA over Ms. Badenduck's financial affairs. But it matters not because in any event by virtue of the PofA, and most likely because the Defendant was a member of the Bermuda Bar, Ms. Badenduck gave the Defendant complete and exclusive control and oversight over her bank accounts (which included the ability to withdraw sums from Ms. Badenduck's bank accounts). One need not burn too many brain cells to reach the conclusion that it was because of the trust that Ms. Badenduck placed in the Defendant to deal with her and her bank accounts with propriety that the Defendant was able to easily obtain the $50,000 from the Defendant under the ruse of securing a junior partnership in M&A and to willy-nilly steal money from Ms. Badenduck by way of unauthorized ATM withdrawals and debit card purchases.

I said in my extemporaneous sentencing decision that it must have been extremely unsettling for Ms. Badenduck in the last couple of years of her precious life to have discovered that the person whom she most trusted to sort out her financial affairs was the one who had ultimately betrayed her (in her recorded police interview Ms. Badenduck stated that when she found out that the $50,000 loan to the Defendant was not used to buy into a junior partnership at M&A that she felt "awful" and "betrayed").

The damage or loss caused by the Defendant: In his VIS dated the 30th March 2023 Tore stated that Ms. Badenduck required "extended psychological counselling" as she found what the Defendant did to be "profoundly disappointing" given the confidence that she had "invested" in the Defendant. One of the caregivers in her VIS stated that Ms. Badenduck's spirit was broken after she discovered what the Defendant did to her. This is consistent with what I said earlier about how betrayed Ms. Badenduck must have felt by the actions of the Defendant.

In her VIS dated the 7th March 2023, and also in her evidence in Court, Ms. MacLellan expressed real concern about the potential reputational, legal and financial damage to her business as a result of the offences committed by the Defendant. For one, she spent two months of her working time cleaning up the work that was done and not done by the Defendant for Ms. Badenduck. She also expended a copious amount of time assisting police with their investigation and appearing in Court to give evidence (on two occasions). She did not bill Ms. Badenduck for this work and during the time that it took for her rectify the Defendant's work, to assist the police, and to attend Court she was unable to do work for or bill her other clients. On a personal level, Ms. MacLellan said that she endured countless sleepless nights worrying about the harm done to Ms. Badenduck by the Defendant and about how she [Ms. MacLellan] must do right by Ms. Badenduck.

I am also obliged to take in consideration the evidence of the caregivers who stated that during the period that the Defendant had the responsibility of paying Ms. Badenduck's staff, which coincided with the period during which the Defendant was making unauthorized transactions from Ms. Badenduck's bank accounts, that the staff were not at times being paid their salaries. This placed some financial strain, stress, and embarrassment on at least one of the caregivers (as gleaned from her VIS).

Other factors to be taken into consideration

51. I also deem the following to be important factors:

The use to which the money obtained and stolen by the Defendant was put: I have already mentioned that it was the Prosecution's case that the $50,000 loan was used to pay on the mortgage of the Defendant's residence and that the Defendant wrongly enriched her family business (the Jury obviously accepted these uses). The Defendant herself admitted that she used Ms. Badenduck's debit card at the Fairmont Hamilton Princess hotel for personal reasons. On their own these uses of Ms. Badenduck's hard-earned and much-needed money by the Defendant is appalling. However, when one adds the fact that the Defendant went about Bermuda using the Defendant's debit card to buy groceries and

supplies presumably for herself (and possibly her family) then the Defendant's conduct is made even more shocking. Basically, the Defendant was using Ms. Badenduck's money as if she was taking money it from her own piggy-bank.

