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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI-2016-004-009662
[2018] NZHC 2552

THE QUEEN

v

LEONARD JOHN ROSS
and
MICHAEL JAMES WEHIPEIHANA

Hearing:	28 September 2018
Counsel:	J C L Dixon QC and J A Zwi for the Crown R S Reed QC and A F Pilditch for the Defendant, Ross M A Corlett QC and J G Donkin for the Defendant, Wehipeihana
Sentence:	28 September 2018

SENTENCE OF EDWARDS J

Counsel:	J C L Dixon QC, Auckland R S Reed QC, Auckland M A Corlett QC, Auckland J A Zwi, Auckland A F Pilditch, Auckland J D Donkin, Auckland
Solicitors:	Serious Fraud Office, Auckland Cook Morris Quinn, Auckland Rice Speir, Auckland

Introduction

[1] Mr Ross, Mr Wehipeihana, you may remain seated until I ask you to stand. You are here today because a jury found you guilty of three charges of obtaining by deception[1], and two representative charges of using a forged document.[2]

[2] The obtaining by deception charges carry a maximum penalty of seven years' imprisonment. The using a forged document charges carry a maximum penalty of 10 years' imprisonment.

[3] I am going to follow a process in sentencing you today.

(a) First, I will summarise the nature of your offending.

(b) Second, I will set out the purposes and principles of sentencing which are relevant in your case.

(c) Third, I will consider an appropriate starting point which reflects the gravity of your offending and your culpability for the role that each of you played in that offending.

(d) Fourth, I will consider whether any uplifts or discounts from that starting point should be made for factors which are personal to each of you.

(e) Finally, I will consider whether a minimum period of imprisonment should be imposed.

The offending

[4] I turn now to summarise your offending.

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1 Crimes Act 1961, s 240(1)(b).
2 Crimes Act 1961, s 257(1)(b).

[5] Your offending stems from events in 2008 and 2010. You were both shareholders in a company called Emily Projects Ltd. Mr Ross, you were the majority shareholder in that company with a 55 per cent shareholding. You were also a director. Mr Wehipeihana, you held a 35 per cent shareholding in the company.

[6] Emily Projects was a company formed to carry out the development of a two-towered serviced apartment complex in Auckland, called the Celestion. This was a project that you, Mr Ross, had started with a former business partner, and which you took over when you went your separate ways.

[7] The catalyst for the fraud was the need to obtain funding to carry out the development. Financial institutions were only prepared to lend if there were a number of sale and purchase agreements in place. These are called pre-sales.

[8] The essence of your deception involved making representations to the ANZ Bank that there were pre-sales in place when you knew that this was not correct. From about June 2008 onwards, representations regarding the level of pre-sales achieved were made to financiers, valuers, lawyers for the bank and bank officers themselves.

[9] Those representations were made orally and in writing. Some of the false representations made were contained in a pre-sales schedule. There were a number of different versions of that schedule, but the final version represented that 47 pre-sales had been achieved through a company called Financial Gain Solutions to New Zealand-based purchasers and 33 pre-sales to Australian-based purchasers had been achieved through an Australian entity called Halim Group. Those representations were not true.

[10] Thirty of the 47 New Zealand-based purchasers named on this schedule came from a list sent to you, Mr Wehipeihana. That information had been sourced from an LJ Hooker database in dubious circumstances. The exchange of emails regarding this list of names was key evidence at trial.

[11] The Bank made a conditional offer of finance on 24 October 2008, and a Facility Agreement was subsequently agreed. The Bank's offer of finance was subject to a number of conditions, including deferral of sales commissions, and signing of an acknowledgement of purchaser document by each of the purchasers who had signed a sale and purchase agreement. Another condition required all cash deposits for pre-sales to be held in a solicitor's trust account with the ANZ Bank.

[12] To satisfy these conditions you presented the Bank with forged sale and purchase agreements, and forged acknowledgement of purchaser documents. Many of the sale and purchase agreements were backdated. Those agreements and purchaser acknowledgements bore the names of genuine people as purchasers, but those genuine people had not signed the documents, and many of them were not even aware of the Celestion development. Some of these so-called purchasers were the family and friends of each of you.

