

STATE OF TASMANIA v MERRICK LEIGH MUTIMER
COMMENTS ON PASSING SENTENCE

3 FEBRUARY 2020
ESTCOURT J

The defendant, Merrick Mutimer, has pleaded guilty to one count of stealing and thirty one counts of computer related fraud. The financial benefit from the crimes amounts to \$64,828.

The defendant was a computer programmer who operated a business known as RKT Software Development (RKT). In around 1999, Martin Payne who managed a number of gymnasiums in the Sydney area engaged the services of the defendant and his company to supply a gym management software program.

This was agreed and between the years 2000-2005, the defendant, through his company, supplied a software program to Mr Payne's fitness centre franchise known as Body Shape Female Fitness Centres (Body Shape).

In 2005 the defendant, his wife Kaye Mutimer and Mr Payne and his wife Lynn Loveday formed a company called eDebit Pty Ltd (eDebit). The aim of this company was to provide a direct debit collection service to the fitness industry and other industries which collect recurring revenue through direct debit such as child minding centres, driving schools etc.

From 2005 eDebit traded as a merchant aggregator with a merchant aggregator's licence operating from two offices; one in Sydney and one in Tasmania.

Mr Mutimer was a working director of eDebit and he was responsible for its IT development and managed the office in Tasmania. He was also responsible for the management of technical support to clients of the company. Mr Payne was also a working Director of eDebit and was responsible for sales and administration and the management of the office in Sydney.

At the commencement of the business Mr Payne, through his franchise Body Shape, engaged and paid eDebit to undertake their direct debit collection service, which was something he previously did himself. This was done to allow eDebit to receive an income stream from the commencement of the company.

eDebit grew to provide a direct debit collection service to about 800 businesses throughout Australia.

The defendant wrote the program in code for "webdebit" which controls the processing of the direct debit and direct credit transactions of eDebit. From 2005 until 2012 eDebit was breaking even after payment of wages and expenses. From 2013 it commenced to operate with a profit. However that profit was unknown at the time.

On 6 June 2013 the defendant accidentally created an invoice for the sum of \$3,647.12. The money was transferred into an account operated by him and his wife. The defendant was aware of this but kept the money (count 2 on the indictment).

Around that time that the defendant adjusted the software which resulted in adjusting the daily webdebit transfer of the administration fees from the trust account to the general account by reducing the actual fees by 5 per cent (count 1 on the indictment).

He then commenced invoicing eDebit using his business RKT and paying the monies from eDebit into his joint account with his wife.

He transferred the funds by fraudulently creating a false invoice in the name of RKT for work that was not done and then paying that invoice by creating a debit entry on eDebit's Westpac Bank account, transferring the funds to a joint bank account with his wife in order to credit the money to his account.

The offending came to light on 18 September 2014 when Mr Payne noticed a transaction payment to RKT for the sum of \$2,405. After some further discoveries and false explanations by the defendant, Mr Payne asked him whether or not he had been misappropriating the money, and the defendant admitted that he had. He told Mr Payne that it had started in March of that year and he had taken about \$25,000. The defendant told Mr Payne that it started by way of a mistake and, when it was not noticed or was not returned, he kept going. He said that no one else in his family or the business knew what he had been doing.

On 22 September 2014 the defendant signed a statutory declaration stating that between 28 March and 18 September 2014 he had misappropriated an amount of \$25,345 of eDebit company funds.

On 22 September 2014 Mr Payne received a text message from Mrs Mutimer saying she had found that a further \$45,000 had unlawfully been credited to their joint bank account from eDebit. She said the defendant had gone missing about an hour earlier and had left a suicide message by phone.

Police commenced a search and located the defendant in bush land near Castra. He was in his motor vehicle, which was running and there was a garden hose attached to the exhaust pipe running to the inside of the car. He was taken to hospital but did not suffer significant injury.

Subsequently Mrs Mutimer supplied all of the Mutimers' bank statements to Mr Payne which showed the amounts received into the bank account on each of some 17 occasions.

A further audit revealed the total sum taken was \$64,828. The audit was conducted by eDebit's bookkeeper and was sent to the defendant, and on 27 October 2014 he accepted that it was accurate.

Mr Payne, through eDebit, commenced civil action in order to recoup the funds that had been misappropriated. On 11 March 2015 the defendant's lawyer wrote a letter to eDebit's lawyer accepting that the defendant had misappropriated the sum of \$64,828.

On 25 March 2015 the total sums misappropriated were repaid by the defendant, plus a sum of \$500, apparently a fee, the total being \$65,328. The defendant drew on his future superannuation in order to do so.

