IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CRIMINAL DIVISION)

CR NO's 390-394/16, 400-404/16
395-399/16, 405-409/16

COLLECTOR OF REVENUE

v

CORAL INVESTMENTS (2001) LIMITED,
RAROTONGA SURF BRANDS LIMITED, and
CHRISTOPHER PETER McKINLEY

Date: 13 March 2017

Counsel: Ms A Mills for Crown
Mr M Short for Defendant

DECISION OF HUGH WILLIAMS, CJ

[9:36:11]

[1] Coral Investments (2001) Limited, Rarotonga Surf Brands Limited and their governing director Mr McKinley face a number of charges to which they pleaded guilty in on 28 November 2016.

[2] As far as Coral is concerned the charges are that for two months in 2010 (Information 390/16), seven months in 2011 (391/16), three months in 2012 (392/16), three months again in 2014 (393/16) and two months in 2015 (394/16) the company knowingly applied PAYE deducted from it's employees' wages and paid it otherwise than to the Collector.

[3] Similarly with Rarotonga Surf Brands there were three months in 2010 (400/16), seven months in 2011 (401/16), three months in 2012 (402/16), four months in 2013-14 (403/16), and two months in 2015 (404/16) where the company again knowingly applied its employees' PAYE deductions otherwise than by payment to the Commissioner.

[4] Over the period therefore of some five years in the case of each company there were 17 months with Coral and 19 months with Rarotonga Surf Brands when employees' PAYE deductions were not paid to the Commissioner.

[5] Mr McKinley, the sole director of both companies, has pleaded guilty, both personally and on the companies' behalf, to aiding and abetting the companies in defaulting on their PAYE obligations.

[6] With the companies the maximum penalty is imprisonment for 12 months – obviously inappropriate for companies – or a fine of $10,000 or both. And with McKinley the maximum is a fine of $10,000 with a minimum of $500.

[7] Coral was incorporated on 13 February 2001. With Rarotonga Surf Brands, they are the wholesale and retail arms of a firm which trades as Turtles Sportswear and they are involved in screen printing and the manufacture and sale of clothing.

[8] With Coral there was an audit carried out on 8 May 2015 covering the periods in the Informations that showed a payment of gross wages of nearly $230,000 and a PAYE deduction of $35,654.82 to the five staff involved. None of that PAYE was paid on to the Collector.

[9] There was an interview with Mr McKinley on 18 May 2015 when he put the lack of payment down to insufficient funds, acknowledged the money was used for other things and when asked if he knew that Coral was breaking the law, he said "a hundred percent yes".

[10] On 17 November last year the company paid the $35,654.82 core tax but the penalties and late payment fees amounting to $32,679.48 remain unpaid. Coral owes a substantial sum of $274,692.19 in taxes and also owes sums for PAYE, VAT and for income tax. Mr Forbes, the revenue officer involved, expressed the view that Coral is insolvent although from financial material handed up by Ms Mills during sentencing it appears the company's position is improving but it could not be said to be in a strong financial position. The company entered into an agreement with the Revenue to pay the amount it owes over four years but, of the first instalment due on 15 February 2017 of $15,000, only $10,092.97 was paid.

[11] Rarotonga Surf Brands shows a similar history. Incorporated on 28 January 2008, it was audited on 18 May 2015, again for the periods shown in the informations and from gross wages paid to the employees of little over $185,000; $23,065.65 was deducted for PAYE and all was unpaid. The explanation given at the interview with Mr McKinley was the same for Rarotonga Surf Brands as for Coral.

[12] The full PAYE core payment of $23,065.65 was paid on 22 November 2015 but the late payment fees of $18,992.92 remain unpaid. Again there was an agreement entered into for the payment of the arrears over three years and again of the $15,000 due on 15 February 2017 only $10,499.03 was paid. The company is also in a difficult financial position although the updated balance sheets and accounts handed up at this hearing showed its position is improving. But Mr Kinley's companies are probably still trading while insolvent.

[13] As far as Mr McKinley himself is concerned at the interviews he was frank and open in acknowledging the default by the companies and the fact that it was as a result of his directions as the sole working director. He said it was he who signed the wage cheques, it was he who is responsible for the default in the PAYE payments and it was he that instructed the companies not to meet their obligations for the months in question.

[14] The Crown's submissions focussed on the intentional, repetitive and premeditated nature of these offences. Ms Mills stressed that the offending occurred over five years and there were significant sums involved. She made the point that failure to pay PAYE to the government penalises the government's capacity to continue with what the goods and services it provides to the community and to pursue its program, of course the case that the failure to pay PAYE to the Collector jeopardises the tax position of every one of the company's employees.

[15] Ms Mills also stressed the breach of the agreement for payment with the first instalment but acknowledges the pleas in mitigation.

[16] There is, so far as the Crown have been able to ascertain, no precedent for offending such as this in the Cook Islands. There are cases involving failure to file returns where the fines imposed were $1,000 to $2,000 for each but of course that is a different kind of offending.

[17] Ms Mills draws attention to New Zealand cases such as *James*[1] and *Easton*[2] where in the latter the Court of Appeal expressed the view that imprisonment should be taken as a starting point for offending such as this.

