IN THE COURT OF APPEAL OF SAMOA

HELD AT MULINUU

C.A. 23/10

BETWEEN: **SEMI SAMAU**, male of Matautu, Apia and Lotopa.

Appellant

AND: **ATTORNEY GENERAL**

Respondent

Coram: Honourable Justice Baragwanath
Honourable Justice Fisher
Honourable Justice Hammond

Counsel: P Dacre, S Perese and S Tuala for the appellant
P Chang and L Taimalelagi for the respondent

Hearing: 10 and 11 May 2011

Judgment: 13 May 2011

JUDGMENT OF THE COURT

Introduction

[1] On 26 October 2010 the appellant was convicted in the Supreme Court of Samoa on three charges of theft as a servant (Crimes Ordinance ss 85 and 86(g)), four of failing to account as a servant (ss 85, 86(h) and 88) and three of forgery (s 99).

[2] The convictions arose from the appellant's employment by the Development Bank of Samoa ("the Bank"). He was found to have committed the offences over a period of three years between 1 November 1999 and 1 September 2002. On 12 November 2010 he was sentenced to imprisonment for a term of five years. Before this Court he appeals against conviction and sentence.

Factual Background

[3] The appellant was a qualified legal practitioner employed by the Bank as Manager of the Legal and Recovery section. The Bank advanced money to borrowers to promote ventures in agriculture, business and commercial development. In return for advances the Bank took security in the form of mortgages over land and other properties.

[4] From time to time the Bank was required to foreclose against land in satisfaction of unpaid debt. In some cases a mortgagor would voluntarily transfer land to the Bank in whole or part satisfaction of debt. In either case the Bank would find a buyer for the land.

[5] As the Manager of the Legal and Recovery section of the Bank, the appellant was in charge of these operations subject only to the final approval and signature of key documents by the General Manager. Only the General Manager, or in his absence the acting General Manager, could confirm proposed sales and sign appropriate documents on behalf of the Bank. On each occasion the documents would include an authority to sell, a discharge of mortgage and a deed of conveyance.

[6] After the appellant had left his employment with the Bank, officers there discovered discrepancies in the records of land sales and receipts. After investigations and correspondence with the appellant a series of charges were laid against him.

[7] The charges were heard at a judge alone trial before Justice Slicer from 27 September to 8 October 2010. At the trial the prosecution called a number of witnesses from the Bank including the General Manager, an internal auditor, other bank officers and the appellant's secretary. The appellant gave evidence in his own defence.

[8] In his conviction judgment the Judge pointed out that this was essentially a circumstantial evidence case. In cases of this nature it was important to consider the cumulative effect of a wide range of details none of which might be conclusive in itself. At critical points the Judge rejected the appellant as a credible witness (paras 39, 62, 63, 96, 150, and 158). He acquitted the appellant on three charges of forgery and another alternative charge but convicted him on the remaining charges. In doing so he divided the charges into five transactions. It will be convenient to use the Judge's division except that we found a consideration of the five in chronological order necessary for their proper understanding.

A. Fruean/Collins $59,280 17/11/99 (S1728/10 forgery, S1732/10 failing to account and S1799/10 theft).

[9] Ma'aola Tenny mortgaged his land to the Bank as security for a loan to Mr and Mrs Lome. When the loan fell into arrears the Bank sold the land for $120,000 in

exercise of its power of sale. The purchasers were initially Mr and Mrs Collins. Mr Collins died and Mrs Collins alone completed the purchase.

[10] The appellant acted for both sides on the sale. He attended at the settlement on 17 November 1999. Mrs Collins and an acquaintance were also present. Mrs Collins paid the purchase price and left the deed of conveyance with the appellant for registration.

[11] After the settlement the appellant accounted to the Bank for $60,720. He produced a document purporting to be a mortgage from Mrs Collins for the balance of $59,280. It is common ground that he witnessed her supposed signature.

[12] In the Supreme Court the prosecution case was advanced on the basis that on settlement Mrs Collins gave the appellant the full purchase price of $120,000 in cash; that of that sum the appellant had kept $60,720 for himself; and that the purported mortgage to the Bank from Mrs Collins was a forgery to cover for the missing $59,280.