[13] Representations were also made about the deposits paid by these purchasers. This is where Mr Slack, the lawyer for Emily Projects, became involved in the deception. He was required to give an undertaking that the deposits for the pre-sales were held in his trust account. He did so despite knowing that there were no deposits held in his trust account. Instead, after the first drawdown of the loan funds, the Bank's own money was allocated as deposits for each of the purchasers, and then paid back to the Bank. Mr Slack gave evidence of a meeting with you both where he said he received instructions to give the undertaking. Although there were, understandably, gaps in his recollection of events over a decade ago, I found his evidence of that meeting to be compelling.

[14] The representations about pre-sales and deposits induced the Bank to advance a credit facility of approximately $41 million. However, this was not the end of your offending. In order to ensure the bank was repaid, you needed to replace the pre-sale purchasers with genuine purchasers. Efforts to obtain genuine pre-sales had commenced in 2008, and continued throughout the relevant period. Both of you made several trips to market the apartments to overseas buyers. None of the original New Zealand and Australian pre-sale purchasers settled their agreements. These purchasers were ultimately replaced with genuine onsale buyers from overseas.

[15] In 2010, when it came time to settle the apartments, the Bank required the purported pre-sale purchasers to sign deeds forfeiting their rights to the alleged deposits that they had paid. Signatures on many of these deeds were also forged. You presented these deeds to the Bank to satisfy its requirement. The presentation of those deeds formed the basis of the second charge of using a forged document.

[16] The Bank's facility was ultimately repaid and in fact the Bank benefited from the interest and fees associated with the credit facility. Although there was no direct financial loss to the Bank, the victim impact statement filed on behalf of the Bank makes it clear that significant time and effort was required by bank staff to fully recover the Bank's debt facility. And, as I will come back to later in this sentencing, your offending has wider ramifications for commercial confidence generally and indeed, New Zealand's international reputation.

Principles and purposes of sentencing

[17] Next, I set out those purposes and principles of sentencing which are relevant in determining your respective sentences.[3]

[18] The relevant purposes include: holding you accountable, promoting a sense of responsibility and acknowledgement of the harm you have caused, denouncing your conduct, deterring you and others from committing the same or similar offences, and assisting in your rehabilitation and your reintegration into the community.

[19] Relevant principles include: the general desirability of consistency with appropriate sentencing levels; the effect of the offending on the victim; the requirement to impose the least restrictive outcome in the circumstances; any particular circumstances which might make the sentence disproportionately severe; your personal, family, whānau, community, and cultural backgrounds; and other means of dealing with you which have a rehabilitative purpose.

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3 Sentencing Act 2002, ss 7–8.

Starting point

[20] I turn now to the assessment of the starting point. I first consider the overall gravity of the offending and then go on to consider your respective roles in that offending, and relative culpabilities.

[21] The using a forged document charges carry a higher maximum penalty than the other charges. But, as the Crown submits, the obtaining by deception charges capture the essence of your offending. The use of forged documents was a component of your deception of the Bank. Both your counsel agree that the obtaining by deception charges should be taken as the lead offences and that is how I have approached your sentencing.

[22] There is no tariff case for your type of offending. However, the Court of Appeal has set out a list of factors to take into account in assessing culpability in fraud cases.[4]

[23] The first of those factors concerns the nature of the offending, its magnitude and sophistication. I consider your deception of the Bank was highly sophisticated. It involved repeated representations that there were pre-sales in place when you knew there were not. Those representations were made to financiers, valuers, consultants, lawyers, and those at the Bank itself.

[24] Your deception involved an elaborate fiction. It did not just extend to representations about the number of pre-sales you had achieved, but representations about who had made those pre-sales, the locality of the purchasers, and the payment of cash deposits in a solicitor's trust account. That was a fiction which extended over a two-year period, and necessitated further steps being taken in 2010 to maintain the initial lie.

[25] The scope and extent of the fraud is also reflected in the use of forged documents – not only the sale and purchase agreements themselves, but the purchaser acknowledgements and deeds of forfeiture and acknowledgement. Those legal

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4 *R v Varjan* CA97/03, 26 June 2003 at [22].

documents were necessary to substantiate and add flesh to your false representations and then to ensure the ongoing concealment of the fraud once the funding had been obtained.

