IN THE SUPREME COURT OF NEW ZEALAND

SC 59/2013
SC 60/2013
SC 61/2013
SC 62/2013
[2014] NZSC Trans 1

DOUGLAS ARTHUR MONTROSE GRAHAM
MICHAEL HOWARD REEVES
WILLIAM PATRICK JEFFRIES
LAWRENCE ROLAND VALPY BRYANT
Appellants

v

THE QUEEN
Respondent

Hearing:	11 February 2014
Coram:	Elias CJ William Young J Glazebrook J Arnold J Blanchard J
Appearances:	J A Farmer QC, M A Corlett and M A Sissons for the Appellants C R Carruthers QC and D R La Hood for the Respondent

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CRIMINAL APPEAL

MR FARMER QC:

As the Court pleases. I appear with my learned friend Mr Corlett and Ms Sissons for the appellants.

ELIAS CJ:

Thank you Mr Farmer.

MR CARRUTHERS QC:

May it please Your Honours, I appear with Mr La Hood for the Crown.

ELIAS CJ:

Yes, thank you Mr Carruthers, Mr La Hood. Yes, Mr Farmer?

WILLIAM YOUNG J:

Mr Farmer, could I just say something before you start? When I went through the references this morning I see that my brother-in-law gave a reference to Mr Bryant. I imagine Mr Carruthers would have recognised that but I thought I should tell you too. It doesn't trouble me very much but.

MR FARMER QC:

How do you see your brother-in-law?

WILLIAM YOUNG J:

No, no, I don't anticipate the case really turning on what he said.

ELIAS CJ:

There's not a problem about that Mr Carruthers? All right, thank you.

MR FARMER QC:

Now if Your Honours please I wanted to start just by getting out of the way, if I could very shortly, the matters raised in the minute issued last week as a result of a memorandum that I had initially filed and just deal with the process issues around that if I could. The point made in the memorandum that we filed last week was that the sentencing should be based on facts found by the Judge and we certainly accept the point that is made in the minute that came from the Court that reference to undisputed evidence is permissible subject, of course, as always to questions of relevance. Our complaint was that there were a number of matters that were

referred to in the Crown submissions that are disputed or that, or in respect of which there was explanatory evidence and indeed cross-examination given by the various defendants so that the submission that was made, and it continues to be made, is that the Court should not be asked to take into account matters of disputed evidence or evidence where there has been some other evidence that puts the evidence relied on by the Crown in a different light.

WILLIAM YOUNG J:
What about your reliance on what happened after December 2007?

MR FARMER QC:
Well I'd seen that in the category of undisputed evidence but I can indicate right now that I'm not going to dwell on any of that material. It was put for one narrow purpose only to the Court and that is because there is some ambiguity around whether the Court of Appeal held the directors responsible for the full extent of the losses, the $125 million losses that the company suffered as a result of going into receivership, or whether the correct level of accountability in terms of the offences that have been committed was the much lower figure of $10 or $11 million and so that was put in to just to make the point that the causes of the company's failure were far more extensive and indeed unpredicted. So having made that narrow point I'm not going to return to it unless the court wants me to.

The points that are made to which objection was taken relate to specific conduct of individual directors and of the director as a whole and that's what that provoked the particular memorandum that was filed. Just from a process point of view what I wanted to say was that we still don't have today specific evidence references, apart from one or two, that the Crown relies on and so I'm not in a position, I won't be in a position in reply, to deal with those matters if they are pressed by my learned friends and so to that extent I will want to take advantage, if the Court allows me to, of the suggestion in the Court's minute at the end of the minute I think that if those matters can't fairly be dealt with, and we would say they can't –

ELIAS CJ:
And if they're material.

MR FARMER QC:

Yes, and if they're material, if the Court takes that view then I would be seeking to have the opportunity to deal with them by way of reply through a written submission supplemented, if the Court would allow it, by a short oral appearance on a later occasion. But I'm just foreshadowing that and –

ELIAS CJ:
Yes, it may not arise.

MR FARMER QC:
It may not arise.

WILLIAM YOUNG J:
Can I just raise two questions because they, for myself I rather doubt whether you will need to do that but there are two points I wanted to draw to your attention. There's the assertion throughout submissions that the governance of the company was exemplary.

MR FARMER QC:
Mhm.

WILLIAM YOUNG J:
Now I think the Judge may have said that at one stage but the general drift of his verdict reasons was that he wasn't going to get into that and indeed there were aspects of his findings that aren't really consistent with that. Now I don't think it's critical but for instance I was left with the impression that if an account had been more specifically worded in relation to events after 24 December there might have been a conclusion that impairment of the loan should have been disclosed.

MR FARMER QC:
Well –

WILLIAM YOUNG J:
It's the perhaps element of hyperbole in the contention that everything was absolutely exemplary and it couldn't have been better as against, and it may have been that that's attracted some of the submissions which Mr Carruthers has made.

MR FARMER QC:

It may have been. Perhaps that's a point that will arise and be dealt with during the course of this hearing I would think but certainly as Your Honour says the Judge did seem, we would say, to accept that the company was operated on good principles of corporate governance. I'm not going to say it couldn't be better, I would never say that about any company. The question in relation to the prospectus, as to whether there was some degree of carelessness about it, and it's a point that's alluded to in the Court's minute, is a matter I will deal with –

WILLIAM YOUNG J:
All right.

MR FARMER QC:
– in some detail because I think that's quite important to be quite clear about the Judge's characterisation of the offending and that's obviously highly relevant then to the question of sentence. I'm going to deal with that in a structured sort of way.

WILLIAM YOUNG J:
All right. The second, and it's the related point, is that my reading of the Court of Appeal judgment suggested that while the Judges had some reservation about what happened in February and March, that is the continued use of the prospectus despite what was happening with some of the loans, was open to question, they didn't actually rely on that in terms of the sentencing decision.

MR FARMER QC:
No and that's an area of, it was very, very hotly contested in the trial and if we were to go into that we'd require extensive references to evidence on both sides of the argument.

What I've handed up through the registrar this morning is a bundle of four or five documents and I've tried to put them in the order in which I'll come to them but the first one, in fact, you don't need to read it, it's just there for the record, a single page which just does list the factual allegations to which I've referred that would be disputed by references to evidence if they're persisted with so you just have that as a record and it really is largely a repeat of what you saw last week in the memorandum that was filed.

I've also given you a full copy of the primary judgment of Justice Dobson which is not in the record. I will want to refer to that, particularly in relation to this point of characterising the nature and the extent of the offending, although of course His Honour also has his sentencing notes in which he traverses that issue as well. What you don't have, and I've just realised it actually this morning, you don't have the full Court of Appeal primary judgment, you have the parts of it that deal with sentencing, and that's one or two paragraphs that I will want to refer to from the substantive part of the judgment that you don't have but I hope that won't be a problem because they're quite short references.

WILLIAM YOUNG J:
I think we do have them.

MR FARMER QC:
You do have them?

ARNOLD J:
It was in the application for leave to appeal.

ELIAS CJ:
Yes I've got them.

MR FARMER QC:
No problem then. Now I've also you'll also when we come to it you'll see in the bundle there are two authorities which are not in the casebook. One of them I, which is a decision of the European Court of Human Rights, I actually only discovered myself on Friday but I sent my learned friend a copy of it yesterday and the other one is a case that will be familiar to you, it's referred to in the submissions, somehow we omitted to put it in the casebook. I've given you a full copy of the prospectus. I'm only going to refer to the part that deals with liquidity risk but it is important, we would submit, to just see what was disclosed in order to assess what was not disclosed and I'll take you to that in due course.

So where we see this case coming down to is perhaps three issues which can be wrapped up in a general statement. The fourth issue was the Court of Appeal right to say that the trial Judge's sentences were manifestly inadequate and the three issues that go to that, as we see it, are first of all was it opened to the trial Judge to take the

view that deprivation of liberty was not a necessary starting point. The Court of Appeal obviously thinking that it was, at least it was for this type of offence on the facts as found.

ELIAS CJ:

You mean imprisonment because there is deprivation of liberty in –

MR FARMER QC:

I'm treating imprisonment and home detention as both being deprivation of liberty and home detention just simply being a milder form of imprisonment.

ELIAS CJ:

Thank you, yes.

MR FARMER QC:

Yes. And in circumstances where the defendants have been found to have acted honestly and where the Judge characterised their offending as a misjudgement or error of judgement at the lower end of the scale on Justice Heath's categories of offending which we are quite happy to work with at both the trial Judge and the Court of Appeal worked with Justice Heath's categories of offending as laid down in the *Moses* case. So that's the first issue, the second issue really raises the question of the issue of precedent. Was the trial Judge right, first of all, to distinguish, as he did, the Nathans and *Davidson* cases.

Alternatively, or putting the issue perhaps more broadly, how should this Court's ruling in *Hessell v R* [2011] 1 NZLR 607 apply in this case. *Hessell* to the extent that Your Honours' judgment in that case dealt with the question of where the principle of consistency fits in the overall scheme of the Sentencing Act 2002. And the third and perhaps the most important point because this actually highlights the distinction or the area of difference between the trial Judge on the one hand and the Court of Appeal on the other is was the Court of Appeal right to give the emphasis that it did to the principles of deterrence and denunciation, particularly in the light of the change to the law that has now been affected by the Financial Markets Conduct Act 2013.

So if I could start perhaps with looking at the nature of the offence that was committed and as found by the Judge. His Honour's finding was that the amended

prospectus was misleading by omission and therefore untrue by virtue of the deeming provision of section 55. He found that there was no positive misrepresentation and that is an immediate area of difference from the other cases, in particular from the situation of Bridgecorp with the judgment, the sentencing of Mr Davidson and I would like, just on that respect, therefore just to make this point, take you immediately to Justice Dobson's sentencing notes, and I will come back to the question of the *Davidson* judgment sentence but just at this point just to make – at this stage just to make the point, if you could look at the sentencing notes which are in the casebook and I wanted to take you to paragraph 29, where His Honour lists four matters, or types of misstatement, in the offer documents in that case, in the Bridgecorp case, and you'll see four lines down, first was an undisclosed related party lending, the fact of undisclosed related party lending. Now that was an omission but a pretty important one and as His Honour said, had that been correctly categorised it would have triggered a breach of the Bridgecorp trustee. Secondly, and then the next three are all positive, in the nature of positive misrepresentations, secondly a claim to have followed good commercial practice and internal credit approval polices when significant lending did not comply with such lending. Thirdly, a claim that Bridgecorp had never missed an interest payment when there had been a measure of default over many months and fourthly that the company's financial position had not deteriorated since the position portrayed by the last audited financial statements when that claim was not justified. So of those one would think certainly the failure to disclose related party lending but on the positive misrepresentation side the failure, the statement that there had been no failure in making interest payments is obviously a major one because that would be a key indicator or pointer to the company being in serious trouble.