[13] At the hearing before us it was pointed out that in addition to releasing a term deposit of $59,284.71 to Mrs Collins, the ANZ instructed the appellant to prepare a first mortgage over the property under purchase, stating that "funds will be made available upon receipt of your interim certificate and undertaking that our security documents have been executed and held in a registrable form". There was clear evidence that Mrs Collins did sign a mortgage to ANZ at that time. As we understood it in this Court Ms Chang ultimately conceded that some of the purchase price is likely to have come from the ANZ mortgage advance. But of course that was not in itself inconsistent with the prosecution

case that at settlement Mrs Collins handed the appellant a substantial sum in cash, and that this would have been enough for him to keep approximately $60,000 for himself and forge a mortgage to explain the deficiency.

[14] The appellant's evidence was that the General Manager had approved the sale on the basis that $59,280 of the sale price would be satisfied by way of vendor mortgage back to the Bank; that Mrs Collins's then deceased husband had asked the appellant to open an account in her name recording the debt; that she had subsequently signed the disputed mortgage to the Bank; and that on settlement she had paid only $60,720, the balance being satisfied by way of vendor mortgage.

[15] The Judge rejected the appellant as a credible witness. He accepted the evidence of Mrs Collins, supported by that of her niece and driver, Telesia Nimo, that on settlement she handed the appellant the full $120,000 in cash. For reasons we have outlined, we doubt whether the full $120,000 was paid in cash but that is not necessarily fatal to the prosecution's case.

[16] The Judge accepted the evidence of the General Manager that the only sale he had authorised was one for immediate payment of the full purchase price. He accepted the evidence of Mrs Collins that she had no knowledge of any mortgage to the Bank. She was not a customer of the Bank and had no knowledge of the account the appellant had created for her at the Bank in her maiden name "Fruean". When the appellant sent her a letter after the transaction he referred to the ANZ mortgage but made no mention of the

disputed mortgage to his own Bank. The Judge pointed to various details in the disputed mortgage and associated documents which indicated that they were forgeries.

[17] In this Court the appellant argued that the evidence from Mrs Collins that she paid the $120,000 in cash could not be believed. It was most unlikely that in a dealing between two banks, ANZ would have handed Mrs Collins the $120,000 in bank notes to take to the settlement. We agree so far as the mortgage advance is concerned. However Mrs Collins had every right to her term deposit in cash if she so desired. This would certainly not be the usual way of attending to a land purchase in most countries but it is not inconceivable.

[18] On this bracket of charges the prosecution was able to rely upon the following:

(a) The appellant controlled all significant aspects of the transaction on behalf of the Bank. He also acted as the solicitor for Mrs Collins.

(b) It is obvious on the face of the appellant's written application to the General Manager for approval of the sale that the document has been altered. On its face the terms of the recommendation originally required immediate payment of the purchase price in full. That has been altered to permit payment of part only with a vendor mortgage for the balance.

(c) The General Manager said that the sale approval document was in its original form when he signed it. When he signed it, it did not have the

payment of part with a vendor mortgage for the balance. If he is to be believed, someone altered the document after he had signed it.

(d) The sale approval document was prepared by, and remained in the control of, the appellant.

(e) Having heard both give evidence, the Judge believed the evidence of the General Manager and rejected that of the appellant.

(f) The transaction was settled on 17 November 1999. Clearly by one means or another Mrs Collins was able to provide sufficient funds to complete the purchase at that time. It was not until approximately five months later that the purported mortgage to "Aloma Fruean" was signed on 4 April 2000. It was not until 31 May 2000 that an associated account was opened and a debit for $52,280 made in that account. The appellant's theory that she required that mortgage advance to make up the purchase price is impossible to reconcile with those dates; the purchase had long been settled.

(g) The disputed mortgage to the Bank was in the name of "Fruean". The appellant accepts that he was in charge of preparation of all documents in the transaction and further that it was he who opened the associated debit account in the name of "Aloma Fruean".