[26] This was a deliberate, planned and premeditated deception. The only way to secure funding for the development was to have pre-sales. The deception had a singular objective which was to deceive the Bank into advancing the necessary funds to undertake the development.

[27] Its execution involved multiple people. False invoices and letters from sales agents about the deferral of commissions were prepared. The lawyer for the project was directed to give a false undertaking to the Bank regarding the holding of deposits and to devise a scheme whereby the Bank's own money was transferred back to it under the guise of deposits. Your co-offenders, Mr Slack and Mr Foster, pleaded guilty to obtaining by deception charges. Parity with the starting points adopted in their sentences is a factor I will come back to later in this sentencing.

[28] The magnitude of the offending is also reflected in the fact that as a result of your deception you obtained credit of approximately $41 million. That is a significant amount of money by any measure and a solid marker of your culpability.

[29] I accept that the motivation for your offending was not greed. The deception was a means by which to get the development built in a market where pre-sales were difficult to secure. That had obvious benefits for you both, and for others involved in the development. Mr Ross, in your letter to me you characterised what you did as "cutting corners". That significantly underplays the nature of the deception, but I accept that for you at least, the deception was a means to an end and a pathway to ensuring that the development went ahead.

[30] There was only one victim of the offending, the ANZ Bank. That is a distinguishing factor from other fraud cases where multiple people or institutions have been targeted. But it is worth remembering that your deception of the Bank took place at a time when financial institutions had tightened their lending criteria due to the impact of the global financial crisis, and the fallout from the Bluechip saga. Your

scheme involved an end run around conditions which had been specifically designed to mitigate risk to the Bank.

[31] Thankfully, that specific risk did not eventuate in this case, and I acknowledge that this was due to your respective efforts to secure genuine sales to ensure the Bank was repaid. The fact that the Bank did not suffer any direct financial loss, and in fact profited from the interests and costs on the facility, is a relevant factor in assessing your culpability. It is also another factor which distinguishes your case from other fraud cases in which substantial losses have been sustained.

[32] But the lack of any direct financial loss needs to be considered in context. As set out in the victim impact statement filed on behalf of the Bank, the risk of fraud is a key concern for the Bank and the expectation is that customers and their legal counsel are trustworthy and act with integrity.

[33] Those sentiments reflect the real harm your actions have caused in this case. Deception of this magnitude threatens the trust and confidence which is essential to commercial deals. And, as Lang J observed in *Serious Fraud Office v Huang*, the ripples of offending such as yours can travel beyond the financial institutions involved, and in that respect they pose a threat to New Zealand's reputation.[5] Your offending was not victimless and the absence of direct financial loss should not be equated with an absence of harm.

Mr Ross

[34] I now turn to consider your individual roles in the offending. I start with you, Mr Ross.

[35] I consider you to be the architect of this deception. I do not base that solely on the company structure or the fact that you were personally invested in the scheme, but on all the evidence I heard at trial.

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5 *Serious Fraud Office v Huang* [2018] NZHC 86 at [21].

[36] This was your project. You were initially developing the Celestion under the umbrella of another company and you took it over when you split from your business partner. You were an experienced and successful developer. As such you knew what was required to bring the development to fruition. Pre-sales were integral to the development getting off the ground, and you knew that obtaining pre-sales was the first critical step in securing the necessary finance.

[37] You fronted the deception. You were responsible for making key representations which induced the Bank to advance the credit. The Bank relied on you, and your reputation, in assessing the application for credit. That was confirmed by a bank witness who described you as a key individual. To that extent, your offending involved a breach of trust.

[38] Your counsel refers me to the case of *R v McKinley* and submits that I should sentence you on the basis of recklessness, unless there is strong evidence of actual knowledge.[6] To the extent that it is contended that I should accept the version of the facts most favourable to you, then I reject that submission. The Court of Appeal has said on numerous occasions that a Judge is entitled to reach his or her own view of the facts relevant to sentencing provided that such a view is not inconsistent with the jury's verdict.[7]

[39] Based on the evidence I heard over some eight weeks, I am sure that you had actual knowledge of the falsity of the representations at the time those representations were made. That conclusion flows from all the evidence called at trial considered in its totality. But the key strands of evidence I rely on in reaching that conclusion are as follows.

