

Court of Queen's Bench of Alberta

Citation: R v Breitreutz, 2022 ABQB 559

Date: 20220819
Docket: 180594889Q1
Registry: Calgary

Between:

Her Majesty the Queen

Crown

- and -

Arnold Breitreutz

Defendant

**Reasons for Decision
of the
Honourable Justice Colin C.J. Feasby**

Introduction

[1] Mr. Breitreutz was found guilty of defrauding the many individuals who invested in his company, Base Finance Ltd between May 1, 2014 and September 30, 2015 of millions of dollars (*Criminal Code*, s 380). The details of Mr. Breitreutz's fraud are set out in *R v Breitreutz*, 2022 ABQB 449 and are not repeated in these reasons.

[2] Now the Court must determine the appropriate sentence for Mr. Breitreutz. His fraud was deliberate, large-scale, and profoundly and adversely affected the lives of many victims. The law provides for a maximum sentence of 14-years in prison in recognition of the harm that can be wrought by large-scale fraud and the significant societal interest in deterring large-scale fraud.

[3] These reasons explain that Mr. Breitreutz's conduct warrants a significant sentence. There are many aggravating factors including the large amount of money involved, the duration

of the fraud, the complexity of the scheme, the trust placed in Mr. Breitzkreutz by victims, and the significant financial and psychological harm suffered by victims.

Time Period of the Fraud and Use of Contextual Evidence

[4] The charge period is May 1, 2014 to September 30, 2015. These were the final 17 months of the operation of the investment business of Base Finance Ltd which began around 30-years earlier. The reason that the Crown selected this period for the charge was that it was the only period for which it had the comprehensive financial evidence necessary to establish its case.

[5] The evidence adduced during the trial, however, ranged well beyond the charge period. Investors gave evidence about their encounters with Mr. Breitzkreutz and investments in Base Finance Ltd as far back as the 1990s. Mr. Breitzkreutz gave evidence about the founding of Base Finance Ltd in the mid-1980s.

[6] For the purposes of sentencing, only the number of victims (over 100) and the quantum of money invested and lost (over \$21 million) during the charge period have been considered. Similarly, all the aggravating factors that I have accepted were present in the charge period.

[7] I have considered trial evidence from before the charge period to put Mr. Breitzkreutz's moral culpability in context.

Crown and Defence Positions on Sentence

[8] The Crown seeks a term of imprisonment of ten to twelve years as well as a significant restitution order. The Crown justifies its proposed sentence on the basis that a number of aggravating factors are present. In particular, the Crown submits that, amongst other factors, the large amount of money taken, significant number of victims, impact on the victims, abuse of trust, and complexity of the fraud all weigh in favour of a lengthy prison sentence.

[9] The Defendant posited in written submissions that a sentence of between five and eight years was appropriate. In oral submissions, counsel for the Defendant stated that 7.5 years was the correct sentence in the circumstances. Counsel for the Defendant concedes the existence of some of the aggravating factors identified by the Crown, but contests others. Counsel for the Defendant further contends that there are also mitigating factors including Mr. Breitzkreutz's age and lack of personal benefit from the fraud.

Victim Impact Statements

[10] Twenty-nine victim impact statements were provided to the Court. Many of the victim impact statements were submitted jointly on behalf of two or more people. The victim impact statements show the serious effects that Mr. Breitzkreutz's fraud had on the victims.

[11] A large-scale financial fraud of the type perpetrated by Mr. Breitzkreutz is pernicious. Not only does it result in financial loss, but it often has significant secondary effects that reverberate through the victims' lives.

[12] Several themes recur in the victim impact statements. The victims are mainly, though not exclusively, retirees who lost some or all their retirement savings. The victims cannot enjoy the retirement lifestyle that they worked hard for their whole lives. And, in some cases, victims have had to postpone retirement or continue to work through their retirement. Other victims had to

liquidate assets to stay financially afloat. One nonagenarian victim reported that because of her financial losses she must live on her own rather than in an assisted living facility.

[13] Many victims reported suffering anxiety, depression, and sleep disorders. These were partly caused by the stress of being placed suddenly in financial difficulty. But these conditions were also provoked by the profound sense of betrayal experienced by many of the victims. Many of the victims had, over time, come to know and trust Mr. Breitreutz and some considered him to be a friend. The stark realization that he had defrauded them hit many of the victims hard.