(h) Although the appellant claimed that he opened the "Aloma Fruean" account at the request of the deceased husband of Mrs Collins, that does not explain how the account and the mortgage came to be in her maiden name. The deed of conveyance, prepared under the supervision of the appellant, showed the transferee as "Aloma Collins", not "Aloma Fruean".

(i) Mrs Collins denied any knowledge of the "Fruean" account or the disputed mortgage. She had not used her maiden name for 40 years. She was not a customer of the Bank. She banked with the ANZ and gave a mortgage to ANZ at that time. The Judge accepted the evidence of Mrs Collins and rejected that of the appellant to the contrary. He further accepted her evidence that she had never received a letter ostensibly sent by the appellant regarding movements in the "Fruean" account.

(j) Mrs Collins and her niece say that at settlement she counted out a large sum in cash. Although 10 years after the event she may have been mistaken over the precise sum, it would be another matter for her and her niece to be mistaken, or to lie, in describing the very large sum counted out in cash. The Judge accepted the evidence of Mrs Collins and her niece and rejected that of the appellant.

(k) The disputed mortgage is a photocopy of a different customer's mortgage. All signatures on it appear to be photocopied except for the appellant's initials. The signature is shown as "A Fruean", not "A Collins". The first

letter in the initials "AF" on the document is demonstrably different from the first letter in the initials "AC" on the undisputed mortgage to ANZ. Despite registration details on its face, the document was never registered.

(l) When the appellant sent a reporting letter to Mrs Collins summarising the transaction after settlement he referred to the ANZ mortgage but made no mention of any mortgage to the Bank.

[19] In a circumstantial evidence case the evidence must be looked at in its totality. In this case there are simply too many coincidences with the appellant at their centre. There was ample evidence to support the Judge's conclusion that the appellant stole $60,720 of the sum received on settlement. Approximately six months later he opened a fictitious account recording a broadly equivalent debt, and forged a mortgage to the Bank, to explain the deficiency. What is more he used the $25,000 the subject of the next transaction to reduce that debt, which was in reality his own.

[20] The Judge did not appreciate that theft and failing to account in relation to the same money are mutually exclusive. In one case the object comes into the offender's possession unlawfully from the outset. In the other the object comes into the offender's possession lawfully in the first instance and is then used unlawfully. Ms Chang explained that in this case these pairs of charges had been laid in the alternative.

[21] Although it is a technicality, we do not think that both theft and failure to account can be left to stand. Of the two, failure to account is the applicable one since in the first

instance this money came into the appellant's hands lawfully on behalf of his employer. It was only later that he dishonestly converted it to his own use. The theft conviction will be dismissed and the failure to account and forgery convictions confirmed.

B. Milford Transaction (S1731/10 failing to account for $25,000) 30/8/01.

[22] Anita Milford (also known as Mulitalo) owned 5 acres of land at Saleimoa. She mortgaged the land to the Bank as security for a loan. When the loan fell into arrears the Bank entered into negotiations to sell it in the exercise of its power of sale.

[23] On 17 June 1999 Henry Mataalii made an offer to buy 4.5 acres of the land for $114,000. The appellant prepared a recommendation and sent it to the General Manager for approval. In his recommendation the appellant referred to the full 5 acres, said that the Bank had received an offer of $114,000, and recommended acceptance. He made no mention of the fact that the offer was for only 4.5 out of the 5 acre total. On 30 June 1999 the General Manager accepted the recommendation. The result was the appellant now had authority to sell the full 5 acres for $114,000.

[24] Over the next three years the appellant arranged for the progressive sale of all 5 acres to Mr Mataalii in three tranches. In each case the terms of sale were recorded in its own deed of conveyance:

(a) 3.75 acres for $114,000 by deed of 14 February 2000.

(b) 0.5 of an acre for $25,000 by deed of 15 August 2001.

(c) The remaining 0.75 of an acre by deed of 30 September 2002.

[25] It is not disputed that in each case the appellant handled the transaction, arranged for preparation of the relevant documents and certified each to be correct for statutory purposes.

[26] The prosecution had no quarrel with the first of the three transactions but laid charges in relation to the second and third. Its fundamental case was that having obtained authority to sell the full 5 acres for only $114,000, the appellant was able to sell the first 3.75 acres and account to the bank for the full amount and keep the excess gained from the second and third tranches for himself.