Then the other references I would give you, paragraph 38 and 39, when turning to the present appellants, the present directors, His Honour said, "There was no intention to mislead and, more than that, I am satisfied that at least each of the non-executive directors treated it as important to satisfy yourselves at all times that you dealt absolutely honestly with potential investors. You have fallen foul of s 58 because of a material misjudgement about the extent to which concerns at Lombard's liquidity, and factors materially contributing to that, should have been disclosed in the offer documents." And then in the next paragraph, "On the other hand, I am satisfied that you committed personal care and attention to the offer documents, which is a material point of distinction." That is to say from the other cases that were being compared with. "Also, that the nature of the omission that has

been made out, whilst important, is certainly not as pervasive a misrepresentation affecting numerous aspects of the description of Lombard's business, as was the case with Nathans and for Mr Davidson. The offer documents were before the public for a short period, and resulted in less money being subscribed, than in those other cases."

Now going into a bit more detail around the actual nature of the omissions and the importance of that here if I could take you to His Honour's primary judgment, the trial Judge's primary judgment, and ask you to turn first to paragraph 87. If what we see in 87 and following, 87/88, we find there set out first of all in the context of the indictment statements that were made about risk, liquidity risk in particular, and perhaps – and then you'll see that what His Honour did going over to the end of 88, he emphasised, or he set out in bold, and in the prospectus it was also in bold, he set out what became a key paragraph in relation to the question of whether the offence had been committed.

So perhaps, having given you those references, maybe I could just ask you to – perhaps I'll look first of all just take you to paragraph 93, His Honour there said, "The nature of what constituted a liquidity risk for a finance company was appropriately described in the amended prospectus," and what I'd like to do now is take you to the amended prospectus, so that's in that bundle that I gave you this morning, and if you go to page 12, and I'll go quickly through this but it is important to an understanding of the case. So on page 12 a whole section which goes for about five pages, four or five pages, on the question of risk starting with liquidity risk. So half way down the page, "Liquidity risk is a risk of Lombard Finance not having enough cash liquidity to meet its obligations as they fall due." Now that's straightforward but it's an obvious correct statement. Then you'll see in the second paragraph there was a reference to the nature of Lombard's business, what it does with the money that it obtains from investors and it, in fact, typically lent that money to developers by way of development loan. It gave them the option of capitalising interest and fees and so it clearly was a situation where the company was dependent on those developers repaying the loans in due course and that they would, in the normal course, not repay them either until the end of the development or until the development was sufficiently advanced to enable it to be refinanced with a trading bank or whatever.

Then in the third paragraph you'll see that there was a description of how Lombard manages its liquidity, regular updating of its projections of those matters, reports –

this is the next paragraph – provided to the board weekly and are available to the credit committee et cetera. Then we get into a bit more of the detail on the next page, "In common with other companies in the finance sector Lombard is currently experiencing a reduced level of reinvestment by borrowers that applied 12 months ago," so there's a reference to what was going on in the industry and there had been at that stage a number of finance company failures, most notable being in July and August of 2007 being Nathans and Bridgecorp.

Then just reading on, "Cash flow projections are completed on a conservative basis meaning at a lower level, and reinvestment is used for this purpose and is currently being experienced and allowances are made for delays in borrowers repaying their loans which recognises that in current circumstances the sales of properties are being delayed." So part of what was going on as disclosed here was that the property market was also being affected.

Then the next two paragraphs in particular –

ELIAS CJ:
Mr Farmer, what is the submission you're going to be making, because we have read this. It does, I'm not trying to deter you from taking us to it because it's important but what is this directed at?

MR FARMER QC:
I'm trying to provide the context in which the omissions are able to be best understood and – so that you need to – you can't just talk about omissions in the abstract. We need to know the context and that's what I'm trying to do.

ELIAS CJ:
But what is the submission you'll then make from that?

MR FARMER QC:
The submission that I'll then make from that is that the nature of the – the error committed by the directors was that they failed to understand the purpose of the disclosure regime. They were strongly of the view, as we'll see shortly –

ELIAS CJ:
But why do you need to go beyond the Judge's findings on that?

MR FARMER QC:
Well I'm not necessarily going beyond the Judge's findings –

ELIAS CJ:
Yes.

MR FARMER QC:
– and indeed the next paragraph, or second to next paragraph that I'm coming to, is the paragraph that is quoted by the Judge in bold in his judgment, that's paragraph 93 I think it was, so that's exactly what I want to take you to and that's where I'll stop and then I'll go to the submission, if you'll just humour me for a little bit longer.

ELIAS CJ:
Yes, I'll humour you.

MR FARMER QC:
So you'll see in the next paragraph that there is a reference to the fact that if the finance sector, if market confidence continued to deteriorate, or decrease, then that could, that would/could impact on liquidity but that's followed immediately by a statement the board remains confident based on a range of conservative scenarios, that Lombard will have the required cash resources to fund all repayments to investors when due and that are not reinvested. So that's the critical statement that the directors relied on at the trial, that they were confident, despite the situation that existed in the market, that Lombard would be able to meet its debts as they fell due. And then that is followed in the passage that's in bold, "There is a risk that a further loss of confidence in the finance sector could result in investors materially reducing their level of reinvestment below that assessed. If that was extreme Lombard would not be able to fund its repayment obligations unless other funding was available or asset realisations/borrower repayments were accelerated." Then that's where I'll stop but beyond, just pointing out that over the next few pages there are other types of risk that are identified and dealt with in the prospectus.

So going if I can from there to look at where the Judge thought they got it wrong and if I can take you back to His Honour's judgment and ask you to turn to paragraph 108. Perhaps start with 106 briefly. 106 sets out what His Honour thought the amended prospectus, he said, could have disclosed but he clearly meant should

have disclosed, namely that the liquidity depended substantially on the level of loan repayments. "That the loan managers most familiar with the major loans had projected substantially larger recoveries than had been received in the last four months of 2007, but that the directors retained confidence in those loan managers to accurately report on the projected timing of recoveries."

So, in effect, although the directors in the prospectus had expressed confidence, that they were going to meet the company's debts as they fell due, what His Honour is saying is you really need to go further than that. You needed to actually say that you were confident there was a problem with predictions on loan repayments not matching the reality and you could have, later should have, disclosed that and then gone on to say that you were confident et cetera.

GLAZEBROOK J:
Can I just check because in fact there's no mention of loan repayments and possible difficulties if loans weren't repaid in the prospectus, it's all related to the loss of confidence in the finance sector isn't it?

MR FARMER QC:
No, no, there is one, I read it to you, I'm sure, just a moment ago.

GLAZEBROOK J:
They're talking about they're confident that they'll have the required cash resources that are not reinvested but it seems to be related to the loss of finance and the loss of confidence in the finance sector?

MR FARMER QC:
It does do that, that's certainly true.

GLAZEBROOK J:
But in the first part, I accept the first part, and also I accept too that there is a reference to the capitalising of loans in the first part.

MR FARMER QC:
And delays in loan repayments.

GLAZEBROOK J:

Yes.

MR FARMER QC:
That's referred to as well.

GLAZEBROOK J:
It's just that the concern about liquidity seems to have been related to the market and lack of reinvestment rather than issues that could arise in respect of repayments, although I do accept that they indicate there's difficulties with the property market generally and perhaps delays.

MR FARMER QC:
Well certainly they say allowances are made for delays in borrowers repaying their loans which recognised in the current circumstances the sales of properties are being delayed so that's the – that relates both to the market and to Lombard. That's as far as it goes. I'm not trying to revisit –

GLAZEBROOK J:
No, I understand that, it's just it's slightly more than being confident – if there's a lack of disclosure specifically of the difficulties of repayment as well as reinvestment, the confidence seemed to be in respect of reinvestment as expressed in the prospectus, that's all, although you would say presumably, looking at the context you've applied to, both repayments and possibly delays?

MR FARMER QC:
Yes, yes.

GLAZEBROOK J:
Thank you.

MR FARMER QC:
That's rights. So if I could go back to 106. Here is where His Honour actually starts to get to the nub of his thinking and what later also was the Court of Appeal's thinking. So having said well if those things had been in and it had also been stated the directors retained confidence in the loan managers to accurately report, so if it had done so, then the fact of continued reliance on such projections, notwithstanding

a pattern of errors that substantially overstated payments, would have been material information.

And then in the next sentence he says, “Potential investors would be likely to question the prudence of the directors’ judgement in continuing to rely on the loan managers in this regard, or might take from such information that conditions in the market were so unpredictable that projections could not reliably be made.” And then that, if I can – you’ll see that point is then picked up again if I take you down to 108, the bottom of the page, the second point, and he’s referring here to evidence that Sir Douglas Graham gave in the hearing, “The second point raised by Sir Douglas was that investors relied on the directors to make commercial judgements, so that investors would decide to invest on the basis of the commercial decision-making judgements they attributed to the directors. On that approach, matters of detail such as the relative reliability of projections on loan repayments from loan managers was a matter to be left to the directors and not appropriately addressed in the amended prospectus.”

Then His Honour said, “However, such an approach misunderstands the rationale for the disclosure regime. It is intended that investors be in a position to make decisions for themselves by being adequately informed on material matters, rather than making an investment decision in reliance on an assessment of the quality of judgement of those who would become custodians of their investments.”

And that is the critical finding that explains the nature of the error of judgement that was made by the directors. They did not understand the purpose of the disclosure regime in the Securities Act 1978 which was to inform investors with sufficient detail so that they could make their own judgement about whether to invest. And it’s that point –

ELIAS CJ:
What else could have been the objective of a disclosure regime?

MR FARMER QC:
The point that was argued at the time, and I’m not defending it now, it’s not open to me to do that, the point that was made at the time was that so long as the nature of the risks was disclosed, and so long as investors were told that the directors had given consideration to those risks and were confident that the company would be

able to meet its debts as they fell due, which – and there's no dispute about the genuineness of that view, so long as that happened then that was sufficient.

GLAZEBROOK J:
Although the directors, it seems to me, weren't totally confident, in fact, were they, in the sense that they were concerned about the liquidity position –

MR FARMER QC:
Yes, yes.

GLAZEBROOK J:
– and they were concerned that the projections so that in fact although ultimately in their commercial judgement, they thought it would be okay. It can't be said that they were, that they had the sort of confidence that might be indicated by a bare statement of confidence, can it?

MR FARMER QC:
No. they – that's correct in the sense that they knew there were issues, they knew there were issues about the loan repayments coming in late, in many cases. They knew what was happening in the finance sector generally.

GLAZEBROOK J:
Which was disclosed so I think that's probably covered off.