[40] First, the evidence established that you were making representations about pre-sales from about mid-2008 onwards. Given the importance of pre-sales to the development, I consider it implausible to suggest that you were making those representations without knowing whether or not they were genuine.

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6 *R v McKinley* [2018] NZHC 601 at [19].

7 *R v Connelly* [2008] NZCA 550 at [14]. See also *B (CA58/2016) v R* [2016] NZCA 432 at [76]; cited with approval in *Edwardson v R* [2017] NZCA 618 at [107].

[41] Second, the evidence suggests that at the same time as you were telling the Bank that there were pre-sales in place, you were involved in trying to secure genuine pre-sales. Although Mr Wehipeihana was more directly involved in this aspect of the project, the evidence shows that you were also involved, for example by engaging a sales agent to assist with that process. I do not accept these efforts were to secure back-up sales. It is further evidence that you knew that many of the pre-sales were not genuine.

[42] Third, your admission made through counsel that what you told the Bank about deposits was not correct, is also significant. You knew that there were no cash deposits held in a solicitor's trust account, because the purchasers were not genuine purchasers, and they had not paid deposits. This was not mere recklessness but actual knowledge of the fraud.

[43] Fourth, the fact that your friends and family were amongst those named as purchasers of the apartments is also probative. It is implausible to suggest that you were reckless as to whether friends and family were genuine purchasers. You also knew that some of the agreements had been backdated as you signed the deed ratifying those agreements on behalf of Emily Projects. You knew that apartments had not be sold to purchasers in the first quarter of 2008, and you knew that many of them had not been sold to genuine purchasers at all.

[44] Finally, actual knowledge is consistent with the jury's guilty verdicts on the two charges of using a forged document. Recklessness was not sufficient to find those charges proved. The jury must have been sure that you knew or were wilfully blind as to the falsity of at least one of those documents. If you knew those documents, or one of those documents were false, then you also knew that the representations made about the pre-sales were false.

[45] In sum, Mr Ross, I consider you to be at the head of this deception. Without you the fraud would not have occurred. Your culpability is to be assessed on that basis and on the basis that you had actual knowledge of the falsity of both the representations made and the documents used to further your deception.

Mr Wehipeihana

[46] Mr Wehipeihana, I now turn to your role in the offending.

[47] I accept that you were brought into the development by Mr Ross, and that you had no prior experience in undertaking a development of this sort. Nevertheless, you played a central role in it.

[48] Key evidence against you included the exchange of the so called "formula" emails in August 2008. It was in that exchange that you received a schedule of names from an LJ Hooker database. This information was the source for the names of many of the purchasers in the schedule of sales forwarded to the Bank, and the names of the purchasers on the sale and purchase agreements.

[49] In addition, you travelled with Mr Ross to Australia to meet with the Australian sales agents, attended meetings with the Bank, and were actively involved in trying to secure genuine pre-sales (and onsales) of the apartments. You also witnessed a number of the forged documents. Finally, it was you that gave the instruction to Mr Slack to give an undertaking as to deposits being held in his firm's trust account.

[50] The fact that you had previously worked as a legal executive is relevant to the assessment of your culpability. It was a feature mentioned in the finance application sent to the Bank. But you were not acting in a legal capacity and the breach of trust involved in your offending is not comparable to Mr Slack's breach of trust, or indeed that of Mr Ross. Ultimately, your legal background is relevant but it is not a key marker of your culpability.

[51] Your role in the deception leads to the irresistible inference that you had actual knowledge of the falsity of the representations and were not merely reckless. I cannot accept that you were a passive passenger in this fraud, or that you simply followed Mr Ross's lead. You must have known that the Bank was being deceived and you intended that very outcome.

[52] In sum, I accept that you were not the ringleader of this deception and to that extent your culpability for the offending is less than Mr Ross's. That warrants a differential in starting points, but not to the degree suggested by the Crown. I consider your active participation in the construction of this deceit narrows the culpability gap between you. I intend to set a starting point on that basis.

Parity with co-offenders

[53] As to relativities with your co-offenders, I consider the offending of both of you to be more serious than Mr Foster's and Mr Slack's. Both men were involved in discrete aspects of the offending, and were not involved for its entire duration.