[14] Other victim impact statements reported physical consequences of the stress resulting from Mr. Breitreutz's fraud including a severe stroke and a premature death. No proof of causation was provided to the Court, but the attribution of these physical consequences to the fraud by victims is understandable. There can be no doubt that regardless of causation, these significant adverse events would have been easier to deal with had the victims had the financial cushion that was taken from them by Mr. Breitreutz.

[15] As detailed in my earlier reasons, the Base Finance Ltd fraud worked mostly by word of mouth. Mr. Breitreutz told the initial stories about investing with Base Finance Ltd and then satisfied investors would repeat the stories and tell of their steady interest payments before introducing their friends and family to Mr. Breitreutz. Many victims reported feeling enormous guilt for being responsible for introducing their friends and family to something that caused them to lose significant amounts of money and, in some cases, their life savings. The damage to victims' relationships with friends and family caused by the fraud cannot be measured.

[16] One of the most insidious effects of Mr. Breitreutz's fraud on the victims was that it robbed them of their faith and trust in others. Our society depends on faith and trust in our fellow human beings. Mr. Breitreutz took advantage of that and now his victims, quite understandably, have difficulty trusting others. The loss of the ability to trust others will significantly impair the lives of the victims.

[17] The victims of the Base Finance Ltd fraud blame themselves for being stupid or foolish or greedy. They are none of these things. What happened to the victims in this case could happen to anyone. People who are strong, smart, and vigilant cannot apply their intelligence and watchfulness to every aspect of their lives all the time. We all make decisions – often big decisions – based on the recommendations of friends and family and on the trust that we put in our fellow human beings.

Sentencing Principles

[18] The objectives of sentencing are set out in *Criminal Code* s 718. The objectives of sentencing are:

- (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and

- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

[19] The fundamental principle of sentencing is proportionality. The *Criminal Code* s 718.1 provides that “a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.” The *Criminal Code* s 718.2 sets out additional principles applicable to sentencing, including that a sentence should be “increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender” and that “a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.”

[20] The *Criminal Code* s 380.1 outlines specific aggravating circumstances to be considered when sentencing someone guilty of fraud. The aggravating circumstances that must be considered are:

- (a) the magnitude, complexity, duration or degree of planning of the fraud committed was significant;
- (b) the offence adversely affected, or had the potential to adversely affect, the stability of the Canadian economy or financial system or any financial market in Canada or investor confidence in such a financial market;
- (c) the offence involved a large number of victims;
- (c.1) the offence had a significant impact on the victims given their personal circumstances including their age, health and financial situation;
- (d) in committing the offence, the offender took advantage of the high regard in which the offender was held in the community;
- (e) the offender did not comply with a licensing requirement, or professional standard, that is normally applicable to the activity or conduct that forms the subject-matter of the offence; and
- (f) the offender concealed or destroyed records related to the fraud or to the disbursement of the proceeds of the fraud.

Aggravating Factors

[21] The Crown conceded that Mr. Breitkreutz’s fraud did not adversely affect the Canadian economy or investor confidence in financial markets. The Crown further conceded that the concealment or destruction of records related to the fraud was not an aggravating factor in Mr. Breitkreutz’s case.

[22] Defence counsel conceded that the magnitude and duration of Mr. Breitkreutz’s fraud were aggravating factors. He also conceded that the large number of victims involved was an aggravating factor.

[23] The disagreement between the parties over the s 380.1 factors were whether the fraud was sufficiently complex as to be aggravating and whether the offender failed to comply with a licensing requirement or professional standard that is normally applicable to the conduct in issue.

[24] Defence counsel argued that Mr. Breitkreutz’s fraud was not complex because it involved a single bank account, all transactions were recorded in handwriting in a ledger, and there was no

elaborate corporate structure designed to obscure the flow of funds. There is some truth to this, but I am nevertheless satisfied that the fraud was sufficiently complex to meet the requirement of s 380.1.

[25] Mr. Breitreutz obscured his fraud using what appeared to be formal legal documents (the Irrevocable Assignments of Mortgage Interest) and cloaked the fraud with legitimacy by issuing T-5 tax forms so that the victims would pay tax on the “interest” that they supposedly earned. Mr. Breitreutz further invested the victims’ money in oil and gas ventures in the United States all the while maintaining the façade that the money was invested in mortgages on Alberta real estate. While Mr. Breitreutz’s fraud was not the most elaborate fraud, it was much more than a simple lie to elicit a payment.

[26] There is insufficient evidence before the Court to determine whether Mr. Breitreutz failed to comply with a licensing requirement or professional standard. There is no question, as I have found, that his conduct fell below that required by the law but that is not because he lacked a specific license or failed to meet a professional standard. Accordingly, I find that the lack of a license or failing to meet a professional standard is not an aggravating factor.