MR FARMER QC:
Yes, they knew that conditions were likely to become tighter, but, ultimately they thought that on the basis of management projections that over the ensuing 12 months the company would come through that and go out the other side looking much stronger. Now – and they had also taken steps, a number of steps to deal with the situation. For example they'd stopped new lending and they had also built up their cash reserves during the course of the year to deal with the situation as they foresaw it happening and it was those – it was the fact that they saw that, the fact that they, in their terms, dealt with it effectively, that led to the conclusion they were confident that they would be able to meet the company's debts as they fell due.

Now this point that I say is the key point in understanding the nature of the error of judgement, which was a lack of understanding of the true scope and intent of the

disclosure regime, was also taken up by the Court of Appeal and relied on very heavily there as well, well not relied on, but simply seen as being at the core of the problem and if you do have the Court of Appeal judgment –

ELIAS CJ:
Sorry are you relying on para 109 as a finding of the culpable actions of the –

MR FARMER QC:
Yes.

ELIAS CJ:
– it's really expressed as a response, a rejection of an excuse put forward.

MR FARMER QC:
Well yes but the basis for rejecting what Sir Douglas said was because the Judge took a different view of what the purpose of the statute was.

ELIAS CJ:
Was it that different?

WILLIAM YOUNG J:
The difference between relying on the directors and relying on the underlying facts must, sort of, be pretty much of a shades of grey question.

MR FARMER QC:
Much of a what sorry?

WILLIAM YOUNG J:
A bit of a shades of grey question. I mean they couldn't just put out a prospectus that says we're confident that it's great and it's a safe investment –

MR FARMER QC:
No, of course not.

WILLIAM YOUNG J:
– so they have to give the facts which underpin their level of confidence.

MR FARMER QC:
Yes, well that's ultimately what was held.

WILLIAM YOUNG J:
Yes.

MR FARMER QC:
And – so that as the Judge said and as the Court of Appeal said in the reference I'm giving you in a moment, so that the investors could make up their own mind and not be – as to whether they should invest – make up their own mind about what the overall situation was, or was likely to be, and not be left to simply rely on the commercial judgement of the directors.

ELIAS CJ:
I just wonder about the word "misunderstands" because he might equally have said that approach misstates. You're building this to be a finding that the error was simply a misunderstanding of the law, are you?

ELIAS CJ:
Yes. That's one of putting it. And it goes to the question, ultimately where I'm going to go to once we've got over this little part of the argument, is to take you to Justice Heath's categories of offending to try and see if we can't get a clearer picture of exactly where this offending fits and then from there the question of sentence that is appropriate.

So if you've got the Court of Appeal judgment handy, it's just one paragraph.

ELIAS CJ:
The sentencing?

MR FARMER QC:
No, no, the –

GLAZEBROOK J:
Can I just check is that the submission is that it's not a deliberate non-disclosure, it's non-disclosure that arises because of a misunderstanding of what was required?

MR FARMER QC:
Yes.

GLAZEBROOK J:
So it's slightly different from negligence in the sense of – because they knew these facts and did not disclose them but it's not that they – it was because of a misunderstanding of what they were required to disclose. Is that a fair –

MR FARMER QC:
Yes, yes it is, and bear in mind that they had taken expert legal advice on the prospectus so their misunderstanding, it would seem, was also the misunderstanding of the specialist lawyer who advised them, and I don't say that to invite you at all to revisit that, I can't, and I don't, but –

WILLIAM YOUNG J:
Can I just ask you though? Can they really have thought that they didn't have to disclose information which cast doubt on, or threw into question, an expression of their own subjective view as to what was going to happen?

MR FARMER QC:
Well –

WILLIAM YOUNG J:
If they know that the projections are speculative, and I know that's not, this isn't the case –

MR FARMER QC:
No that's a word that you won't find, with respect, anywhere.

WILLIAM YOUNG J:
I won't find it in your submissions.

MR FARMER QC:
You won't find it in the judgments.

WILLIAM YOUNG J:

I know that's not the case but I'm just trying to get – perhaps start a little bit further out and then come in. If they knew that the projections were speculative then their unconditional expression of confidence would be misleading and they would know that.

MR FARMER QC:
Well that's not these facts.

WILLIAM YOUNG J:
No but let us say that these facts, they know facts which cast doubt on whether someone can rely on their expression of confidence.

MR FARMER QC:
Well then you would be starting to undermine the finding of honest belief which was made if you go down that track.

GLAZEBROOK J:
You can still have an honest belief that it will – you can still be confident that it will occur but it's the point I put to you before –

MR FARMER QC:
Yes, yes.

GLAZEBROOK J:
– you have knowledge of facts that give you cause, and did give them cause –

MR FARMER QC:
Yes, yes.

GLAZEBROOK J:
– to think that there might be a problem, having worked through those we decided they weren't.

MR FARMER QC:
And they also had the other facts that are in the November/December period, the December period particularly. They had the other facts of up to date 12 months management projections of the cash flow which took account of the borrower

repayments that made what was described in that prospectus as looking at it from a range of conservative scenarios and they had the actual, you don't have it before you, but they had the actual levels of projected month by month cash levels which reduced at its lowest point in February, the February/March period I think to around $8 million and then built up again to quite high levels as the major loan repayments came in and that's to be looked at in the context of the Judge's finding that with one exception, which he thought was not material, the major loans were not impaired at that time. The problem was delays in repayments not in the viability of the, the repayment of the borrowings.

ELIAS CJ:
So is that what is meant by "impaired"?

MR FARMER QC:
Yes.

ELIAS CJ:
Delay doesn't, delay isn't –

MR FARMER QC:
"Impaired" means you're not going to get your money back.

ELIAS CJ:
Oh, at all?

MR FARMER QC:
At all. In whole or in part.

WILLIAM YOUNG J:
I thought that when he got to that he was saying, well I'm not going to double up, I've already dealt with impairment in the short-term liquidity situation and I'm now looking at medium to long-term recoveries. So –

MR FARMER QC:
No he, the number of charges, in fact the major thrust of the prosecution was that the major loans were impaired and His Honour rejected that, those charges.

WILLIAM YOUNG J:

I thought – yes – but I thought that he excluded from that analysis short-term impairment relevant to –

MR FARMER QC:

Well impairment, it's a question of whether he used the term "impairment" in the context of delays in periodic payments coming in.

ELIAS CJ:

Well that's what I was asking you because the company –

MR FARMER QC:

Yes, His Honour doesn't –

ELIAS CJ:

– the company was impaired if there were delays.

MR FARMER QC:

Well His Honour doesn't use the term "impaired" in that way.

ELIAS CJ:

Right.

GLAZEBROOK J:

So you say he uses the term "impaired" in terms of the actual capital being available even if delayed?

MR FARMER QC:

Yes, yes. So to deal with Your Honour's question, Justice Glazebrook, yes there were concerns that the directors had during the relevant period leading up to December and I'm sure we'll hear – there's reference made by His Honour in the judgment to Sir Douglas Graham saying at one time, "We're sailing close to the wind," which has different meanings to different people according to whether they say it or not, and we – and there are sort of instances of that kind. But as I say on the other side of the coin they did have positive ultimate management projections which they obviously took account of in forming the view that they were confident that the

company would be able to make payment of its debts as they fell due, which is what the test was. If I take you to the Court of Appeal's judgment, paragraph –

WILLIAM YOUNG J:
Just before you do, can I just identify the paragraph that I had in mind where he was, he said in dealing with impairment he recognised that he'd effectively made a finding of impairment in relation to liquidity and he wasn't going to double up on that, it's para 150 of his judgment.

MR FARMER QC:
150?

WILLIAM YOUNG J:
He refers at the end of that, "In light of the finding I have made that the material omissions in relation to liquidity extends at least to short-term recoverability."

MR FARMER QC:
Yes, thank you. So paragraph, in the Court of Appeal judgment, paragraph 167, "Nor are we persuaded," the Court said, "that the Judge was wrong to find that the appellants could justify omitting reference – "

ELIAS CJ:
Sorry, what paragraph was it?

MR FARMER QC:
167. "Nor are we persuaded that the Judge was wrong to find that the appellants could justify omitting reference to the identified matters on the basis that the analysis of those matters was properly for the judgement of the directors. While we accept that directors must exercise a degree of judgement in deciding upon the wording of the offer documents and on issues of materiality, the statutory obligation is clear. The statements made must be true and must not omit any material matter that would render those statements misleading and therefore untrue. Ultimately, whether that has occurred is a matter for the court to determine," and then it's this passage, "but investors are entitled to make their own judgement on whether to invest on the basis that statements in the offer documents are true and not materially misleading."

Now that perhaps leads us shortly into the question of how we characterise the offending but before I do that I probably need to just identify for you, although you'll know it already I'm sure, the precise matters that His Honour said were omitted and should not – and should have been included and by way of quick summary they are, of course, the failure to disclose specifically that there had been a pattern of over the last four months or more of delays in loan repayments, notwithstanding the measures that the company had in place to ensure that payments were made on time and if they weren't to find a way of dealing with the situation, that was the first one.

The second one was that the reduction in cash levels that had occurred over that same period was not disclosed. Just very briefly on that I mentioned earlier that the company in the early part of 2007 had set out deliberately to build up its cash reserves in the light of the known tightening of the market, if I can put it that way, and the lower levels of reinvestment that were occurring generally in the market in the case of finance companies and in fact they successfully built up reserves to quite a high level in the, around the August period, and that was intended to be able to deal with that situation and they did deal with that situation in the sense that from those higher level of cash reserves, much higher than normal levels of cash reserves, they were able to make repayments of investments as they fell – as they matured, as they fell due. But – and at the time that the prospectus was signed the cash level was around $8 or $9 million, depending on which day you look at it, which was not untypical over – one could look back over the previous three or four year period. But the point His Honour made was well you had had a reduction in the level of cash and you should've disclosed it.

And the third point was that the directors did have concerns, one might say serious concerns, about the situation and the fact that they had concerns ought to have been disclosed. So that was, they're the three features, the three omissions if you like that led His Honour to the findings that he did and he really encapsulates that in his judgment. If we go back to that, paragraph 121. He actually set out, following, I think, a precedent that had been set by Justice Heath earlier, he actually set out his own version of what might have been, or should have been included in the prospectus so I'll quickly read that. So you'll see it there, "Since mid 2007 LFIL has sought to build and maintain cash reserves to guard against the reduced investment and reinvestment rates likely to be caused by the loss of investor confidence in the finance company market. The company's cash reserves reached a high of approximately $40 million in August 2007, and although the amounts fluctuate, the

downward trend during December 2007 has been to around 22-18 per cent of that high point. A substantial majority of the cash reserves have been applied to repay maturing investments. The adequacy of LFIL's cash resources is a source of concern to the directors. The company's ability to meet its obligations to investors in the coming months depends upon receipt of loan repayments as forecast. The directors are dependent on the respective loan managers for projections as to the timing and amount of loan repayments. Since September 2007 there has been a substantial extent of over-estimation in the projected loan repayments, month by month. However, the directors continue to have confidence in the competence of the loan managers and provided there is a material improvement in the accuracy of their projections, LFIL will be able to continue meeting its obligations as they fall due." So that is how His Honour saw what should have been –

ARNOLD J:
The Court of Appeal at paragraph 170 identifies five matters. Now two of them are quite similar, both relating to the cash position. They certainly identify more than the three you mentioned I think?