[54] I accept that Mr Slack's offending was pivotal to the Bank's decision to advance the credit. The starting point of four years' imprisonment adopted in his case also reflected the significant breach of trust involved by an officer of the court. Yet, I consider Mr Slack was acting under your joint direction. And, it was not only the undertaking as to the deposits which induced the Bank to advance the credit. If representations as to the existence, and strength of the pre-sales had not been made, the Bank's conditions would not have been met and the finance would not have been forthcoming.

[55] Finally, as the Crown highlights, neither Mr Slack nor Mr Foster were charged with using a forged document. Those charges carry a maximum penalty higher than the obtaining by deception charges. I consider the starting points for both of you must be higher than the four years adopted for Mr Slack,[8] and significantly higher than the three years adopted for Mr Foster.[9]

Comparable cases

[56] The principle of consistency requires me to have regard to the starting points adopted in comparable cases. I have read all the cases referred to me. Some involve offending more serious than yours because the fraud led to significant losses.[10] Others

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8 *R v Slack* [2017] NZHC 2330.
9 *Serious Fraud Office v Foster* [2018] NZHC 1422.
10 For example, *Mayer v R* [2015] NZCA 206.

involve offending of a different nature which makes a meaningful comparison difficult.[11] Similarly, differences in the scale of offending, and the absence of any in-depth scrutiny of the starting point, reduces the overall assistance from other cases referred to me.[12]

[57] Of all the cases cited to me by counsel, I consider the offending in *Serious Fraud Office v Huang* to be the most comparable.[13] There are a number of parallels between Mr Huang's offending and yours, Mr Ross, but on balance I consider Mr Huang's to be more serious. There were multiple loan applications to different financial institutions in that case. A larger sum was also obtained as a result of the deception, and there was evidence that some of the financial institutions had suffered a loss. I consider these differences warrant a starting point less than the six years adopted in that case.

[58] Taking into account the starting points adopted for your co-offenders and in the cases cited to me, I consider a starting point of five years, six months for you Mr Ross, and a starting point of five years for you Mr Wehipeihana, adequately reflects the gravity of your offending and satisfies the principle of consistency.

[59] I do not consider a separate uplift is required to reflect the using a forged document charges. As I said at the outset, the use of forged documents formed a component of your deception, and it is already reflected in the starting points adopted.

Personal factors: Mr Ross

[60] Next, I consider whether any adjustment should be made to the starting point for factors that are personal to each of you. I start with you Mr Ross.

[61] You are 51 years of age. You have four children from your first marriage aged between 32 and 15, and a six-year-old daughter from your second marriage. Soon after the Serious Fraud Office investigation began, you moved your family overseas.

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11 For example, *Rosenberg v R* [2015] NZCA 97.
12 *Aryasomayajula v R* [2011] NZCA 633.
13 *Serious Fraud Office v Huang* [2018] NZHC 86.

Your daughters attend school there, and you and your wife have decided that they will continue their schooling in that country whilst you complete your sentence.

[62] The pre-sentence report records that you accept full responsibility for your actions and that you show a strong level of remorse. Your risk of re-offending is assessed as low. A heightened sense of entitlement at the time of offending is identified as offending-related behaviour.

[63] There are no personal aggravating features which require me to uplift your sentence. However, your counsel has sought discounts for a raft of personal mitigating factors which I turn to address now.

Remorse

[64] The first factor is remorse. In addition to the remarks made to the pre-sentence report writer, you have filed a letter with this Court explaining how sorry you are about your offending. You acknowledge the impact of your actions on the Bank, the critical importance of trust and confidence in commercial relationships, and the potential harm to which the Bank was exposed as a result of your offending.

[65] I agree with the Crown that there is a significant element of remorse for the impact of your offending on your family, and for the circumstances you have found yourself in, reflected in that letter. Those expressions of remorse must also be weighed in light of a lengthy jury trial where your defence involved pointing the finger at others as being responsible for this fraud.

[66] Nevertheless, I consider your remorse to be genuine, and to reflect genuine insight into your offending. That remorse is substantiated by your efforts to contribute back to the community through voluntary work with a Trust as a way of making amends. I am satisfied that your remorse extends beyond just remorse for yourself and your family. In that respect it is deserving of a discount greater than the limited discount applied in *Huang*.