[27] The conviction presently in question arises from the second tranche of 0.5 of an acre sold for $25,000 on 15 August 2001. That sale was settled on 30 August 2001. Mr Mataalii's solicitors paid the Bank the purchase price of $25,000 by way of cheque. In return they received the deed of conveyance for the half acre.

[28] It is common ground that when the Bank received the cheque for $25,000 for the second tranche it was not dealt with in the normal manner. Although the Bank generated a receipt in the name of the mortgagor, Milford, the funds themselves were credited to an entirely unrelated account. The account was the one referred to earlier which the appellant had created in the name of "Aloma Fruean".

[29] The prosecution case was that having created the "Fruean" account for his own use, and having debited it with a fictitious loan of $52,280, the appellant needed to find a means of repaying the loan in order to avoid drawing attention to a non-performing loan.

To that end he diverted the Milford $25,000 to this account in partial repayment. The evidence relating to the true nature of this account has already been outlined.

[30] By way of explanation for this particular transaction the appellant said that he often delegated the details of transactions like this to other members of his staff. He acknowledged that the $25,000 had been posted to the wrong account but implied that his staff must have been responsible. The Judge rejected his evidence, pointing out that only he had all the knowledge necessary to commit the fraud.

[31] In addition to that evidence the Judge relied upon a mistaken assumption over certain correspondence between the appellant and the mortgagor's solicitors. On 7 August 2000 the solicitors for the mortgagor, Mr Milford, wrote to the Bank asking for confirmation that the $25,000 recovered on the sale of the half acre to Mr Mataalii had been applied in reduction of his client's indebtedness to the Bank. The appellant replied by letter of 29 August 2000 stating that the Bank had still not received confirmation that Mr Mataalii wanted to buy the half acre. The Judge's assumption that the sale had already taken place by the time the appellant sent that letter was self-evidently an error over the year involved.

[32] In this Court Mr Dacre understandably made much of the error referred to in the last paragraph. We agree that it was one of the factors on which the Judge relied when arriving at his conclusions on this charge. It is also a reason for us to view with special care the adverse view he took of the appellant's credibility in general.

[33] However there is much independent evidence to support the Judge's conclusions. The appellant stood at the centre of this transaction. He was responsible for the preparation and certification of all the relevant documents. He attended to its settlement. He had also created a fictitious account for his own dishonest purposes. The chances of the Milford money finding its way into this account, which we have described as his, through the innocent error of some other member of staff is negligible. There was ample evidence to support the Judge's conclusion that the appellant was guilty on the charge of failing to account for the $25,000.

C. Talamaivao Transaction $11,500 (S1729/10 failing to account and S1803/10 theft) 13/2/02.

[34] Mafa Talamaivao and her husband were directors of a trading company, Siasau Services Ltd. The company gave a mortgage to the Bank securing advances. In the exercise of its power of sale under the mortgage the Bank sold the land to David Tung and Henry Fruean for $23,000 which they paid in equal shares. The conveyance was executed in the name of the General Manager and witnessed by the appellant who also certified the documents. The appellant attended at the settlement on 13 February 2002. Mr Tung and Mr Fruean paid the $23,000 in equal shares, Mr Tung paying his $11,500 by cheque and Mr Fruean his $11,500 in cash. It is the $11,500 in cash that has gone missing. The prosecution case was that the appellant took the cash and falsified documents for that purpose.

[35] It is not disputed that the appellant prepared, witnessed and certified the conveyance and discharge of mortgage, attended the settlement meeting, received the

cash, and issued a receipt. The receipt was not however the standard accounting receipt of the kind issued by bank cashiers. It was a typed document prepared for the occasion on a bank letterhead. The cheque was banked in the usual way but no trace of the cash was ever found or recorded.

[36] The appellant's evidence was that although the cash came into his possession at the settlement he left it to others to take the money to the cashier. He implied that they must have lost or stolen it. He specifically pointed to the possible role of his secretary, Amanda Aualitlitia. Although he prepared his own unorthodox form of receipt, he did this because Mr Tung wanted a receipt for his records.