Age of Offender as a Mitigating Factor

[27] Defence counsel submitted both in his written memorandum and orally that the Court should take Mr. Breitreutz’s advanced age into account in sentencing. No authorities or evidence were provided to the Court to support this submission.

[28] Chief Justice Lamer, writing for the Supreme Court, observed in *R v M (CA)*, [1996] 1 SCR 500 at para 74 that:

in the process of determining a just and appropriate fixed-term sentence of imprisonment, the sentencing judge should be mindful of the age of the offender in applying the relevant principles of sentencing. After a certain point, the utilitarian and normative goals of sentencing will eventually begin to exhaust themselves once a contemplated sentence starts to surpass any reasonable estimation of the offender’s remaining natural life span. Accordingly, in exercising his or her specialized discretion under the *Code*, a sentencing judge should generally refrain from imposing a fixed-term sentence which so greatly exceeds an offender’s expected remaining life span that the traditional goals of sentencing, even general deterrence and denunciation, have all but depleted their functional value. But with that consideration in mind, the governing principle remains the same: Canadian courts enjoy a broad discretion in imposing numerical sentences for single or multiple offences, subject only to the broad statutory parameters of the *Code* and the fundamental principle of our criminal law that global sentences be “just and appropriate.”

[29] To follow Lamer CJC’s direction, I am required to ascertain Mr. Breitreutz’s life expectancy so that I may avoid imposing a sentence that greatly exceeds that term. I take judicial notice of the life expectancy by age data published by Statistics Canada: *Warkentin Building Movers Virden Inc v LaTrace*, 2021 ABCA 333 para 34. Statistics Canada, “Life expectancy at various ages, by population group and sex, Canada” (December 17, 2015) (<https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1310013401>) indicates that at 75 years of

age the average Canadian male has a life expectancy of 10.2 years. I conclude that 10.2 years marks the upper limit of the range of sentence that can be imposed on Mr. Breitreutz.

[30] The point made by Lamer CJC, that the purpose of sentencing is exhausted if it exceeds the expected lifespan of an offender, is different than saying that the advanced age of an offender is a mitigating factor. Nevertheless, I agree that in appropriate cases old age may be a mitigating factor. It is important, however, to recognize that old age should not automatically be treated as a mitigating factor. As I will explain, I think that it is especially important in the context of fraud to approach the question of age as a mitigating factor with caution.

[31] The question of old age as a mitigating factor is discussed in Helene Love, “Canadian Sentencing Practices in Relation to Older Adults” (2011) 89 Can Bar Rev 729. Love conducted an empirical analysis of sentencing practices of Canadian courts between 1981 and 2011 with respect to individuals older than 60 years. Love divided her data set into four categories of cases: (1) sexual offences; (2) drug offences; (3) theft or fraud; and (4) driving offences. Love concluded at 757 that “[t]he proportion of cases where age was explicitly found to be a mitigating factor in sentencing is higher for theft and fraud than any of the other offence categories.”

[32] The findings of Love with respect to sentencing for fraud are troubling. Fraud generally, and specifically in the case of Mr. Breitreutz, is a crime that is planned and executed, sometimes over a prolonged period. It is not a crime of circumstance or passion. Fraudsters make cost-benefit decisions as they plan and execute their fraud. One of the important cost calculations that fraudsters make is the likelihood of being caught and the probable punishment that will follow. As the Court of Appeal observed in *R v Steinhubl*, 2013 ABCA 39 at para 22: “There are many schemers who would be quite willing to pocket millions from a fraud, if the likely jail sentence resulting and actually served if they were convicted would only be a small number of years.” Fraud, among all crimes, is the one where specific and general deterrence must loom largest in sentencing.

[33] Fairbairn JA explained in *R v Reeve*, 2020 ONCA 381 at para 44 that denunciation and deterrence are particularly relevant to sentencing in cases of fraud. She held that:

...denunciation and general deterrence are the primary sentencing principles when it comes to large-scale Ponzi-related frauds of this nature. While serious frauds may not involve physical violence, it is a mistake of serious proportion to think that they do not leave just as many seriously wounded behind, often with financial and mental scars that will never heal. The futures that they worked so hard to build are stolen from them because they trusted a professional who they justifiably believed had their best interests in mind.

[34] The Alberta Court of Appeal took the same view in *R v Davis*, 2014 ABCA 115 at para 27 saying that, in the context of sentencing offenders for fraud, “the paramount concern must be denunciation and deterrence.”