[67] I apply a discount of five months, for remorse.

Good character

[68] I also consider a discount for your prior good character, and your significant fall from grace is warranted. You were a successful developer with a good reputation. You have made positive contributions to the community throughout including those made more recently following the trial. I have read a small book of references from various people who attest to your good character. You are extremely fortunate, Mr Ross, to have such a high level of support around you, as is evidenced by the number of people here for both you and Mr Wehipeihana today.

[69] The fall from grace is accordingly a significant one for you. I accept that this is a form of punishment in and of itself, and the consequences of conviction will be felt well beyond completion of your sentence, irrespective of the length of it.

[70] I do not overlook the Crown's submission that any discount must be tempered by the fact that the offending took place over a two-year period. That is correct. But properly characterised, this was a single incident of fraud, and it does not reflect a propensity or a pattern of offending over a long period of time which would otherwise detract from your previous good character.

[71] Accordingly, I apply a discount of four months for prior good character and your fall from grace.

Delay

[72] Your counsel seeks a discount for the delay in bringing the prosecution. I do not consider such a discount to be justified. Whilst it may have made it more difficult for witnesses to recollect events, I am not persuaded that it had a material impact on your defence. There was still sufficient evidence before the jury to find you guilty beyond reasonable doubt. The delay did not involve you being held in custody or on unduly restrictive bail pending trial. I decline to grant a discount for delay.

Admission of facts and other assistance

[73] Your counsel also seeks a discount in relation to certain admissions of fact you made which she says relieved the Crown of the need to call approximately 70

witnesses to give evidence at trial. I accept that this represents a material saving in terms of time and costs. Steps taken by an offender to shorten the length of a trial or reduce costs are now treated by the Sentencing Act 2002 as a mitigating feature.[14] However, that saving, and the quantum of any discount must be seen in the context of a jury trial which stretched into a ninth week.

[74] I do not consider any additional discount is warranted for the voluntary return to New Zealand to face charges, or any disclosures made during the s 9 interview with the Serious Fraud Office. I apply a two-month discount for the time and cost saved as a result of the admissions.

Health

[75] As to your personal circumstances, I do have a report from Dr Goodwin which confirms that you have suffered claustrophobia since the age of about eight or 10, and that this will worsen in prison where you are likely to experience significant anxiety when confined in a small locked space. Further, this report confirms you are suffering from depression for which you have been receiving professional treatment. I accept that these factors will make serving a sentence of imprisonment more severe for you and that this is a factor which may justify a further discrete discount.[15]

[76] I apply a discount of three months for these factors.

Impact on family

[77] Your counsel also urges me to take into account the effect of the sentence of imprisonment on your family, and in particular on your two daughters. One of the tragic consequences of offending is the deep impact it has on innocent members of the offender's family. I accept you feel the anguish of causing that pain very deeply.

[78] I address in this context also your counsel's oral submissions that your sentence may preclude you from returning to Australia to join your family after you have completed your parole period. That is said to also cause undue hardship.

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14 Section 9(2)(fa).
15 Sentencing Act 2002, s 8(h).

[79] This Court is not without compassion for the very real impact on family members as a result of an offender serving a sentence of imprisonment. But the Court of Appeal has observed that society cannot overlook serious offending by parents in order to save distress to their children.[16] And, where offending is serious, premeditated and occurs over a lengthy period of time, the impact of the sentence on the family of an offender can play little, if any, role in the sentence.[17]

[80] The difficulties in living overseas once you have served your sentence is one of the consequences that flows from conviction and from the offending. Regrettably, the harm caused to your family from a sentence of imprisonment is something that this Court sees in sentencing for offending of this sort. The particular vulnerabilities of your family are also, sadly, not that uncommon. The Court extends its sympathies to your family members, Mr Ross, but I decline to make any adjustment for the impact of a sentence of imprisonment on your family.

Alternative sentence

[81] Finally, I have given consideration to the suggestion that you might serve part of your sentence by undertaking work for a charitable trust for a period of time. Your counsel cites the current concerns about overpopulation in prisons as supporting such a request. In your letter to me you ask what would be achieved by imposing a sentence of imprisonment on you, and it is a sentiment, I suspect, that many in this courtroom would echo. It is a valid question.

