

STATE OF TASMANIA v KENNETH DAVID DRAKE
COMMENTS ON PASSING SENTENCE

5 APRIL 2016
PORTER J

The defendant appears for sentence having pleaded guilty on complaint to one count of stealing. Pursuant to s 385A of the *Criminal Code*, I am also dealing with his plea of guilty to a second charge of stealing laid on complaint. The defendant is convicted of the crimes. The victim of crime compensation levy of \$70 is to be paid within 28 days of release. The first matter, on which the defendant was committed for sentence, alleges that between April 2009 and December 2015 he stole \$925,085.09 the property of Barbara Reardon. The second charge is that he stole \$15,850 between May and July 2010, the property of Geoffrey Lyden. The facts are that the defendant was employed as a financial advisor by a financial services company, wholly owned by a major bank. The defendant had known each of the complainants for about 20 years. He was their financial adviser and had control over their investments. Mrs Reardon is now 94; Mr Lyden is now 71. The defendant invested Mrs Reardon's money in four different external managed investment accounts. He also operated her savings account with a different bank. The defendant invested Mr Lyden's money in one of the same managed investment accounts that he used for Mrs Reardon's funds. In about August 2015, the Public Trustee took over the administration of Mrs Reardon's financial affairs. In December 2015 the Public Trustee received advice from, it seems, the defendant's own bank that he had misappropriated money belonging to Mrs Reardon. Police were notified. Investigations identified Mr Lyden as a second victim. The investigations showed that the defendant transferred large sums of money from the investment accounts into his own bank accounts, and in the case of two investment accounts, he directed the income be deposited into his own bank account. In order to transfer or withdraw money from each of the complainants' investment accounts, the defendant was required to present signed instructions from each of the complainants. On a number of occasions the defendant forged Mrs Reardon's signature and instructions to withdraw money, and forged Mr Lyden's signature on three occasions. In relation to Mrs Reardon's investments, there were 61 unauthorised transactions across the four investment accounts. In relation to Mr Lyden, there were the three transactions in which the defendant completed withdrawal slips and forged Mr Lyden's signature. On 5 February 2016 the defendant was interviewed by police. I am told that the defendant was aware of the queries which had been raised and of the impending investigation, and arranged through his lawyers to present himself for interview. He admitted what he had done. He said he did not remember taking any money from Mr Lyden until a few days before the interview. He said he had misappropriated the money because of a personal debt crisis. He said his debts were large, but that he really had no idea where all the money had gone other than business and credit card debts. It appears that he was the sole director and shareholder of a proprietary company called Ken Drake Financial Services, but what he and the company did is unexplained.

The Crown case was initially put on the basis that the complainants had very little ability to replace the money that was stolen from them, the clear suggested inference being that all the money had been lost to them. A victim impact statement of Mr Lyden seems to have been prepared on that basis. Mr Barker, Senior counsel for the defendant, questioned the suggestion that the two complainants had lost the money forever, raising the involvement of the major bank as the owner of the defendant's employer. I have now been told that the bank will reimburse the full amount. Accordingly, I proceed on the basis that the loss is that of the bank and, very possibly, an insurer, at least to an extent. A victim impact statement prepared by Mrs Reardon's niece speaks mainly of the emotional hurt and distress that Mrs Reardon has suffered. She had complete loyalty and trust in the defendant and feels the betrayal very

keenly. In Mr Lyden's statement, modifying it to reflect the impending reimbursement, he says that the defendant's conduct has left him emotionally upset, financially disadvantaged to date, and has caused deteriorating health. He had been reliant on his investments to maintain a reasonable lifestyle that included a hobby and some interstate travel for relaxation. He finds the betrayal hard to cope with.

The defendant is now 60; he was 54 when the criminal conduct began. He has no recorded offending history of any relevance. He has tertiary qualifications in commerce and worked in various positions before joining the financial services company 25 years ago. He worked both as a financial adviser and was the accountant to that business. His clients numbered about 100, in respect of whom he had the same powers and authorities as he did in respect of the complainants. There is no suggestion that his wrongdoing goes beyond the two present complainants. The genesis of the offending seems to be a marriage breakdown in about 1995. Prone to low mood, this made his emotional state much worse and he took to substantial alcohol use as a means of self-medication. He was also gambling which seemed to go hand in hand with the drinking. He lacked motivation and enthusiasm. As I understand it, his gainful work decreased. He remarried in 1999. His second wife was a publican which apparently did nothing to help his drinking problem. I am told that she knew nothing of his real difficulties and was quite unaware of his offending behaviour when it was happening. His debt levels increased, and he exhausted the credit available on a number of credit cards. The mood and alcohol abuse gave rise to temptation to which he ultimately succumbed. Once he started, the conduct became easier to repeat. His mood was such that he told himself that if he was caught out, he would commit suicide. Despite the amount involved, the defendant has nothing to show for what he did. There is no dispute that he has not accumulated wealth or assets. Having been in custody since 5 February 2016, his health has greatly improved. I take into account the defendant's co-operation with the police. He provided them with information which they might otherwise have taken time and effort to uncover. He agreed to be taken into custody and dealt with on the day of the interview. He pleaded guilty that day on his very first appearance and has made no application for bail. His plea of guilty has undoubtedly saved a document-intensive and time consuming trial.

Mr Drake, I have set out the things which count in your favour, but your conduct amounted to very serious breaches of trust in respect of the two clients. They were elderly victims who had absolute faith in you and trusted you completely with full power over their affairs and access to their money. This devious conduct was not an isolated lapse but a systematic course of conduct over a lengthy period. It is very fortunate that the victims will be reimbursed but they have suffered distress and uncertainty, and feel deeply betrayed. Although the loss is to be borne by corporations having a greater capacity to absorb it, that can still have an ultimate impact on sections of the community. It is important that members of the community have faith in professionals such as financial advisers entrusted with money. The appropriate sentence is one of 6½ years' imprisonment to commence on 5 February 2016. Having regard to your personal circumstances I think that the maximum parole eligibility is justified, and I order that you not be eligible for parole until you have served one-half of that term.

I make compensation orders in favour of Barbara Reardon and in favour of Geoffrey Lyden. They will both be for amounts to be assessed and I adjourn the further hearing of those applications to a date to be fixed.