[35] An elderly fraudster who knows that age is a mitigating factor in sentencing will consider that fact as part of the cost-benefit analysis of whether to perpetrate the fraud. That is especially problematic because, as in the present case, aging fraudsters are well-positioned to victimize their peers. The biggest effect of Mr. Breitreutz’s fraud was to impose emotional and financial hardship on his victims during their sunset years.

[36] In *R v Sarraf*, 2017 ONSC 7668 Justice Gibson reviewed cases considering whether advanced age was a mitigating factor in sentencing. Following his review, he concluded at para 24 that “advanced age may be considered as a mitigating factor; however, it is not generally independently dispositive on sentencing. If advanced age is considered to be mitigating, it is almost always in conjunction with the ill-health of the offender.” As discussed in the following section of these reasons, submissions concerning ill-health must be supported by evidence from a medical professional.

[37] Except for using Mr. Breitreutz’s life expectancy to set the upper limit for an appropriate sentence as provided for by *R v M (CA)*, I have not taken Mr. Breitreutz’s age into account as a mitigating factor.

Other Asserted Mitigating Factors

[38] Defence counsel submitted that Mr. Breitreutz has some health conditions that should be considered as mitigating factors in sentencing. No evidence from a medical professional has been adduced to substantiate the alleged health conditions, show their gravity, or allow the Court to assess how imprisonment might affect Mr. Breitreutz’s health given those conditions. I adopt the conclusion of Finch JA in his majority reasons in *R v Shah*, 1994 CanLII 1290 (BCCA) at para 34: “Justice is to be tempered by mercy. But in my view an otherwise just sentence should not be reduced on compassionate grounds unless the evidence is current, clear and convincing.”

[39] With respect to concerns about ill-health, I note that *Corrections and Conditional Release Act*, SC 1992, c 20, s 121(b) provides the parole board with the discretion to grant parole, irrespective of parole eligibility, in cases where an offender’s health “is likely to suffer serious damage if the offender continues to be held in confinement.”

[40] Defence counsel submitted that Mr. Breitreutz has been financially ruined by the various legal proceedings that followed the failure of Base Finance Ltd, that he did not personally profit from the fraud, and that he lost his own money investing in Base Finance Ltd. He blames Mr. Fox and others for the victims’ losses.

[41] The fact that Mr. Breitreutz has suffered financially from the legal proceedings that followed the failure of Base Finance Ltd is not a mitigating factor. Civil proceedings, receivership proceedings, and securities enforcement proceedings are all natural consequences of the collapse of a large-scale fraud of the type perpetrated by Mr. Breitreutz. The existence of these legal proceedings and their cost to Mr. Breitreutz is irrelevant to sentencing.

[42] Mr. Breitreutz asserts that he did not profit from the fraud but again offers no evidence to support his claim. If Mr. Breitreutz wanted his submission that he did not profit from the fraud and that he too is a victim to be taken seriously, he would have had to adduce evidence to show where the money went and provided more information than the bare fact that he advanced money to Base Finance Ltd including during its last months of operation. The only inference available from the trial evidence is that Mr. Breitreutz advanced money to Base Finance Ltd in hopes of staving off collapse of the fraud long enough to get some new investors.

[43] I accept that Mr. Breitreutz did not enjoy the flamboyant lifestyle common to many fraudsters nor, so far as the evidence shows, did he take elaborate steps to sequester the funds that he appropriated behind layers of corporations and using offshore havens. So far as the Court can determine, Mr. Breitreutz lost the victims’ money on improvident and unauthorized

investments and then played a shell game for years and perhaps decades to try and avoid reckoning with the fact that he had lost his investors' money. Defence counsel submits, and I agree, that while Mr. Breitreutz's behaviour was despicable and caused pain to many people, it was less egregious than the worst frauds.

[44] Defence counsel submits that Mr. Breitreutz's expression of remorse should be weighed in his favour in sentencing. A careful look at Mr. Breitreutz's words shows that he is sorry that the victims' money was lost but that he still does not accept that his fraud was the cause. Defence counsel in oral submissions asserted that Mr. Breitreutz did not think that he was doing anything wrong during the commission of the fraud and that this is indicative of a lower level of moral blameworthiness. Mr. Breitreutz's affidavit and statement to the Court shows that he clings to this view even after his conviction. For his remorse to be a mitigating factor, Mr. Breitreutz would have to admit the wrongfulness of his conduct and regret for his actions as well as the victims' losses.