The impact of the Defendant's offences on the public and public confidence: The Barrister's Code of Professional Conduct (1981)("BCPC")[3] is, or at least should be, endorsed and slavishly followed by every member of the Bermuda Bar Association. The opening few paragraphs of the BCPC encapsulates the guiding prinples as to how barristers should conduct themselves when carrying out legal work on behalf of their clients. Rules 4 to 7 of the BCPC stipulate that:

> *"4 A barrister must discharge his duties to his client, the court, members of the public and his fellow members of the profession with integrity and in accordance with this Code.*
>
> *5 The conduct of a barrister within or outside the professional sphere must not be likely to impair a client's trust in him as a professional consultant.*
>
> ***Duties***
> *6 It is the duty of every barrister-*
>
> *(i) to comply with the provisions of this Code;*
> *(ii) not to engage in conduct (whether in pursuit of his profession or otherwise) which is dishonest or which may otherwise bring the profession of barrister into disrepute, or which is prejudicial to the administration of justice;*
> *(iii) to observe the ethics and etiquette of his profession;*
> *(iv) to be competent, diligent and efficient in all his professional activities;*
> *(v) within twenty-eight days (unless a longer period has been agreed by the Bar Council) to respond to every enquiry made of him by the Council."*
>
> *7 A barrister has a duty to uphold the interest of his client without regard to his own interest or to any consequences to himself or to other person."*

[3] Created by the Bermuda Bar Council and confirmed by the Chief Justice under section 9 of the Bermuda Bar Act 1974 and brought into operation on 7th August 1981.

By committing the offences charged the Defendant surely has shaken the public's confidence in the legal system generally and in lawyers specifically. Lawyers who properly operate in the legal system zealously guard their individual and collective reputations and they do all that is humanly possible to act in accordance with the deeply engrained virtues of their honourable profession. Despite this, lawyers continuously have to confront negative and unjustified stereotypes held by some in the community. What the Defendant did to Ms. Badenduck, in one fell swoop, solidified whatever misperceptions which some may have about the legal profession. One can only hope that the public will eventually see the Defendant and her despicable conduct as being aberrant to the high standards that the vast majority of lawyers aspire and do attain in carrying out their duties. If any of the public's confidence in the legal system has eroded by the Defendant's conduct then hopefully it can be restored in short order.

The delay in the Defendant being sentenced: I have regard to the fact that the offences committed by the Defendant were revealed in or around November 2016, that the Defendant was not arraigned in the Supreme Court until 22nd November 2019, that it was not until the 27th January 2023 that she was convicted of the offences, and that it was not until the 9th May 2023 that she was sentenced for the offences. It should be noted that the time which has elapsed should not be attributed to any deficiencies in the Court processes or to the Defendant and that from April 2020 and throughout 2021 the global COVID-19 pandemic compelled the Courts to reduce operations thereby causing a backlog in cases (in fact, the first trial was aborted because of COVID-19 concerns).

52. Mr. Mark Pettingill, who was not Counsel at trial, urged me to consider what he coined as the "Bermuda Factor". That is, because Bermuda is a small community then the opportunities for the Defendant, who is 49 years of age, to earn an income in Bermuda post-sentence are severely hindered as it is unlikely that she will secure any employment. I would agree that in a relatively small community such as Bermuda that a convicted person may be hard pressed to find employment after a conviction, especially if the offence committed involves an element of dishonesty. However, the possibility that the Defendant may not find employment after she is released from prison is of only minimal consideration

for me. Lawyers who breach the trust of their clients and steal from them should expect that their reputations within their community will be severely tarnished and that they will never be employed as lawyers or be placed in positions of trust ever again. Had the Defendant had these very real consequences in mind then maybe she would not have even contemplated stealing from such a vulnerable client as Ms. Badenduck.

Conclusion

53. In consideration of the above paragraphs I confirm the sentence which I gave the Defendant on the 9th May 2023, *to wit*:

(i) **5 years imprisonment for the offence of obtaining a money transfer in the sum of $50,000 by deception** (Count 1 on the Indictment);

(ii) **3 years imprisonment for the theft of $28,615 by means of unauthorized ATM withdrawals** (Count 2); and,

(iii) **2 years imprisonment for the theft of $7,601.06 by means of unauthorized debit card transactions and an online transfer** (Count 3).

Dated the 21st day of June, 2023

SEAL OF THE SUPREME COURT OF BERMUDA

The Hon. Mr. Justice Juan P. Wolffe
Puisne Judge