[82] Recent observations have been made by the President of our Court of Appeal,[18] and by Palmer J[19] on whether sentence length specifically deters either the offender, or any other person, from offending in the future. I have not sought, and nor have I received, any data before me which proves that a sentence of imprisonment provides general deterrence for offending of this sort. Nevertheless, I observe that deterrence has long been recognised as a particularly important consideration in sentencing for this type of offending and indeed, Katz J recognised it as such in her recent sentencing

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16 *R v Williams* CA23/05, 15 March 2005 at [20].
17 *McGregor v R* [2015] NZCA 565 at [46].
18 Hon Justice Stephen Kós "Better Justice" (paper presented to the Legal Research Foundation Annual General Meeting, Auckland, August 2018) at [18]–[20].
19 *R v Wellington* [2018] NZHC 2196 at [5]–[8].

in *R v Xu*. As her Honour put it, "it is important that a strong message be sent that the type of fraudulent behaviour you engaged in is entirely unacceptable in our society".[20]

[83] Deterrence is only one of the principles of sentencing that I must bear in mind. There can be no doubt that a sentence of imprisonment represents a strong condemnation of your offending. It reflects the very real harm to society that your offending has caused. It also holds you accountable for your actions, and sends a very loud message that no one is above the law.

[84] Those principles, and the principle of consistency, demand the imposition of a full sentence of imprisonment. I decline the invitation to structure your sentence to allow you to continue working for the trust. Nevertheless, I would encourage that involvement to continue if at all possible and commend any assistance that may be given to you whilst serving your prison sentence to allow that to occur.

Totality

[85] Standing back and considering the factors in their totality, I am satisfied that an end sentence of four years, four months' imprisonment meets the principles and purposes of sentencing and adequately reflects the culpability of your offending. It is the least restrictive sentence in the circumstances and the end sentence I intend to impose.

Minimum period of imprisonment

[86] The final step is to consider whether a minimum period of imprisonment should be imposed. The law allows the imposition of a minimum period where a court is satisfied that the relevant parole period is insufficient to hold an offender accountable, to denounce the conduct, to deter the offender and others from committing the same or a similar offence, and to protect the community.[21] In your case, you will be eligible for parole after serving one-third of your sentence.[22]

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20 *R v Xu* [2018] NZHC 1971 at [28].
21 Sentencing Act 2002, s 86(2).
22 Parole Act 2002, s 84(1).

[87] A minimum period of imprisonment is not unusual in cases of serious fraud, and one was imposed in both *Huang* and *Mayer*. However, I do not consider it is necessary in your case. As I have already explained, I consider your offending to be less serious than in *Huang* and in *Mayer*. Furthermore, your genuine remorse, acceptance of responsibility for the harm caused, prior good character, and the length of time since the offending occurred, also mean that the standard parole period is sufficient to meet the principles of accountability, deterrence, denouncement, and protection of the public from harm.

End sentence: Mr Ross

[88] Mr Ross, please stand.

[89] For the three charges of obtaining by deception and two charges of using a forged document, I sentence you to four years and four months' imprisonment.

[90] Mr Ross, you may stand down.

Personal factors: Mr Wehipeihana

[91] Mr Wehipeihana, I now turn to consider your personal aggravating and mitigating circumstances.

[92] You are 46 years of age. You are of Tūhoe descent and you maintain an active involvement with your iwi. You live with your partner, and although you do not have any children of your own, you regard your three nephews as whāngai children because of the strong involvement you have had in their upbringing.

[93] The pre-sentence report records that you maintain your not guilty plea and you are recorded as stating that you wished to elaborate on your innocence. Nevertheless, the report writer regarded your expressions of remorse as genuine, and considered you as being motivated to right the wrong. Your counsel explains that the comments about the not guilty plea appear to be a misunderstanding by the pre-sentence report writer and they should not be interpreted as detracting from you taking full responsibility for your offending.

[94] The pre-sentence report identifies the risk of harm you pose to others and the risk of re-offending as low. Offending-related behaviours are identified as lifestyle, associates and attitude.