MR FARMER QC:
Yes although I read that as being really three broken down into five. The first two bullet points are really the same point, just stated differently, and similarly the third and fourth are just two dimensions of the same point.

BLANCHARD J:
Mr Farmer, do you criticise the Judge's reconstruction of what the prospectus should, in his view, have said?

MR FARMER QC:
I can't. I don't think I can.

BLANCHARD J:
It's pretty stark, isn't it?

MR FARMER QC:
I can't because we're here dealing with sentence not with conviction.

BLANCHARD J:

Yes.

WILLIAM YOUNG J:
It would probably have resulted in receivership wouldn't it?

MR FARMER QC:
In the –

WILLIAM YOUNG J:
I mean a prospectus in those terms would probably have resulted in receivership, wouldn't it?

MR FARMER QC:
Well –

WILLIAM YOUNG J:
Is there evidence about that?

MR FARMER QC:
That point was raised and discussed at the hearing as to whether that would have but the pint that is made in response, which I don't, can't quibble with, is that the obligation is to set the position out correctly and accurately.

WILLIAM YOUNG J:
It might be material to the amount of loss though? It might mean that the amount of loss is better looked at in terms of new money that went in rather than reinvestments which may have been sunk anyway?

MR FARMER QC:
Well the reinvestments were reinvestments where the investment matured during the currency of the prospectus.

WILLIAM YOUNG J:
Yes.

MR FARMER QC:

If – to postulate the worst possible scenario, if that prospectus had been issued in those terms, and if that had led to an immediate receivership, then of course the whole, yes you would have avoided the new investors and the re-investors but – I mean there's no suggestion that directors chose not to give a more fulsome account of the company's position because they were concerned that there would be an immediate receivership. That's not suggested.

WILLIAM YOUNG J:
Was there, I vaguely remember from the leave submissions, wasn't there some concern that if they panicked or got spooked then they might trigger losses that would otherwise have been avoided?

MR FARMER QC:
Well it's certainly the case that Sir Douglas, I think, in his evidence said that he, when he looked at the situation in the round he recognised the duty to all investors , not just the future investors, and so that was why they – and they believed, honestly believed they could, as it were, survive, trade their way out. They had very substantial assets in the form of the loans, the assets that consisted of the loans, and notwithstanding the delays that were occurring in some of those instances they were confident that they were addressing the situation effectively.

So perhaps now is the time to turn to look at Justice Heath's categorisation and His Honour set that out in his sentencing notes at paragraph 21.

ELIAS CJ:
So this is your second point is it?

MR FARMER QC:
Well it flows from the point I've just made.

WILLIAM YOUNG J:
Is this Justice Heath or Justice Dobson?

MR FARMER QC:
Justice Heath. No, no, sorry, Justice Dobson's sentencing notes. He quotes Justice Heath. At paragraph 21.

ELIAS CJ:

Is this directed at your second point about whether the Judge was correct to distinguish these cases?

MR FARMER QC:

No.

ELIAS CJ:

It's not. It's still on the first point?

MR FARMER QC:

I'm still on the first point. So paragraph 21, if Your Honours have that, "In terms of the relative seriousness of offending within the categories that might arise under s 58, Heath J observed a ranking: … At the most serious end would be offending involving dishonesty, for example, an intention to mislead potential investors in order to secure funds for a particular venture or to obtain a personal financial gain. Immediately below that would be conduct that could be characterised as either reckless or grossly negligent. By gross negligence, I refer to conduct that involves a major departure from the standard of care expected when a director performs a statutory duty. Below that are cases involving innocent misrepresentation arising out of greater or lesser degrees of carelessness. For example, there may have been an error of judgment in respect of a particular issue that ended up being material to an investment risk."

So there His Honour, clearly in that lowest category, Justice Heath is equating innocent misrepresentation as involving some degree of carelessness. Now Justice Dobson went on to say, "So that is a pecking order which at the most serious has offending involving dishonesty where there is an intention to mislead. One then steps down to conduct that is reckless or grossly negligent, and below that there are cases involving innocent misrepresentation arising out of greater or lesser degrees of carelessness."

Now still on this – sorry, I'll give you the next reference in the sentencing notes, if you go to 37, over the ensuing paragraphs what he's actually doing, I'll come back to it, he's actually drawing a comparison between Bridgecorp and this case. So at 37 he said, "I am satisfied that the levels of culpability attributable to each of you are towards the lower end of any scale such as that as was described by Heath J in the

Nathans case. Having classified the relative level of offending in that way, it is appropriate to consider the non-executive and executive directors separately, and I will consider first the non-executive directors."

Then in 38 he went on to say, "There was no intention to mislead and, more than that, I am satisfied that at least each of the non-executive directors treated it as important to satisfy yourselves at all times that you dealt absolutely honestly with potential investors." And I read this to you before I think. "You have fallen foul of s 58 because of a material misjudgement about the extent to which concerns at Lombard's liquidity, and factors materially contributing to that, should have been disclosed in the offer documents. In the circumstances that applied, I nonetheless remain satisfied that the omission of disclosures on liquidity pressures was not a decision that you could reasonably have come to. On the other hand, I am satisfied that you committed personal care and attention to the offer documents, which is a material point of distinction." He means from the other cases that had been of concern. "Also, that the nature of the omission that has been made out, whilst important, is certainly not as pervasive a misrepresentation affecting numerous aspects of the description of Lombard's business, as was the case with Nathans and for Mr Davidson. The offer documents were before the public for a shorter period, and resulted in less money being subscribed, than in those other cases."

And then to complete the point that leads on to the question of the relationship between carelessness in that lowest category and a starting point of imprisonment. He raises that in paragraph 44 and said, "The Crown submissions on the starting point reflect an expectation that all convictions under s 58 involving misleading offer documents issued by finance companies where any degree of money subscribed and any degree of carelessness was involved will justify a starting point of imprisonment. That is not the case. In lesser cases of inadvertence or error of judgement rather than gross negligence, there will be cases where an appropriate response does not require a starting point of imprisonment. There will be some cases in which the appropriate starting point is on the cusp between a short sentence of imprisonment (which carries with it the prospect of home detention in substitution for imprisonment) and the community-based sentences that sit below custodial sentences in the hierarchy of sentences."

And in fact when he dealt with the executive director, Mr Reeves, he thought Mr Reeves was on the cusp where a starting point of a short sentence of

imprisonment, that was a correct starting point for it because there were two particular factors about Mr Reeves' position that he identified that he thought warranted a different treatment to that extent and they were first that he was closer to the action, as it were, because he was an executive director. He was closer to the running of the company than the non-executive directors and secondly because there was a previous conviction which I'll come back to albeit it, it was one that was regarded as a relative minor matter leading to a fine of $1000.

So effectively then that really is a re-statement by the Judge from his primary judgment as to how he saw the nature of the offending and how it should be categorised. He did, so far as Mr Reeves was concerned, if you go to paragraph 96, and I'll come back to deal with Mr Reeves in more detail, but in 96 he said, of the sentencing notes that is, "As to the relative seriousness of your offending, the same analysis in distinguishing your case from those in Nathans and of Mr Davidson equally applies. The starting point appropriate for the non-executive directors needs to be revisited to take account of your closer day-to-day familiarity with Lombard's business and some allowance for the previous conviction."

But in terms of all directors, the findings of honesty and so forth were found to apply to all directors and so the question of the nature of the error, inadvertence, error of judgement, however it's described, is – well it's the same for each of them.

So really just to try and sum up at this point what I'm really suggesting to you is that we have the higher levels of Justice Heath's characterisation, deliberate dishonesty and gross negligence or recklessness, and then if we go, drop down, we would say a long way really to the lower levels of innocent misrepresentation involving some degree of carelessness and in the submissions there has been, I think on both sides, there's been some question as to whether that, in this case, can be categorised as negligence, albeit not gross negligence. Whether carelessness is the same as negligence and it may be a semantic debate that we don't need to get into but I would just make the point that if the nature of the error of judgement is that the directors misunderstood the purpose and scope of the disclosure regime, and that was careless, then it's of –

ELIAS CJ:

Why don't you stick with the statutory language? I'm just really wondering why the – there's an awful lot of baggage in the terms that you're using but it's just, the statutory language is that it wasn't reasonable for them to believe what they put out.

MR FARMER QC:
No reasonable belief.

ELIAS CJ:
Yes, no reasonable belief.

MR FARMER QC:
I'm happy to stick with that. No reasonable grounds for belief

ELIAS CJ:
Yes, no reasonable grounds for belief.

MR FARMER QC:
And actually that led to a debate about whether reasonable belief and reasonable grounds for belief is the same but I won't go into that. Well the reason I'm dealing with this in this way is because Justice Heath, as adopted by Justice Dobson, and there's no departure from this in the Court of Appeal either, have used the term "greater or lesser degree of carelessness" and then that feeds into the question of sentencing and I'm really just saying it will be enough for my purposes if the Court accepts my submission that the nature of the carelessness, if one wants to put it that way, is that of misunderstanding the true scope, and purpose, of the section in the Act and the submission I would make from that is that all of us, all of us being lawyers, at least from time to time, misunderstand the purpose of statutes and even occasionally Judges do as well, which is why cases are on appeal, and whether one says well that's a matter of carelessness or whether one says it's an error of judgement, whatever, is a little bit of a semantic debate that I don't really think we need to have. So I'm suggesting that the question of negligence or not is a bit of a red herring that doesn't actually help very much. So long as you're satisfied that we're in that bottom category, and the Judge seemed to think towards the bottom of the bottom category, then that's the right context in which to consider whether or not there should be a starting point of imprisonment.

ELIAS CJ:

Well I would have thought again, if one started with the statute, the very fact that it doesn't impose a minimum sentence of imprisonment takes you a long way and – but surely the basis on which the conviction has entered is that the statement put out was misleading and the defendants had no reasonable grounds for believing it to be accurate.

MR FARMER QC:
Yes. That's – well the Judge had to –

ELIAS CJ:
I don't see, apart from the reference to a misunderstanding of the statute, which is actually a rejection of the characterisation made in really what's almost an explanation, almost a submission, I don't see why the focus is on misunderstanding the statute. It's a failure to have any reasonable belief in the accuracy of what was put out.