[37] The Judge did not believe the appellant's evidence. He pointed out that only the appellant had all the information necessary to prepare the special form of receipt. The loan was not in default to begin with. The mortgagor company never received any notice of sale. It was the appellant's responsibility to ensure that a notice of sale was prepared and served. The settlement meeting was held in the appellant's room away from the cashiers. He accepted that the appellant's secretary never handled money or had any dealings with the cashiers. The purchasers were right to regard the letterhead document as a purported receipt. Given the cashier's receipt for the cheque, one would have expected an equivalent and adjacent one for the cash if it had reached the cashier.

[38] In this Court Mr Perese challenged the prosecution contention that the cash component of $11,500 had never reached a cashier. We accept that it is difficult to conclusively prove a negative in this situation, namely that several years earlier a sum of

money was *not* received by a large organisation. What can be said, however, is that despite investigation no receipt for the $11,500 in cash was ever found. To that can be added the two points that a receipt for the $11,500 cheque was found without difficulty and that one would have expected a receipt for the cash to have been adjacent to the receipt for the cheque in the receipt book.

[39] As to the unorthodox receipt, the prosecution contended that no copy had been retained in the Bank records. We accept Mr Perese's response that there is no evidence to support that contention.

[40] Mr Dacre submitted that the appellant had prepared a special receipt only because Mr Tung wanted one for his business records. However the notes of evidence made by the Judge show only that Mr Tung's evidence was "I asked for a receipt". We can see no innocent reason for creating a special receipt which bypassed conventional financial records. Still less could there be justification in failing to arrange a conventional receipt, which the appellant acknowledged was required. Further, Mr Tung provided a cheque. It was Mr Fruean who provided his $11,500 in cash.

[41] Settlement was effected in the appellant's office. When $11,500 was paid in cash the obvious course was to take it to the cashier located in another part of the same building, obtain a conventional receipt, and hand it to Mr Fruean. That this was not done was a powerful point in support of the prosecution's case. To that we add the view the Judge took as to the credibility of the appellant compared with the credibility of his

secretary. In our view there was ample evidence to support the Judge's conclusion that the appellant took the $11,500 in cash for himself.

[42] For reasons previously discussed, the convictions for theft and failure to account cannot both stand. We regard this as failure to account since the money first came into the hands of the appellant lawfully on behalf of his employer. The conviction for failure to account will stand and that for theft will be dismissed.

D. Blakelock transaction $40,000 (S1727 forgery, S1720/10 failure to account and S1800/10 theft) 20/8/02.

[43] On 24 January 2000 a debtor of the Bank, Mr Blakelock, conveyed land to the Bank in part satisfaction of the debt he then owed to the Bank. The land was treated in the Bank's records as having a value of $40,000.

[44] On 20 August 2002 the Bank transferred the land to Fraser Faavae To'o and Siaifoi Viliamu To'o for $40,000. These details were shown on the conveyance of the land registered in the Land Register. The signature on the deed of conveyance and discharge of mortgage purported to be that of the Bank's General Manager. The witness to his signature was the appellant. The appellant acted on the sale as a solicitor for both the Bank and the purchasers. The appellant had also signed the compliance declarations required to comply with the Alienation of Freehold Land Act 1972 and the Land Registration Act 1992.

[45] No record could be found indicating that the Bank had ever received the $40,000 paid by the purchasers. That fact did not come to light until 2007 when the Bank received an approach from a person interested in purchasing the Blakelock land. When the Bank investigated, it found that although the land remained in the Bank's asset register, a search of the land registry showed that it had in fact been sold to a third party for $40,000. The Bank's file was missing. The records showed that the appellant was the last one to have it in his possession. He had called for the file on 12 November 2002, some three months after the transaction had been settled. The practice was to enter a deletion line through the name of the party uplifting the file. There was no record of any return of the file by the appellant. That the appellant should seek access to a long – completed file and the file should then go missing are striking facts.

