

STATE OF TASMANIA v KEVIN JOHN CLANCY
COMMENTS ON PASSING SENTENCE

8 NOVEMBER 2021
ESTCOURT J

The defendant in this matter Kevin John Clancy has pleaded guilty to two counts of computer related fraud.

He was between 72 and 73 years of age at the time of this offending. He is now 76 years old.

The now deceased victim of the defendant's offending was his late sister Ethel Kaye Hawtree who died in April 2021. She was between 66 and 67 years of age at the time of the offending which occurred between December 2017 and April 2018.

The deceased as I will refer to her, had a life-long alcohol abuse problem which caused the expedited progression of her moderate dementia. She was suffering from dementia during the period of the indictment. This condition was accompanied by significant memory impairment, anxiety, dis-inhibition and impulsivity. She lacked insight into her condition and the physical and financial vulnerability that it caused her, although she knew that she was not capable of looking after her own financial affairs.

In October 2013 the deceased gave the defendant access to her MyState Bank Access Assist account and a Visa debit card which allowed him to make EFTPOS purchases and cash withdrawals from automatic teller machines.

At the time the offending began on 6 December 2017, the Access Assist account had \$135,258.15 in it. The deceased's pension of approximately \$445.50 per fortnight was also paid into the account.

At the time of these crimes the complainant also held a second Access account with MyState Bank. A relatively low balance was maintained on that account during the period of the offending. The defendant would make transfers into that second account and the deceased would use the money in the account for daily purchases and living expenses.

The defendant's authority in managing the two accounts was to help the deceased to manage her money. She did not give him permission to take money to keep for his own use.

The first count on the indictment relates to a period between 7 January 2018 and 24 April 2018 when the defendant used the debit card to make 41 cash withdrawals from automatic teller machines totalling \$39,300.

The second count on the indictment relates to a period between 6 December 2017 and 26 April 2018 during which the defendant used his access to the deceased's account to make three electronic transfers, each of \$5,000 to an account in the name of the defendant and his wife.

In total, the defendant defrauded the deceased of \$54,300.

The defendant has no prior convictions.

The State seeks a compensation order in the sum of \$54,300 in favour of the Estate of the Late Ethyl Kaye Hawtree and I make that order pursuant to s 68(1) of *Sentencing Act* 1997.

The State draws attention to the aggravating features of these crimes namely, that they involved a serious breach of trust against a vulnerable complainant.

On behalf of the defendant, it is submitted that the background to the commission of these crimes is somewhat unusual in that in 2015 the deceased and defendant purchased a unit in Claremont for \$224,070 with the entirety of the purchase funds contributed by the deceased and the defendant on a respective 60/40 basis.

In 2017 the property was sold for \$235,000, however, because of an inexplicable error made by the conveyancer, the sale proceeds were divided 75/25 between them in the deceased's favour. I am advised, that the conveyancer's file does not reveal how this occurred. The overpayment to the deceased totalled \$37,470.80.

The defendant's counsel is instructed that when the defendant raised the error with the deceased, it was agreed that the defendant would take the funds by drawing down from her bank account from time to time. The deceased's bank records demonstrate that money was drawn by the defendant commencing shortly after the date of settlement in September 2017.

It is against this background that the defendant continued to take money to which he was not entitled. The money was spent on his own personal expenses and in pursuit of his gambling addiction, from which I am informed he is now in remission.

The defendant is married, and has 4 adult daughters. He resides at St Helens with his wife, and one daughter, who has Down Syndrome.

His daughter requires ongoing care and assistance with day-to-day activities. The defendant does all of the long-distance driving in the household, as his wife, because of her age and health no longer feels capable of making long trips. The defendant is responsible for driving his daughter to a range of scheduled appointments.

The defendant has had an extensive work history. Following the end of his formal education he undertook an apprenticeship in carpentry and joinery. He has worked on post-1967 bushfire reconstruction projects around southern Tasmania, he then worked for the Boyer Paper Mill, and for the Tasmanian Government as a railway maintenance carpenter for four years, before undertaking work as a subcontractor glazier. From 1978 he worked for Ansett as a ground service officer and stayed until the company ceased trading in the early 2000s. Following this, he became a subcontractor for Innerspace Wardrobes. He retired from the workforce in 2014 and has been in receipt of an old age pension since that time.

The defendant suffers from degenerative disc disease, diabetes, high blood pressure, a heart murmur, hypertension and gout, for which he is prescribed medication. He is currently consulting an ophthalmologist and may require cornea surgery in the near future to improve his eyesight.

In regard to his mental health he was referred to Doctor Angela Josephs, a Hobart based Clinical Psychologist, by his Lindisfarne based treating general practitioner, Dr K.R. Krishna, on 13 February 2020. Ms Josephs confirms that the defendant suffers from Major Depressive Disorder, single episode, severe, with anxious distress in direct response to the current offences, however, although his depression onset most likely began during his offending conduct as he had endured prolonged frustration and stress as a result of his sister's behaviour which influenced poor decisions. His symptoms include insomnia, nightmares, anxious thoughts and rumination, suicidal ideation, thought of worthlessness, guilt and helplessness, agitation and restlessness. She is of the opinion that the defendant's Gambling Disorder, now in sustained remission began during the period of his offending.

The defendant has been assessed as suitable for home detention, however the report I have received states that should a Home Detention Order be imposed the defendant would not be permitted to attend Hobart and stay overnight for regular medical appointments and that any future appointments for ongoing psychological care would need to be conducted via telephone.

In addition, his role as a driver for his daughter's medical appointments and potentially for his wife would not be permitted for the same reasons.

The defendant is remorseful and pleaded guilty after a proposal was put to his legal advisers following preliminary proceedings. That proposal was put before the death of the deceased but accepted after she had died.

He has attempted to obtain finance to repay the monies and has now succeeded in that by way of an advance from Centrelink which I am told would in effect double the pension he receives, with the result that the extra amount would be available to be paid in restitution. The advance would be secured against his home and repaid to Commonwealth at the time of his death.

I accept the State's submissions as to the aggravating features of the defendant's offending, but having regard to his age and the fact that he has lived until 2017, a long life as an honest, law abiding, and industrious member of the community I do not see this as a case calling for an immediate custodial sentence.

Nor do I see home detention as a just response to the defendant's crimes, given their context are serious but not egregious, and when home detention would prevent him and his disabled daughter and potentially his ageing wife from driving from St Helen's to Hobart with overnight stays, for the purpose of accessing medical treatment in Hobart for complex and multiple medical conditions.

The defendant is sentenced to a single sentence of nine months' imprisonment, which sentence I wholly suspend on condition that he commit no offence punishable by imprisonment for a period of two years.