During this process both the defendant and his wife resigned as directors of the company and subsequently sold their shares.

I have read a victim impact statement prepared by Mr Payne. Notwithstanding that restitution has been made, he has suffered financial loss, stress and hardship, during the period of, and for

the five years since, the defendant's fraudulent conduct. It has, in effect, taken five years to get the company back to the same financial position as it was in as at September 2014.

The defendant is aged 61 years and has led a hitherto blameless life and has no prior convictions. There are a number of mitigating factors with respect to this obviously serious crime.

The defendant was born in the UK and in 1979 he entered into a relationship with Mrs Mutimer which still endures. The couple have four children. They came to Australia in 1990.

The defendant has always been employed and over time he gained considerable computer skills from hands-on experience. He came to Tasmania with his family in 2003 and began to work in the IT field of e-debit. He developed and owned the code which was utilised by Mr Payne and him in their company.

He developed a very strong sense of grievance with Mr Payne as he did not receive any recompense for the code, which he valued at \$25,000 and which has now been lost to him as a result of being revealed to others after the defendant's offending.

Moreover, the defendant perceived that he was working much harder for the company than Mr Payne for the same return.

At one point in time there had been an expression of interest in the company which valued it at between \$400,000 and \$500,000, but in the events that occurred he and Mrs Mutimer sold their shares, after his offending, for \$5,000 each.

It is also to be noted that of the money misappropriated, portion of it would, in the ordinary course of events have found its way back to the defendant and Mrs Mutimer.

As one of my fellow judges said recently upon sentencing a defendant, in not entirely dissimilar circumstances, and I quote:

"Employers who trust employees with the control of money are entitled to expect honesty from them. Such dishonesty is sometimes difficult to detect. The courts have a duty to impose sentences which attempt to make it clear that those who may be tempted to steal money in breach of trust should expect harsh punishment. Only then will sentences operate as an effective deterrent."

Having said that, it is abundantly clear from a review of sentences passed by judges of this Court in recent years that it is not in every case such as this that an immediate custodial sentence is deemed necessary.

In my view the factors which militate in favour of the defendant being punished while remaining in the community are: his personal circumstances as outlined, including his blameless past, his suicide attempt, his complete co-operation, albeit after initial denial, by providing, in effect, the whole of the case against him, his ultimate pleas of guilty, the fact of complete restitution, and his own financial loss. In addition to the defendant's lack of prior convictions, I also note that the misappropriation was motivated otherwise than solely by greed, the first misappropriation having been accidental and, subsequently his offending being motivated by a misguided sense of grievance within the business in which he was involved

with Mr Payne. I have already noted that some of the money would ultimately have rightfully been the defendant's.

I convict the defendant on all counts and order that he serve 18 months' home detention.

My order includes all of the core conditions contained in s 42AD(1) of Part 5A of the *Sentencing Act 1997* to be imposed, including s 42AD(1)(g) as to electronic monitoring.

In addition to those core conditions I impose the following conditions to be included in the order:

- (1) the defendant must, during the operational period of the order, remain at [address] at all times unless approved by a probation officer;
- (2) the defendant must, upon his release from Court today, attend the Community Corrections office at Level 3, 46 Mount Street Burnie for induction onto this order;
- (3) the defendant must, during the operational period of the order, maintain in operating condition an active mobile phone service, provide the contact details to Community Corrections and be accessible for contact through this device at all times;
- (4) the defendant must submit to the supervision of a Community Corrections officer as required by that officer;
- (5) the defendant must not take any illicit or prohibited substances. Illicit and prohibited substances include:
 - (a) any controlled drug as defined by the *Misuse of Drugs Act 2001*;
 - (b) any medication containing an Opiate, Benzodiazepine, Bupropion, Hydrochloride or Pseudoephedrine, unless he provides written evidence from a medical professional that he has been prescribed the relevant medication; and
 - (c) the defendant must not, during the operational period of the order, consume alcohol, and must, if directed to do so by a police officer or Community Corrections officer, submit to a breath test, urine test, or other test, for the presence of alcohol.

I also make a community correction order that contains, in addition to the statutory core conditions, a special condition that the defendant must, within the next two years, satisfactorily perform community service as directed by a probation officer or a supervisor for a period of 210 hours. I note that the defendant is not recommended by Community Corrections for a community service condition as his employment is said to likely be a significant barrier to attendance. I do not accept that as a valid reason for not undertaking community service – the defendant will have to find the time.