Uplift

[95] The Crown seeks an uplift from the starting point to reflect charges laid against you by the Auckland District Law Society in 2003 in relation to your work as a legal executive. These charges related to the misappropriation of funds from a trust account and the provision of trust receipts without a corresponding deposit. You admitted these charges but contested that they were serious enough to warrant being struck off the roll. There is little information provided about these charges, and no record of the sanction.

[96] On balance, I do not consider these charges warrant an uplift. They were not criminal charges, and the criminal standard of proof did not apply. There were no criminal charges laid. Any reflection that these charges have on your character is diminished by the five to seven-year gap between those charges and the offending which is the subject of today's sentence, and the 15-year gap between those charges and now. I consider an uplift from the starting point would be disproportionate in the circumstances.

Remorse

[97] As to discounts for mitigating factors, you also claim a discount for remorse. In light of the remarks in the pre-sentence report, there is some question about just how genuine that remorse is. Nevertheless, in a letter to the Court, you state that you unreservedly accept the jury's verdict and accept full responsibility for what you have done. Your expressions of remorse are expanded on in that letter, in which you accept that your failures have betrayed the community and brought into disrepute the property industry and all the honest men and women who work in that industry. You accept that you have made a huge mistake and will ensure that it will never happen again.

[98] In light of that letter, I accept that you are genuinely remorseful. But I am not convinced that you have the same degree of insight as Mr Ross into your own offending and the harm it has caused. A slightly more limited discount in the circumstances is warranted, and I apply a four-month discount for remorse.

Effect on career prospects

[99] I do not consider a further discrete discount is required to reflect the fact that you moved away from your previous career as a legal executive into property development, and now neither career pathway is open to you. The impact on your future career prospects is an ordinary consequence which flows from your offending. You are solely responsible for that consequence and it does not warrant separate recognition by way of discount.

Good character post-offending

[100] The material I have before me suggests that you are actively involved in your community, and in particular around your marae. You have also worked with non-profit organisations which are extremely grateful for your assistance. I believe your expressed desire to serve the community is genuine.

[101] I have also read a large number of references from a variety of people who describe your offending as being out of character. Those references describe you as being inherently selfless and a man of integrity. You are extremely fortunate to have such strong support from friends and family and others in the community.

[102] I consider these factors bear on your rehabilitation and prospects for reintegration into the community. They deserve separate recognition, although any discount must be tempered by the Auckland District Law Society charges which you faced some 15 years ago. I apply a discount of three months for your contributions to the community and your good character post the offending.

Admissions of fact

[103] Like Mr Ross you also made a number of admissions of fact which saved the Crown the time and cost in calling a significant number of witnesses. I apply a two-month discount to your starting point for these admissions.

Alternative sentence

[104] Finally, I also record that your counsel also suggested a non-custodial sentence be considered, echoing observations made in the pre-sentence report that a community-based sentence may be of greater benefit to both you and society.

[105] That suggestion must be rejected for the same reasons I rejected Mr Ross's suggestion of an alternative sentence. A sentence of imprisonment serves more than one purpose. In your case, I consider a sentence of imprisonment is necessary for the purposes of accountability, responsibility, deterrence and denouncement.

[106] Nevertheless, I strongly support all efforts to assist you in continuing to be involved with these community organisations whilst you are serving your sentence of imprisonment.

Totality

[107] This brings your end sentence to four years and three months' imprisonment. This is only marginally less than Mr Ross's sentence but that is due to your differing personal circumstances. I am satisfied that this sentence reflects the overall gravity of your offending and is the least restrictive sentence in the circumstances.

Minimum period of imprisonment

[108] Finally, I consider whether a minimum period of imprisonment should be imposed. Like Mr Ross, I consider the consequences of conviction and a sentence of imprisonment are sufficient to meet the principles of accountability, deterrence and denouncement, and to protect the community from harm. A minimum period of imprisonment is not necessary in your case and I decline to impose one.

End sentence: Mr Wehipeihana

[109] Mr Wehipeihana, please stand.

[110] For the three charges of obtaining by deception and two charges of using a forged document, I sentence you to four years and three months' imprisonment.

[111] You may stand down.

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Edwards J