[46] By the stage of the Bank's investigations the appellant had left the Bank. The General Manager wrote to him asking for his assistance in resolving the matter. With the appellant's reply he sent the Bank a cheque for $40,000. He said that there had been confusion and that he had agreed with the purchasers that it was "best to fix up the Bank's $40,000" and hoped that would resolve matters at the Bank's end. He would sort out matters with the purchasers. The Bank replied that it also needed $32,608 in lost interest. The appellant paid a further $20,000, stating that the total interest claimed was excessive and beyond his ability to raise that sum.

[47] At the trial the prosecution evidence was that there had been a settlement at which the purchaser gave the appellant a cheque for $40,000. The appellant's evidence was essentially that any problems were not his responsibility. He was responsible for

preparation of the documents but he often delegated the settlement of, and accounting for, such matters to other officers. Alternatively he speculated that the purchasers might not have paid the purchase price.

[48] In his judgment Slicer J pointed out that, as the solicitor for both parties to the transaction, the appellant must have acted for the purchasers and been present at the settlement. He must have been satisfied that the Bank had been paid the necessary money or he would not have registered the deed of conveyance. The Bank's records did not show any record of the transaction or receipt of the money. The deed of conveyance did not record the root title. The Judge rejected the appellant's argument that the purchasers may not have paid the purchase money. His prompt return of the $40,000, together with a further $20,000 for lost interest, showed his consciousness of guilt. The Judge found him guilty of theft of the $40,000 sale price, failing to account for the same sum and forgery of the deed of conveyance.

[49] In this Court Mr Dacre and Mr Perese advanced a number of arguments for the appellant. First, we accept their submission that there was nothing sinister in the fact that the deed of conveyance did not recite the root of the title. Unlike most land sold by the Bank in the exercise of a mortgagee's power of sale following foreclosure, this land came to the Bank on a voluntary basis to reduce debt.

[50] Secondly, we accept the submission discussed earlier that it is difficult to conclusively prove a negative in this situation, namely that several years earlier, a sum of money was *not* received by a large organisation. What can be said, however, is that

despite investigation no receipt for the $40,000 was ever found. Nor was there any trace of its receipt in the Bank's audited financial records. That much is fully consistent with the prosecution's case, although not conclusive of it.

[51] Thirdly we accept that the fact that the General Manager could not recall signing the deed of conveyance could not of itself take the prosecution's allegation that it was a forgery very far. There is little positive probative value in such evidence. The most that could be said is that it is would be consistent with any other more powerful reasons for concluding that the document was a forgery.

[52] Fourthly we accept the argument commonly made that if the appellant were seeking to cover his tracks by removing the Bank's file he made a poor job of it. He did not remove the land from the Bank's asset register. But this scarcely goes to the heart of the matter.

[53] Two further submissions for the appellant were more critical. Mr Dacre pointed out that there was no direct proof that the cheque for $40,000 had ever been presented. Without a doubt the prosecution ought to have called direct evidence of presentation. However the ultimate question is whether presentation would be a reasonable conclusion based upon all the evidence that was in fact presented. On that subject the following points support the prosecution's case that the cheque was presented and that the $40,000 finished up with the appellant:

(a) In the normal course of business cheques are presented for payment. It is by no means unknown for cheques for small sums to remain unpresented, particularly in non-commercial situations, but this was a cheque for the relatively large sum of $40,000. It was received by a bank in exchange for a substantial block of land. In that situation the chances of accidental non-presentation would seem remote.

(b) This case is concerned with a bank cheque. It was drawn on the National Bank of Samoa. It is safe to assume that if presented it would have been paid out upon.

(c) As soon as the matter was raised with the appellant he refunded the $40,000. He did so without making any request for further details or documents from the Bank. The suggested explanation that he was concerned about a possible reflection on his professional competence is difficult to accept.

[54] In the end the question whether the cheque was presented can only be decided as part of the larger picture. As to the larger picture Mr Dacre submitted that there was too much doubt to find the appellant guilty on this bracket of charges. As to that, however, the prosecution was entitled to rely upon the following points in addition to those just discussed in relation to presentation of the cheque:

(a) The cheque for $40,000 must have come into the appellant's possession at settlement or he would not have proceeded with processing and registration of the conveyance.

(b) No receipt or other financial trace of the $40,000 could be found.

(c) Some three months after the transaction had been settled the appellant called for the file and seemingly did not return it.