MR FARMER QC:
Well I –

ELIAS CJ:
Reasonable grounds.

MR FARMER QC:
Well I'm building my submission on what both the trial Judge and the Court of Appeal said.

GLAZEBROOK J:
Although one can understand the categorisation that Justice Heath put forward in a case that did involve carelessness or negligence. So the cases he was talking about did involve –

MR FARMER QC:
Gross –

GLAZEBROOK J:

– either gross negligence or could have involved an argument about whether it was merely careless so one can understand that he's talking in those terms because that's what the case was dealing with.

MR FARMER QC:

I think in the cases that he had there was no doubt that they were – well with the exception of Mr Davidson.

GLAZEBROOK J:

That's what I was...

MR FARMER QC:

The other case though which he was dealing with, the Nathans case –

GLAZEBROOK J:

The Nathans case was certainly no –

MR FARMER QC:

There was no, that was a really bad case.

GLAZEBROOK J:

Yes.

MR FARMER QC:

And that would have been true also of the other directors in Bridgecorp who were sentenced separately from Mr Davidson.

WILLIAM YOUNG J:

Mr Farmer, can I just, the issue of reasonable grounds to believe it was true is quite an elusive one here because if the prospectus is construed as having the meaning that the Judge in the Court of Appeal gave it, that is unconditional expression of confidence meaning there are no conditions which cast a doubt on that, then they couldn't possibly have believed that it was true in that sense because all of the reasons why it was untrue were within their knowledge. What they may have thought is, well, we're not actually meaning that, which is probably a different thing.

MR FARMER QC:

Well they had formed their own assessment, as I said earlier, that the company would be able to pay its debts as a company. They'd also though – and they said that in the prospectus. They also said in the prospectus that if things get worse and become extreme then a different scenario would develop and the company may not be able to make, repay the debt.

WILLIAM YOUNG J:

Yes but just looking at the findings, the Courts below thought that in light of a failure to refer to the cash flow position – sorry the cash on hand position, the inaccuracy of the forecast, and their own subjective ways, an unconditional expression of confidence was misleading.

MR FARMER QC:

Misleading, yes, exactly, and because it was misleading then it became untrue by the virtue of the deeming provision in section 55.

WILLIAM YOUNG J:

And then the defence is, is only if they believe it's true but they couldn't really have believed it was true in the sense that it was construed by the Court.

MR FARMER QC:

Well –

WILLIAM YOUNG J:

They may have thought they were saying something else. That's the elusive aspect of the case.

MR FARMER QC:

Yes, I understand what Your Honour is saying, yes.

WILLIAM YOUNG J:

I mean if they're saying there are no loans that are impaired, well you can say, well why did you think that, well yes there were, but you've got reasonable grounds to believe it because you've got reports saying here are the valuations.

MR FARMER QC:

Yes, yes.

ARNOLD J:

What they were really doing was expressing confidence that the company could trade its way through a problematic point in time.

MR FARMER QC:

Yes, that's true. So I'm really wanting now to get into the question of imprisonment as a starting point and we've dealt with that actually –

ELIAS CJ:

There's no statutory peg for starting points is there?

MR FARMER QC:

No.

ELIAS CJ:

It's all case law?

MR FARMER QC:

It is and so if you turn to our written submissions we've sort of dealt with that. We have a section called "starting point of imprisonment". Before I get to that we've got a section earlier in the submissions on Sentencing Act principles and this – I'm not going to try and lecture to Your Honours something that you know a lot better than I do but you'll find –

ELIAS CJ:

Well we don't really because we haven't had much occasion in this Court to consider sentencing principles.

MR FARMER QC:

Well you at least had that *Hessell* case.

ELIAS CJ:

Yes.

MR FARMER QC:

And I imagine that when some of Your Honours were on the Court of Appeal you would have dealt with cases like –

ELIAS CJ:
Yes, they did.

MR FARMER QC:
But, anyway, Sentencing Act principles begins at paragraph 4 immediately with the reference to section 7 and we've actually – I notice that the Sentencing Act is not in the bundle and I'll take my share of responsibility for that, but if you go to paragraph 6 you'll find the relevant principles – or purposes rather, not principles, purposes of sentencing are set out there and the particular relevant ones – well the purposes start with, "To hold the offender accountable for harm done to the victim and the community by the offending." And then we go down to (e), "To denounce the conduct in which the offender was involved; or (f) to deter the offender or other persons from committing the same or a similar offence."

And you'll see when I come to it shortly that the key difference between Justice Dobson on the one hand, and the Court of Appeal, is that the Court of Appeal thought that Justice Dobson didn't give weight to the need – to what is effectively (e) and (f), the need to denounce the conduct of the offender so as to deter others from committing the same or similar offences, and that's why they actually went off in a different direction in the way they did. Anyway, there's section 7 and I'll come back to that point.

Section 8, if you go back to paragraph 5, we haven't set it out, but we've just said that that sets out a list of principles. So you have purposes in section 7, principles in section 8. The principles that must be taken into account when sentencing, and these include the gravity, the first one is the gravity of the offending including the degree of culpability of the offender, and then I've just picked out (e) which is the consistency ground, "The general desirability of consistency with appropriate sentencing levels," and then (h) is particular circumstances of the offender et cetera and then 8(g) is important, section 8(g) requires the Court to impose, "The least restrictive outcome that is appropriate in the circumstances in accordance with the hierarchy of sentences and orders set out in section 10A." And that hierarchy of sentences starts with imprisonment and home detention and then you go down to community service, which I'll come back to, and down to fines and so on, so it goes

down, that's the hierarchy of sentences. I shall summarise them here, at the bottom, complete discharge; fine and reparation; working up, community-based sentences; home detention; imprisonment. So 8(g) says, the Court, the relevant principle is that the Court should impose the least restrictive outcomes that is appropriate in the circumstances.

And then we've referred to section 16, which isn't referred to by the Court of Appeal, "When considering the imposition of a sentence of imprisonment for any particular offence, the Court must have regard to the desirability of keeping offenders in the community as far as that is practicable and consonant with the safety of the community." And then subsection (2), "The Court must not impose a sentence of imprisonment unless it is satisfied that, (a) A sentence is being imposed for all or any of the purposes in section 7(1)(a) to (c), (e), (f), or (g); and (b) Those purposes cannot be achieved by a sentence other than imprisonment: and (c) No other sentence would be consistent with the application of the principles in section 8."

So there's a sort of a statutory leaning towards, almost presumption, of don't put people in jail if you can help it. That's the sort of general approach that we take out of that.

Now just in terms of how the principles are dealt with, and this is particularly relevant of the one of consistency, that issue was dealt with by the Court of Appeal in the *R v Rawiri* [2011] NZCA 244; [2011] 25 CRNZ 254 case, which is one of the ones I handed up to you this morning in that bundle *R v Rawiri*, which was a methamphetamine case, interestingly, where the appellants, or the defendants rather had, it was a Solicitor-General appeal, the defendants, accused had actually been found to have equipment in their home for the making of methamphetamine and they were not sent to jail. The Solicitor-General sought leave to bring an appeal. He was given leave but as you'll see from this judgment the Court of Appeal then dismissed the appeal and just looking first of all at the headnote in the findings on page 255, the second finding was that there was a discernible legislative policy of keeping offenders within the community wherever appropriate in passing of sentencing, remember that 2007, Parliament plainly had the intention of increasing the range of sentencing alternatives available to a Judge other than home detention or imprisonment. And if you go to paragraph, that's referred to at paragraph 17 of the judgment of the Court. The reference is made to in fact the, you'll see there set out in paragraph 15, the hierarchy of sentences that was enacted in section 10A in 2007

and then paragraph 17, “These changes are consistent with a discernible legislative policy of keeping offenders within the community wherever appropriate. Parliament’s intention was plainly to increase the range of sentencing alternatives available to a Judge other than home detention or imprisonment. Significantly, the legislature placed community-based sentences well up the hierarchy, immediately below home detention.”

And then the Court went on to say well community-based services actually have some real teeth in them. They shouldn’t be regarded as just being simply a soft option so in 18 the Court said, “This Court has recognised that a sentence of community service has a punitive aspect. It is intended by Parliament to be and is a very real and effective alternative to imprisonment which should not be regarded by the public as a minor or insignificant reaction a sentence of community work is designed to achieve the principles of accountability, deterrence and denunciation traditionally associated with imprisonment while avoiding the default option inherent in that sentence.”

ELIAS CJ:
Well it is a deprivation of liberty.

MR FARMER QC:
It is a form of yes, “And promoting a sense of community participation and awareness. The statutory hierarchy of sentencing options is a blunt affirmation that prison is a measure of last resort.” And then going down to paragraph 20, turning to the facts of this case, which were quite dramatic because it was a methamphetamine case, “While courts recognise that principles of deterrence and denunciation generally predominate in methamphetamine dealing cases, they must take account of the statutory prohibition against imposing sentences of imprisonment unless required by another statutory provision, whether mandatory or presumptive, or by specific purposes or principles.”

And then the other case that perhaps I should refer to at the moment is this Court’s judgment in *Hessell* which is in the casebook, tab 1, which is a sexual offending case and the question of consistency, the principle of consistency and how that fits into the whole set of principles in the Sentencing Act and how important it is within that context is dealt with in the judgment of the Court beginning at paragraph 41, and that was immediately after a reference to the need for consistency as it had been

developed in the case law. So 41, "While these passages indicate the legislature's desire for consistency, there is no suggestion that it is to be achieved by curtailing sentencing discretion in favour of a more structured approach than the courts were applying at common law. Rather, the Select Committee believed that a proper judicial evaluation of individual cases in applying the purposes and principles set out in the Act would lead to consistent sentencing. Accordingly, in articulating the purposes and principles of sentencing, and circumstances which will aggravate or mitigate offending, Parliament has both clarified the factors to be addressed and given legislative force to the duty to take them into account. It has done so both for the benefit of judges and to foster greater awareness of the public," et cetera and talks about the complexity of the sentencing process.

And then 43, "In this context the proper application of punishment for offending remains, as it was prior to the 2002 legislation, an evaluative task for sentencing judges and those judges who determine sentencing appeals. The task reflects the amalgam of sentencing discretion, on the one hand, which ensures the gravity of individual offending and circumstances of the offender are duly assessed, and sentencing consistency, on the other, which tempers sentencing judgment to ensure that sentencing outcomes reflect a policy of like treatment for similar circumstances."