[18] With Coral the Crown's suggestion is that the fines should be $2,000 per monthly failure or $30,000 in total. And for Rarotonga $2,000 per failure or $34,000 in total.

[19] So far as Mr McKinley is concerned the Crown points to the fact that this is representative offending covering 36 defaults and again draws attention to the premeditation, the intent, the repetition and the like and the significant amounts in default. The Crown suggests that the fines imposed on Mr McKinley should be $1,500 per default or $53,000 in total.

[20] There is clearly a necessity to impose fines which recognise accountability for the harm to the employees and to the government by failure to pay on PAYE, to promote a sense of responsibility in Mr McKinley and provide reparation and denounce conduct and deter others.

[21] Mr Short, lately instructed for Mr McKinley, helpfully, in the short time available, was able to amass several testimonials which recognise Mr McKinley's significant contributions by way of sponsorship and other assistance to sporting communities here in the Cook Islands.

[22] In searching for the appropriate level of fines to be imposed, whilst the criteria stressed by the Crown are apposite the totals are, in my view, too high if one looks at the totality principle against the financial position of the companies and the fact that the core PAYE has now been paid. It also needs to be kept in mind that this is apparently the first such prosecution in the Cook Islands so there is a precedent aspect to sentencing plus the fact that the companies are almost certainly still insolvent and the fines to be imposed on them and on Mr McKinley should not be so high as to drive them out of business, thus of course extinguishing the chance of payment and the chance of recovery and the ongoing support by Mr McKinley and his companies for various sporting communities in the Cook Islands.

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[1] James v R [2010] NZCA 206, 13 May 2010

[2] R v Easton [2013] NZCA 677, 19 December 2013

[23] Nevertheless there are substantial aggravating features. The informations each cover a number of months in a financial year. They cover five years of defaults and they cover substantial sums of money which employees were entitled to expect should have been paid on to the Collector in satisfaction of the employees' financial obligations.

[24] In the split between the company fines and the personal fines, although Mr McKinley is only charged as a secondary party, namely charged with aiding and abetting, he acknowledges that his was the directing mind and it was he who gave instructions that the companies did not comply with their obligations to the Revenue. Seen in that light the personal fines should be higher because of the feature of Mr McKinley directing the companies to break the law, particularly when he knew he was directing the companies to break the law, as evidenced by his comment of a hundred percent liability in the interviews.

[25] Also to be borne in mind in the sentencing process is that these are representative charges and that had all the charges in a particular financial year not been rolled up into one, the companies may have been facing 36 informations. Seen in that light, in my view, the Crown's suggestions for the penalties to be imposed are higher in aggregate when the totality principle is taken into account.

[26] The Crown suggests penalties totalling $30,000 for Coral, $34,000 for Rarotonga Surf Brands and $53,000 for Mr McKinley – a total of $117,000. In my view however the appropriate level for these, the first such prosecutions in the Cook Islands, balancing all the factors mentioned one against the other, is that for the companies the fines should be $1,500 per month of default.

[27] That results in Information 390/16, the fine will be $3,000; Information 931/16 at $1,500 per month would be $10,500. That exceeds the maximum so the fine will be $10,000. Informations 392/16 and 393/16 will be $4,500 each; and Information 349/16 is $3,000. So a total of $25,000 fines are imposed against Coral.

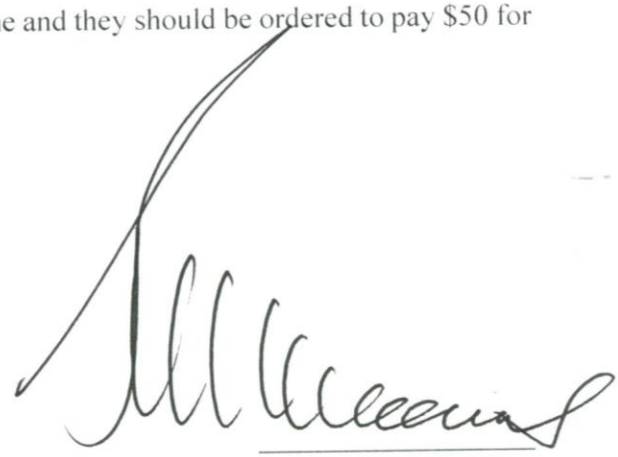
[28] Adopting the same formula for Rarotonga Surf Brands, the figures are Information 400/16 – $4,500; for 401/16 reduced from the $1,500 per month to $10,000 the maximum; Information 402/16 – $4,500; 403/16 – $6,000; and 404/16 – $3,000. A total of $28,000.

[29] So the total impost on the companies is $53,000.

[30] For Mr McKinley there are ten charges. There is the minimum fine to be taken into account in assessing the sum to be imposed. Having regard to the aggravating features mentioned, the appropriate formula in this case is considered to be double the amounts imposed on the companies for each of the monthly defaults, so the fines would be $3,000 on each of the informations, a total of $30,000.

[31] That means that the total imposition on the companies and Mr McKinley is $83,000 – ($53,000 for the companies and $30,000 for the individual).

[32] Although in the scale of things it is minor, he and they should be ordered to pay $50 for each information.



Hugh Williams, CJ