(d) In earlier transactions (Fruean/Collins $59,280 on 17 November 1999, Milford $25,000 on 30 August 2001 and Talamaivao $11,500 on 13 February 2002), the appellant had revealed a propensity for dishonestly taking the Bank's money in broadly similar circumstances.

[55] As noted earlier, in a circumstantial evidence case the evidence must be looked at in its totality. We consider that there was ample evidence on which the Judge could convict on this bracket of charges. The failure to account and forgery convictions will stand but for reasons previously noted the theft charge will be dismissed.

E. Fruean transaction (S1725/10 forgery re $20,000) 30/9/02

[56] The history of the Milford sales was outlined earlier. Of the original five acres, the first two sales left three quarter acre lots remaining. These were transferred to Mr Mataalii by deed of conveyance of 30 September 2002 at a recorded sale price of $20,000.

[57] No record could be found of the Bank's receipt of that sum. The deed of conveyance transferring the three lots to Mr Mataalii for $20,000 was certified and witnessed by the appellant. It was ostensibly signed by the General Manager on behalf of the Bank. As to this document the General Manager was adamant that it was not his signature. He pointed out that the deed of conveyance bore the date 30 September 2002. As his passport confirmed, he was out of the country between 19 September and 1 October 2002.

[58] In explanation the appellant deposed that it was common practice for the General Manager to pre-sign deeds and return them to him for witnessing. He could not recall other details of the transaction.

[59] The Judge did not consider it to be proved to an adequate standard that the appellant had stolen the $20,000 involved. He noted that at the foot of the "contract of sale dated 17 June 1999" someone had written "of the 5 (five) acre block, 2 quarter acre pieces go to Milford's niece, Naui Patu". The Judge drew a connection between that notation and the possibility that the appellant had never received the $20,000. On that basis he acquitted the appellant on the theft and failing to account charges but convicted him on the charge of forging the relevant conveyance.

[60] We see difficulties in the link which the Judge sought to draw between the Naui Patu notation and the $20,000 sale. The Judge saw this as the possible basis for a reasonable doubt on the theft and failing to account charges. However the notation does not purport to be a contractual part of the document he was referring to. It appears to be

someone's note to explain why that document referred to only 4.5 out of the total of 5 acres involved. The $20,000 sale was for three quarters of an acre, not half an acre. It was a disposition to Mr Mataalii, not Naui Patu. It is difficult to see any connection between a disposition to Anita Milford's niece and the sum of $20,000 mentioned in the deed.

[61] In this Court Mr Dacre and Mr Perese did not pursue any argument based on the Naui Patu notation. Their argument was that a conveyance of the last three quarters of an acre was required in order to complete performance of the 1999 agreement to sell 4.5 acres. The first deed had conveyed only 3.75 acres. Another disposition of three quarters of an acre was needed to make up the promised area. The reference to $20,000 in the deed of conveyance was a nominal one only so that the document could be presented for stamp duty.

[62] We are unable to accept that argument. A preliminary point is that an analysis of the transactions from a stamp duty perspective could not explain the insertion of $20,000 in the deed in question. But more fundamentally, there never was any concluded agreement to sell Mr Mataalii 4.5 acres for $114,000. The document upon which the appellant's argument rests was never anything more than an offer. It was not accepted by the Bank. Having received the offer, the appellant obtained the General Manager's authority to sell the full 5 acres to Mr Mataalii for $114,000. He then proceeded to progressively sell the land in three lots for a greater total sum. There never was any obligation to convey the last three quarters of the land in order to complete the performance of an agreement for sale and purchase entered into in 1999.

[63] There is no reason for questioning the accuracy of the terms of sale recorded in the three deeds of conveyance. The last of these was a sale of three quarters of an acre for $20,000. Nor is there any reason for questioning the normal assumption that a vendor would not settle an agreement to convey land for $20,000 without payment of the $20,000.

[64] The appellant might therefore count himself lucky that he was acquitted on the theft and failing to account charges arising from the $20,000 Milford transaction.