Which then really takes us probably to the further aspect of this which is the comparison between the situation with Mr Davidson and the Nathans directors and –

GLAZEBROOK J:

Can I just check with you because the *Hessell* comments were made in the context of a policy of there is to be a gradation of discounts for guilty pleas no matter why they were late or not late and no explanation et cetera, on the basis of consistency. I don't read anything in *Hessell* and in fact that last paragraph that you read reads, in fact, against that but if you have similar offending in similar circumstances there should be consistent sentencing. So it's not an Australian approach of you leave it to the individual sentencing Judge and you may have wide discrepancies in sentencing with exactly the same circumstances. It's really saying you take all individual circumstances into account and all of the sentencing principles but if you do happen to land up with exactly the same then there should be consistency.

MR FARMER QC:

I think that's fair, with respect. The – I mean by definition the occasions when you will have exactly the same –

GLAZEBROOK J:
Well not exactly –

MR FARMER QC:
– are going to be very limited but I think that point of principle that's been emphasised by this Court there is that the Sentencing Act has a whole host of listed principles and you shouldn't really over-focus on the particular one of them perhaps. Some may be more important than others but –

GLAZEBROOK J:
Well in particular cases certainly some –

MR FARMER QC:
Yes, yes, but then all that too is overlaid now by section 16 and the, and 8(g) – well not – perhaps section 16(g) which is given – not just a list, is not one of the principles, you've got a principle in 8(g) that the Court should impose the least restrictive outcome that's appropriate in accordance with the hierarchy sentences set out in 10A but then you've got section 16 which sits over the top, or alongside, and you rate all of that, and is quite expressly focusing on the whole question of imprisonment and the desirability, as its put, of keeping offenders in the community.

So as far as the grounds of difference between this case and Nathans and Davidson, we've dealt with that quite fully in our written submissions. It really begins at page 22 paragraph 41. It runs right through into a lot of detail on the particular facts of Bridgecorp and the position of Mr Davidson, and then Nathans from paragraph 50, which was a gross negligence case and where what was happening was that the money that was being raised was being channelled straight into a related company and submissions on that runs right through to 52, and then 53 we have a concluding section, the firm sanction imposed in Nathans and Bridgecorp reflect the much more serious circumstances of those cases. What is generally recognised, I think, is that Mr Davidson's situation is probably the closest to what we have here. He was certainly found to have acted honestly, but I've already alluded to the fact that the nature of misrepresentations were quite serious, including the statements that the company had never missed an interest payment and the failure to disclose related

lending, which is considered a no-no, was also emphasised. So I'm not sure I want to take up the Court's time. You will have read what we said about Mr Davidson in particular in those paragraphs, and so unless Your Honours want me to deal with that aspect particularly, I'll just really perhaps leave you to read that again, because what I'd rather talk about is the question of where the Court of Appeal – what was it that led the Court of Appeal to take a different view from Justice Dobson, bearing in mind that he – the Court generally agreed with Justice Dobson's analysis of the nature of the offending didn't seek to disturb the findings of honesty and so forth and, along with Justice Dobson, wasn't really minded to go into the sort of other peripheral matters that the Crown had been urging.

So it took us, as I say, specifically to the Court's view of the need to have denunciation and deterrence which the Court thought Justice Dobson hadn't given any real consideration to or certainly not sufficient consideration. I see it's 11.30. This is really the last major topic I'm going to deal with.

ELIAS CJ:
Yes, we'll take the morning adjournment now, thank you.

COURT ADJOURNS 11.31 AM
COURT RESUMES 11.51 AM

ELIAS CJ:
Yes, thank you, Mr Farmer.

MR FARMER QC:
So where I come to now is the key difference between the trial Judge and his approach to sentencing and that of the Court of Appeal, and I'd like to take you to the Court of Appeal's primary judgment, if I could, just to look at the part of it, first of all, that deals with sentencing. The first point to note, if you go to paragraph 246, what we see there is an acceptance by the Court of the trial Judge's characterisation of the directors' culpability as a misjudgement, so 246, "Sentences need to reflect the gravity of the offending." 245, they just said above there that they thought the Judge had erred in adopting starting points short of imprisonment. They did say there may be cases where culpability is properly assessed as being so low that a non-custodial sentence could be considered as the appropriate starting point, but this case does not fall into that category.

Then in 246, "By any measure, the number of investors affected serious impacts upon them, the amounts of money invested or re-invested on the strength of the truth of the statements were substantial," and then the second, "While we accept the Judge's characterisation of the directors' culpability as a misjudgement, we cannot overlook the Judge's findings that the amended prospectus was misleading by omitting to identify the unreliability of the forecast dates for the known repayments, the serious deterioration, the company's cash resources, and the level of the directors' concern about those matters." All these factors were critical to Lombard's liquidity, et cetera.

Now, where the Court of Appeal differed, though, from His Honour, and why it had the view that starting point should be imprisonment, is because of the approach it took for the need for denunciation and deterrence for this kind of offence, so if you go down to 248 –

ELIAS CJ:
But isn't the Court of Appeal also saying, though, in 246, I know it doesn't lead into it exactly like this, that the Judge had not sufficiently reflected the gravity of the offending.

MR FARMER QC:
It's not stated quite in those terms, although it would be fair to say that there's perhaps a bit more emphasis being given in that paragraph to those particular matters which they say they accept, the matters characterised as the directors' culpability. But it is still the Judge's findings on those omissions which the Court repeats and re-states but it's fair to say, looking now at the end of the paragraph, they do say, "These factors clearly show the company was in a particularly vulnerable state, yet these matters were not brought home to investors as they should have been."

ELIAS CJ:
Well, that goes to the gravity of the offence.

MR FARMER QC:

Yes, it does. But there's no dispute, either, that that was stated differently was Justice Dobson's view, as well, that he thought these were matters that should have been brought up.

ELIAS CJ:

But they are saying that they justified a starting point of imprisonment.

MR FARMER QC:

Well, I think, with respect, where we get to on the starting point of imprisonment is when we turn to denunciation and deterrence, which I'm going to go to now. So if you go down to 248, "However, we accept the submission made on behalf of the Solicitor-General. The Judge placed too little weight on the statutory purposes of denunciation and deterrence. Much of the Judge's discussion on deterrence was focused on personal deterrence of the Lombard directors, the Judge accepting that they are unlikely to re-offend." But as Mr La Hood pointed out, "The Solicitor-General does not contend this case needed to take into account personal deterrence. What was important for the need to deter others generally from offending in a similar way."

Then going to the next paragraph, 249, "The Judge did not sufficiently focus on general deterrence and holding the offenders accountable. The starting point ought to have reflected the purpose of the Securities Act, namely, to protect the investing public through the timely disclosure of material information. The investing public is highly dependent upon the truthful disclosure of relevant information and offer documents. This is required to facilitate the raising of capital and to promote confidence by the investing public and financial markets. Failure to meet the required standard has a number of potential consequences; loss of investor confidence, lack of trust in this country's financial institutions, damage to capital markets and the wider economy, and loss of funds invested by the public. Although the Judge notes some of these points, he did not give sufficient weight to them," and then they went on immediately to say, "We are satisfied these factors ought to have led the Judge to adopt a starting point of imprisonment." So that's why I say, with respect, that that's the focal point of the Court's view that the starting point should be imprisonment.

ELIAS CJ:

But you would say that that would mean that in all cases of conviction under section 58, the starting point would be imprisonment?

MR FARMER QC:

Yes, yes, although the Court did say, to be fair, back where I started out, that there may be cases – that was paragraph 245 – where culpability is so low that a non-custodial sentence could be considered as the appropriate starting point. But it's a de minimis type of approach.

ELIAS CJ:

It's hard to imagine what it would be if there's no reasonable grounds to believe ...

MR FARMER QC:

No, but just on that point of the purpose of the Securities Act, protecting the investing public, the Court had earlier dealt with that. If you just go back quickly to paragraph 82 in the judgment, and I won't read all this to you because some of this law will be familiar to you. There was a reference, first of all, in 82 to this Court in *R v Steigrad* [2011] NZCA 304 saying the purpose of the Act is to protect the investing – sorry, that should be the Court of Appeal, actually, in *R v Steigrad* saying the purpose of the Act is to protect the investing public through timely disclosure of material information, and then there's a reference to number of other authorities in civil cases with the leading case probably being *Re AIC Merchant Finance Ltd (in receivership)* [1990] 2 NZLR 385, where Justice Richardson had said that the pattern of the Securities Act in sanctions it imposes makes it plain the broad statutory goal is to facilitate the raising of capital but securing the timely disclosure of relevant information to prospective securities, and that continues, if you go down to 86. Criminal liability under section 58 is properly viewed as supporting the disclosure regime by the imposition of criminal sanctions.

So there's the – that goes back to the submission I made earlier that the misunderstanding by the directors, the error of judgement by the directors, was that they didn't understand what the purpose of the Act was. Now, just on that, Your Honour Justice Young put to me fairly enough that really perhaps a more precise way of trying to look at the misunderstanding is that they misunderstood the need to give the facts that underpinned their judgement, but however it's put in both cases, what is being aimed at and what is being required is that the investors have enough facts to be able to make up their own minds as to whether they should invest rather than just simply rely on the directors' judgment, and that feeds back in, as I say, to these broad statutory objectives that the Court here is outlining.

That led them on, then, to the point that deterrence and denunciation had not been given proper account, proper weight, by Justice Dobson and that that's what was the very thing that required a starting point of imprisonment. That's paragraph 250 that I read a moment ago, and they supported that, they followed up with that, still going back to 250, the next sentence, by saying, "To do so would have given effect to the important principle of consistency in sentencing," so they sort of led from starting point of imprisonment is required in order to give effect to the principle of denunciation and deterrence and they said, "Well, that then gives effect to the principle of consistency in sentencing," and then they referred back in that context to Nathans and to Bridgecorp.

Now, what I want to say – what we say about that is that having identified that as being the critical point here is that in our written submissions, if I can take you back to that, we deal with, at paragraph 36 and following, we set out first of all those paragraphs that I've just read you and another one. That's at paragraph 35 of our written submissions. Then we've gone on, paragraph 37, to say, well, when you're considering deterrence and denunciation what must be, surely, highly relevant is the passing of the Financial Markets Conduct Act which, in a case of this kind where there is honest error, is no longer a criminal offence and there are civil remedies that are provided for it, but it's no longer a criminal offence, and I won't read it to you because you will have seen it, but in paragraph 39 we set out what the Minister said when introducing the Bill as to what was trying to be achieved by the reform, and in particular, although the objective of trying to make sure that investment in financial markets is done on proper principle, as he says, just going to the bottom of page 21 of the submissions, as he says, "The regime in this Bill plays an increased emphasis on civil liability for contravention of the law, including the ability of the Financial Markets Authority to take civil pecuniary proceedings in a wide variety of circumstances. It contains serious criminal offences for egregious violations of the law and he refers to intentional or reckless conduct. He then goes on to say, "In this Bill, we are proposing to replace a strict liability regime with one where essentially you come under the criminal provisions of this Bill only if it can be proved that you were deliberate in misleading people or that you were reckless." So we have moved from a situation where as we've seen with some of the recent prosecutions, the directors of companies that put out misleading prospectuses and mislead investors resulting in the loss of retirement savings of many, et cetera, had strict liability for actions if they signed off misleading prospectuses. Under this Bill they will have only

civil liability, that is, they will not go to jail. They will not face jail time unless it can be proven that what they did was deliberate or reckless in signing off a misleading prospectus and so on. The question we have to ask is whether that is right, is that good policy.