Appropriate Sentence for Mr. Breitreutz

[45] Both the Defence and the Crown provided cases to demonstrate what sentences have been imposed in similar circumstances.

[46] Defence counsel provided the following cases: *R v Adams*, 2015 ONCJ 161; *R v Charbonneau*, 2008 QCCQ 251; *R v Macleod*, 2017 ABQB 722; *R v Iyer*, 2016 ABQB 680; *R v Pastuch*, 2019 SKQB 196; *R v Vuong and Quach*, 2018 ONSC 6298. According to Defence counsel these cases establish a sentencing range of 5 to 8 years. Notably, however, every case cited by the Defence involved fewer victims and less money than the present case.

[47] The Crown provided several cases. One, *R v Sorenson and Brost*, is an unpublished decision of Hall J of this Court from 2015. The fraud in *R v Sorenson and Brost* was larger than the fraud in the present case with over 2,000 investors losing money and an unquantified amount over \$100 million lost. The fraud in *R v Sorenson and Brost* was also more complex than the fraud in the present case with victims investing through what Hall J described as "complicated means" through an "offshore company". The offenders were sentenced to 12-years in prison. Given that Mr. Breitreutz's fraud, at least during the charge period, was smaller in scale than that in issue in *R v Sorenson and Brost*, his sentence should be less than 12-years.

[48] The two cases provided by the Crown that I consider most relevant are *R v Reeve* and *R v Johnson*, 2010 ABCA 392. Both cases were Ponzi-like frauds. In *R v Reeve*, the offender defrauded 41 victims of almost \$11 million. In *R v Johnson*, the offender defrauded over 50 people of a total of \$2.43 million. Both cases involved fewer victims and less money than the present case. The trial judge in *R v Reeve* imposed a sentence of 14-years and the trial judge in *R v Johnson* imposed a sentence of 13-years. On appeal in both cases, the sentences were reduced to 10-years. The identical 10-year sentences imposed by the Alberta Court of Appeal and Ontario Court of Appeal in these cases for Ponzi-like frauds smaller in scale than the one in the present case establish a standard. Accordingly, I sentence Mr. Breitreutz to 10 years in prison.

[49] Mr. Breitreutz has been in custody since his conviction on June 29, 2022. As contemplated by *Criminal Code* s 719(3.1), he shall have the time served since his conviction credited at 1.5 days for every day served. Mr. Breitreutz has served 51 days which multiplied by 1.5 and rounded up to the nearest whole number is 77 days. Mr. Breitreutz's 10-year period of incarceration shall be reduced by 77 days.

[50] Mr. Breitreutz is ordered to make restitution to victims pursuant to *Criminal Code* s 738 in the amount of \$3,100,568 which has been calculated by the Crown as being two-thirds of the readily ascertainable loss during the charge period. The readily ascertainable loss is significantly less than the over \$21 million invested in Base Finance Ltd and lost during the charge period presumably because some victims did not work with the Crown.

[51] The Crown seeks a victim surcharge in the amount of \$200 payable to the Clerk of the Court by October 31, 2022. Given the timing of this payment sought by the Crown, it would have priority over any restitution payment to the victims.

[52] Justice Paciocco, as he then was, observed in *R v Michael*, 2014 ONCJ 36 at para 13 that a victim surcharge is “the payment of money to the State, to be spent at the discretion of the State, to assist victims in a range of ways. There is no relationship between the payment an offender makes and the provision of benefits to their victim, if there even is a victim.”

[53] A victim surcharge is appropriate in most cases. However, I can see no reason to allocate even the comparatively small sum of \$200 that would otherwise be paid in restitution to the victims in this case to the government to spend as it sees fit. *Criminal Code* s 737(2.1) does not afford the Court the discretion to decline to order a victim surcharge except where it would cause undue hardship to the offender. To resolve the priority problem that I have identified, I direct that the victim surcharge is not due and payable by the offender until such time as the restitution order has been satisfied in full.

[54] Mr. Breitreutz is prohibited from ever seeking, obtaining or continuing any employment, or becoming or being a volunteer in any capacity that involves having authority over the real property, money or valuable security of another person for life pursuant to *Criminal Code* s 380.2.

Heard on the 17th day of August, 2022.

Dated at the City of Calgary, Alberta this 19th day of August, 2022.

Colin CJ Feasby
J.C.Q.B.A.

Appearances:

Shelley R. Smith
for the Crown

Cale W. Ellis-Toddington
for the Defendant