[65] We consider that there was ample evidence to justify the forgery conviction. In isolation one might accept the possibility that the General Manager was wrong when he said he did not sign this conveyance. But given the wider context in which the appellant was in charge of this transaction, there was no sign that the $20,000 ever found its way into the Bank's records, and the pattern of conduct the appellant had displayed in relation to earlier frauds, we consider that there was ample evidence on which to convict on this charge.

The Sentence Appeal

[66] On the convictions entered in the Supreme Court, the appellant was sentenced to a period of 5 years imprisonment. The Judge arrived at that result by adopting a starting point of seven years "for the fixing of the ultimate sentence." He then adjusted that starting point downward for a variety of factors to reach the 5 year sentence.

[67] At the request of defence counsel the Judge also noted what period of imprisonment he would have imposed on each of the charges separately, and using that methodology arrived at a like period of 5 years.

[68] In a case such as the present, the approach which is more in accord with standard appellate authorities in the Commonwealth jurisdictions is to assess the case on a totality basis, and attach the totality figure to the most serious charge(s). The lesser charges attract concurrent sentences.

[69] The Judge's approach is open to the objection that it conflates the well-established principle that "a starting point is the sentence appropriate for the particular offending (the combination of features) for an adult offender after a trial" (*R v Taueki* [2005] 3 NZLR 372 (F.Ct; CA) at [8]). This is important because the starting point so arrived at will provide the basis for assessing consistency from one case to another. Here, at various points the Judge conflated the establishment of an appropriate starting point, and the circumstances of the particular case and offender.

[70] As to a starting point, the maximum sentence on these various counts was seven years, and as the Judge rightly observed, the several incidents could have attracted cumulative sentences.

[71] This kind of case, involving multiple offences over a period of time, can however only be approached on a totality basis, having particular regard to the central characteristics of the offending under consideration.

[72] Here, the offending was not just the simplistic and opportunistic purloining of monies to which the appellant had access. It involved deliberate, contrived, commercial defalcations – with in large part the construction of false transactions – by a senior professional adviser in a Bank. On any view, more than ST$100,000 was deflected into the appellant's pocket. These are therefore offences of a very serious character, and are at the top end of the criminality for the particular offences which have been proved.

[73] The fixing of a starting point in a case like this is not easy. It may even exceed the maximum for any single charge. Here the Attorney argued for a starting point of 9 years. It may well have been difficult to displace such a starting point, on the facts of this case, if it had been imposed. However we have no doubt that (on a totality basis) the starting point of 7 years which was adopted was well merited. On any view of the matter it was not, in principle, excessive given the central characteristics of the offending.

[74] Turning next to the particular circumstances of the offender, the Judge took into account that some restitution that had been made, the lack of prior offending, and some admittedly serious health issues the appellant has, to reach a discount of 2 years, thereby reaching an overall effective sentence of five years imprisonment. Those were entirely orthodox, and proper deductions. It was suggested something more should have been deducted for the health problems. We are not minded to interfere in that respect, and the Judge correctly noted the steps the prison authorities can take in that regard.

[75] In the result, we are of the view that an effective sentence of 5 years in this case cannot be said to be manifestly excessive in the circumstances of the offences as found

by the Judge, and endorsed by this Court. Consistent with contemporary sentencing practice that sentence of 5 years will be attached to each of the most serious offences. These comprise the Fruean transactions (S1732/10 and S1728/10).

[76] On each of the other charges, the appellant is sentenced to specific periods of imprisonment concurrent with the Fruean sentences in [10] above:

a. Blakelock sale (S1727/10 and S1730/10) – 9 months each;
b. Talamaivao transaction (S1729/10) – 6 months; and
c. Pasia Milford account (S1731/10) – 6 months.

[77] We have differed from the Judge as to how the sentences are to be allocated, but the sentence appeal is dismissed. The effective period of imprisonment remains at 5 years.

Result

[78] The appeals against conviction on three charges of theft (S1799/10, S1803/10 and S1800/10) are allowed and the three convictions quashed on the ground that these were alternative charges. In all other respects the appeal against conviction is dismissed.

[79] The appeal against sentence is dismissed.

Honourable Justice Baragwanath

Honourable Justice Fisher

Honourable Justice Hammond