Now, what will be said against me is, well, of course at the time these offences were committed the Act was what it was and it did provide for a penalty of up to, among other things, five years' imprisonment and the Court should deal with it on that basis. We, with respect, make two points. First of all, in a sense that is undoubtedly right but the question of deterrence and denunciation in relation to this offence simply can't be something that can properly be said to have any great weight, because the law has changed. It's now inoperative and it is – so nobody is going to be deterred by the thought of going to prison if they honestly make a mistake. They will be deterred, of course, if they deliberately set out to mislead.

While perhaps not part of our law, quite by chance on Friday, hence the lateness of my providing you with this, I came across a judgment of the European Court of Human Rights which recognised in civil – criminal law and then applied it in a wider context of dealing with human rights, a principle that said that if, between the time of the commission of the offence and the time of sentencing, final sentencing, final disposal of the case, there was a change in the law, then if, of course, the change in the law was to make the situation more stringent, for example, if, instead of – I'm giving a hypothetical example – simply a fine for an offence if it became, then, the penalty became one of imprisonment, the Court would never, of course, apply that retrospectively back against the defendant. But if, on the other hand, the new law is more lenient or more favourable to the defendant, then on sentencing the Court said that the Court should recognise the change in thinking about the nature of the particular offence, change in thinking that can be regarded properly as a change in community thinking as reflected in the legislature's enactment of the new provision.

BLANCHARD J:
Mr Farmer, have you come across the New Zealand case of *R v Oran* (2003) 20 CRNZ 87?

MR FARMER QC:
No, I haven't.

BLANCHARD J:

It was decided in 2003 and it was a situation in which, after sentencing but before the appeal was heard, the home invasion legislation was repealed, which I think might have been part of the Sentencing Act provision.

MR FARMER QC:

Right.

BLANCHARD J:

But what the Court of Appeal decided was that the offender could not get the advantage of that.

MR FARMER QC:

In terms of the nature, the commission of the offence or of the penalty?

BLANCHARD J:

In terms of the penalty.

MR FARMER QC:

Right, okay.

BLANCHARD J:

Yes. The crime didn't change. It was simply that the home invasion legislation had provided for an enhanced penalty. That was removed and it was simply brought within the Sentencing Act generally. It's a case that you might like to look at. Mr La Hood will be aware of it because he was the unsuccessful counsel for the appellant.

MR FARMER QC:

Thank you, Your Honour. Well, obviously I will look at it.

BLANCHARD J:

I can give you a reference. It's 2003, Criminal Reports of New Zealand at page 87. But having said that, I'm not saying that that's necessarily controlling in this situation because you're making a broader point, I think.

MR FARMER QC:

Yes, I am, and I'm in a higher Court.

BLANCHARD J:
It's just that I don't think the Italian case helps much.

MR FARMER QC:
Well, it's Italian but it's the European Court of Human Rights.

BLANCHARD J:
Yes.

MR FARMER QC:
Can I just give you the references, because even if the *Oran* case is accepted as remaining good law in New Zealand, I would still make the submission that in terms of the denunciation deterrence principle that the thinking in this case is something that will at least downplay that principle to a very considerable degree and put it back, probably, where Justice Dobson had it rather than at a much higher level than the Court of Appeal had it.

So I'll be quick with this case but at any rate I think the Court will find it of interest. I certainly found it of interest. The facts, very briefly, doesn't matter too much for present purposes but it concerned a man who'd been convicted of murder and the penalty had changed. It was a question of life imprisonment either with daylight deprival or not daylight deprival, which I took to mean you either had to stay in your cell or you were allowed out in the exercise yard. It wasn't quite clear to me exactly what it was saying, but in any event, there was a change between the time when the conviction occurred and when this Court or, rather, the highest Court in Italy finally got to deal with the question of precisely what form of life imprisonment should be imposed on him. Where I would just take you to is paragraph – it's actually otherwise known as the principle of lex mitior. I wasn't quite sure what "mitior" meant, despite the fact that I suffered six years of Latin at school and university.

At the very beginning, and I won't read all this to you, but at the beginning of paragraph 103, where there is first of all a reference to an earlier decision of the European Commission of Human Rights, not the Court, in a case called *X v Germany* which took a different view from that which was ultimately taken here, and the majority in this case eventually decided not to follow that particular precedent because, among other things, they thought there'd been a change of thinking and if

you look at paragraph 105, they're also influenced by the fact that there had come into force into America the American Convention on Human Rights, Article IX, which guaranteed the retrospective effect of a law providing for a more lenient penalty enacted after the commission of the relevant offence, and they were influenced by that. Then 106 was where they effectively overruled the earlier decision and did so on the basis that the view was that the application of the criminal law providing for a more lenient penalty, even one enacted after the commission of the offence, has become a fundamental principle of criminal law.

Then the thinking about that, the important paragraphs about that are paragraph 108 particularly. I will read that, if I might. "In the Court's opinion, it is consistent with the principle of the rule of law, of which Article VII" – which was the new provision – "forms an essential part to expect a trial Court to apply to each punishable act the penalty which the legislator considers proportionate. Inflicting a heavier penalty for the sole reason that it was prescribed at the time of the commission of the offence would mean applying to the defendant's detriment the rules governing the succession of criminal laws in time." This concept of succession is interesting. "In addition, it would amount to disregarding any legislative change favourable to the accused which might have come in before the conviction and continuing to impose penalties which the State and the community it represents now consider excessive." That's quite an important way of looking at it. "The Court notes that the obligation to apply from among several criminal laws the one whose provisions are the most favourable to the accused is a clarification of the rules on the succession of criminal laws which, in accord with another essential element of Article VII, namely, the foreseeability of penalties." Then it goes on and you can go over to paragraph 119 follows that the applicant was given a heavier sentence than the one prescribed by the law which, of all the laws enforced during the period between the commission of the offence and delivery of the final judgment, was most favourable to him.

Now, as I say, I don't push that too far but I do –

ELIAS CJ:
Do we have the present provision and when did it come into effect?

MR FARMER QC:
It came into effect, I think, in November. I'll just check that. I'll have that checked. It came into effect towards the end of last year, I think.

ELIAS CJ:
Do we have the text of the provision?

MR FARMER QC:
No, sorry, you haven't been given that.

ELIAS CJ:
Well, there's no Bill of Rights Act argument that's being run here, is it, about – it would depend on the terms of the offence, which is really why I'm asking you about the existing – because there's still a criminal offence, isn't there?

MR FARMER QC:
If it's intentional and wilful.

ELIAS CJ:
Yes.

WILLIAM YOUNG J:
Or reckless.

MR FARMER QC:
Or reckless.

ELIAS CJ:
And there's a civil penalty if it's not?

MR FARMER QC:
Yes. The penalty for what we effectively have here is civil. Imprisonment as an option has been taken away.

ELIAS CJ:
There is – I can't remember, it used to be section 6 of the ...

WILLIAM YOUNG J:
I don't think we have a problem with the prosecution for an offence that was committed while it was still an offence.

MR FARMER QC:

No, absolutely not. I'm not advancing that.

WILLIAM YOUNG J:

The point you make is that in a situation where this sort of conduct is no longer criminalised, references to deterrence are perhaps over the top.

MR FARMER QC:

Yes. I'd put it a bit stronger than that, but yes.

ELIAS CJ:

There may be another – oh, never mind, it's not being put.

ARNOLD J:

There was a provision in the Criminal Justice Act 1985 which says if the sentence changed after the act was committed –

BLANCHARD J:

Yes, it's now section 6 of the Sentencing Act and it reads, "An offender has the right, if convicted of an offence in respect of which the penalties have been varied between the commission of the offence and sentencing to the benefit of the lesser penalty."

MR FARMER QC:

I wasn't aware of that.

GLAZEBROOK J:

But I think that's been held to be maximum, hasn't it, in terms of more than ...

ELIAS CJ:

Yes, a very poor decision.

GLAZEBROOK J:

It has actually been held to be the maximum penalty. Here there isn't a penalty, I suppose, but there is still a penalty for that particular offending.

ELIAS CJ:

Which is why I'd quite like to see what the civil penalty is. Anyway, never mind.

MR FARMER QC:
My focus has been on the question of deterrence and application but I suppose by reference to this human rights case I have expanded that to say we should look at – the Court should look at the thinking.

GLAZEBROOK J:
I suppose the difficulty with an argument that would say you shouldn't be convicted of something that was an offence at the time you did it is that every time you change the law and made it not an offence – but that's not your argument.

MR FARMER QC:
No, no, I'm not saying that.

GLAZEBROOK J:
You're merely saying that deterrence in those circumstances cannot bite in the same manner that as it would if it continued to be an offence.

MR FARMER QC:
Yes, I'm certainly not trying to say that we can't be found guilty. That's not my ...

ELIAS CJ:
No, but the policy behind these provisions helps the argument that you're making about deterrence, that's all, because it represents a legislative judgment of what the appropriate outcome is for non-intentional non-compliance.

MR FARMER QC:
Yes. Thank you, Your Honour, that's absolutely right, with respect.

Now, I can finish very quickly. I did want to just say a few words about the circumstances of the appellants. It was recognised by Justice Dobson that the very fact of convictions for people in this situation was itself probably a much greater penalty than the – whatever might then follow and in particular that was true. It was true for all of them because even in the commercial world Mr Bryant and Mr Reeves, their reputations have been severely damaged with the media attention, particularly, that this case has had accompanying it. And then, of course, there was specific

reference to the position of Sir Douglas Graham and the Honourable Bill Jeffries and we've – that's traversed by the trial Judge, especially, it is referred to in passing, at least, by the Court of Appeal.

The Court of Appeal did think that the discounts that were provided by Justice Dobson were overgenerous. I did want to say something specifically about Mr Reeves and if I take you to the sentencing notes, again, of Justice Dobson because you'll recall that Justice Dobson did single out Mr Reeves because he was executive director as requiring some special treatment, although giving him the benefit of the basic findings that had been made, and one of those findings, apart from the finding of honesty, was that all the directors, despite submissions to the contrary by the Crown, were found to have considered the documents before they signed them and I'll just give you the reference in passing to where that topic was dealt with by Justice Dobson, I just can't find it off the top of my head but I will give it to you.

However, but going back to Justice – to Mr Reeves. In the sentencing notes beginning at paragraph 100 he said, "Given the starting point for the non-executive directors at the top end of community detention and community work services any material increase in the seriousness attributed to your offending places you above that in the hierarchy possibly to a short prison sentence which might be substituted with a term of home detention."

And he went on in the paragraphs, I won't read them all, from 102 to 107 to consider Mr Reeves' situation specifically. There was the question of previous conviction in the District Court under the same section of the Act which was, the Court of Appeal described it as, and this is, I won't take you to it but paragraph 259 said that that previous conviction did not carry great weight and Justice Dobson had said at paragraph 96 that of I think the sentencing notes, "That some allowance nevertheless should be made for the previous conviction." He had been fined $1000 in the District Court.

But the other factor that the Court referred to was the fact that he was an executive director and so the Court thought some account should be taken of that but ultimately nevertheless imposed on him also home detention and the two factors that he mentioned, the Court, the trial Judge mentioned if you've got his sentencing notes there are, or three factors really was that the, and particularly in relation, at

paragraph 101 the Court said this, “As to mitigating factors a prior conviction would classically prevent you calling in a previous good character. Notwithstanding that Mr Henderson has urged on me the work you've done in helping others in need. I'm not going to go into the detail of that but you'll find it, I’ll give you the reference to it but it was quite impressive what he has done for others and then went on to say, “I accept the convictions which you have are blips in the context of your character, some allowance can be made for your good character,” and then he made an allowance for remorse. Then in 103 said, “However, the overwhelming mitigating factor in your case is your state of health and the family responsibilities you continue to assume.”

Now I'm not going to go into the detail of that but you should have but didn't have and I've handed it up in the bundle this morning, you should have the bundle of references and medical reports that the trial Judge had on sentencing and, with respect I do –

ELIAS CJ:
We do have these.

WILLIAM YOUNG J:
We have got them.

MR FARMER QC:
I'm sorry, you have. I do, with respect, if you haven't done so already ask Your Honours to look at that to see, first of all, the nature of the work he has done for others but more particularly also to see the situation he faced throughout the whole of 2007 beginning with a diagnosis at the beginning of the year of cancer.

WILLIAM YOUNG J:
Well he was likely to be a bit distracted.

MR FARMER QC:
Pardon?

WILLIAM YOUNG J:
He was likely to have been a bit distracted in the latter part of 2007, I think it's an understatement.

MR FARMER QC:

Well he did his best, he continued to box on and I actually, it was sad for me at the time. I remember the late Justice Giles being in exactly that situation and remaining on the Bench until shortly before he died and, you know, one can take different views of that but it's a mark of credit I think that he continued and he did ultimately succeed in a full recovery. So I do ask Your Honours to take – that Justice Dobson was clearly very heavily influenced by that and, with respect, so he rightly should have been.

So I think I've really come to the end of my submissions. I will finish at that point unless Your Honours want me to deal with anything else.

ELIAS CJ:

No thank you Mr Farmer. What are you seeking Mr Farmer? You're simply seeking restoration of the –

MR FARMER QC:

Justice Dobson.

ELIAS CJ:

Yes Mr Carruthers.

MR CARRUTHERS QC:

May it please Your Honours, if I can begin by dealing with the trial Judge's approach to the seriousness of the offending. I then want to move to the position of the Court of Appeal. Some of the material that I'm referring to will inevitably be material that my learned friend has already referred to so I will try and not to duplicate that. But if I can begin with the Judge's sentencing notes and in the case on appeal, I'm at page 99, that is the pages towards the end of the case that are numbered in black pen at the top, page 98, and I'm at paragraph 18 where the Judge starts, "The process," and my submission is, of course, that he has started correctly there where he records that, "The process for sentencing requires me first to identify the appropriate starting point which is intended to reflect the relevant seriousness and circumstances of the offending," and then continues with the sentencing process.

He then goes to paragraphs 21 and 22 and my friend has taken you to these. I will come back to Justice Heath's description of the categories in a moment but in

paragraph 22 I simply note that there's a recognition there that these are categories, that is the third category, are cases arising out of greater or lesser degrees of carelessness. It admittedly is in the context of innocent representation but it refers to greater or lesser degrees of carelessness and I just want to focus on that concept.

In paragraph 37 the Judge describes this as being culpability towards the lower end of any scale but what is important in my submission is in paragraph 38 where in the last sentence the Judge, having described the conduct as a material misjudgement, says this, "That in the circumstances that apply I nevertheless remain satisfied that the omission of disclosures on liquidity pressures was not a decision that you could reasonably have come to." In my submission that is a very important finding concerning the seriousness of the case.

Let me just pause there to deal with the way in which the Crown case was put.

ELIAS CJ:
Sorry just pausing for a moment. That of course is a necessary finding for him to come to in order to convict.

MR CARRUTHERS QC:
Yes.

ELIAS CJ:
So it doesn't go further than that, that's the threshold. He can't convict –

MR CARRUTHERS QC:
Yes, yes, that's – no, the threshold is even lower than that. It could be an entirely accidental an innocent failure to disclose something which would then engage the strict liability part of the sections but then I think what Your Honour's putting to me, there would be an obstacle in the way of conviction because there would be likely to be belief on reasonable grounds in the truth. Is that the –

ELIAS CJ:
Well, yes that is what I'm saying.

MR CARRUTHERS QC:
Yes.

ELIAS CJ:

Are you saying it's the deliberate decision that lifts it up a notch?

MR CARRUTHERS QC:

I am. That it was a decision that you just couldn't have come to. So that's the...

ELIAS CJ:

Well what about if it's a belief you just couldn't have come to? That would have to be the lowest level. A belief that you had no reasonable grounds.

MR CARRUTHERS QC:

Yes.

ELIAS CJ:

I mean there's always a choice isn't there? It's disclosure or non-disclosure.

MR CARRUTHERS QC:

Yes.

ELIAS CJ:

So you're always going to have an element of deliberateness.

MR CARRUTHERS QC:

Yes.

ELIAS CJ:

I'm just wondering how you get from this, that it's up from the bottom, because that's really the submission you're making to us, that this is not at the bottom.

MR CARRUTHERS QC:

That is the submission I am making to you, yes.

ELIAS CJ:

But I'm just simply pointing out to you that I read paragraph 38. It's not necessarily supportive of that.

MR CARRUTHERS QC:
Right.

ELIAS CJ:
I'm not saying there aren't other circumstances but to the extent that you're relying on what is said in the last sentence there, I'm not sure that I'm with you on it.

MR CARRUTHERS QC:
Well, let me accept what Your Honour is saying to me and move to the next reference that I want to give you because I'm still on the same topic about the level of seriousness.

ELIAS CJ:
Yes.

MR CARRUTHERS QC:
And I'm going back now to paragraph 6 of the reasons – of the sentencing notes which is on page 95. Now here the Judge is dealing with the question of disclosure and he says, "Here I am satisfied that if adequate disclosure of the liquidity risks confronting Lombard in December 2007 had been addressed in the offer documents, then the readers of those offer documents would have seen the risks they faced in investing in Lombard in a materially different light. It is fair to infer that if greater disclosure was made along the lines of what I gave as an example in the reasons for my verdicts, then most would not have invested," and then there's the description of the investments that were made.

Now, if we then turn to what the Judge said should have been said in the prospectus, and my friend has taken you to this. It's in the reasons for verdict of the trial Judge at paragraph 121, and it's in paragraph 38 of our submissions but I'll stay with the Judge's reasons. The background to this approach really goes back to Nathans case where the Crown opened in that case by formulating what the prospectus should have said, and you'll see from the reasons for judgment of Justice Heath in that case that he adapted the Crown's statement and following – and a similar procedure was followed in this case where the Crown formulated what the prospectus should have said on the Crown's argument and Justice Dobson adapted that in the way in which paragraph 121 records. And my learned friend dealt with that issue by reading the paragraph. And the Judge concluded at paragraph 123, "I am satisfied beyond

reasonable doubt that the combined impact of the omission of statements describing the lack of reliable forecasts about the timing of loan repayments on which LFIL's liquidity depended, plus the omission of any acknowledgement about the reduction in the cash on hand and the directors' concerns about that topic, rendered the amended prospectus misleading in relation to LFIL's liquidity position."

Now I was just going to pause a moment ago to say the Crown's case always was, and the focus of the Crown's case was on the liquidity issue. And the Crown's case recognised that that issue and the ill-liquidity of the company turned on the failure of the company to be able to achieve the loan repayments. So the two issues were tied together and Your Honour, Justice Young, picked up paragraph 150, which is the way that the Crown had dealt with the case. So, my learned friend is not correct to say the focus of the Crown's case was on impairment. The Crown's – the focus of the case was on liquidity.

From that point in the way in which the trial Judge looked at the issue of the conduct, I want to go what the Court of Appeal said about conduct in the way in which the Court of Appeal dealt with the issue and if I can come to the submissions that we made, because part of the argument on this arises from that part of the Court of Appeal's judgment that dealt with the conviction appeals and in the written submissions at paragraph 41, I've set out the Court of Appeal's decision at paragraph 170. And what the Court concluded there, and this was a paragraph to which Your Honour, Justice Arnold, drew attention. "Our overall conclusion is that on the basis of all the evidence available to the Judge, it was entirely open to him to conclude that the statements in the amended prospectus were untrue by the omission of reference to, first, the sharp deterioration in the company's cash position, the serious downward trend in the company's cash position, the pattern of serious delays in the recovery of loan repayments, the significant discrepancies between the projected timing of loan repayments and their actual receipt and the extent of the directors' concerns about these matters." And then the Court continued, "All of these matters were critical to the liquidity of the company and its ability to meet its commitments when due. The omission of reference to these matters meant that the amended prospectus did not convey the imminence of the identified risks and the vulnerable state the company was actually in. We are satisfied the Judge was right to find these matters were material to investors and without reference to them the statements in the amended prospectus were misleading and untrue. It was not necessary for the Judge to identify precisely how these matters should have been expressed in the amended

prospectus. It was sufficient to identify the topics that ought to have been included and the general nature of them," and then, "We wish to add a point about the concern expressed by the directors that the inclusion of more material in the amended prospectus might have led to the premature demise of the company. When a public offer is made the statutory obligation is to ensure that the statements made in the offer documents are true and that they are not rendered untrue by material omission. That obligation overrides the duty directors owe to the company to act in its best interests where those duties may conflict. It also means that if the directors cannot be satisfied that the statements contained in the offer documents are true and are not misleading by omission the offer should not be made irrespective of the consequences that might then flow. Decisions on issues such as this can be finely balanced but it's the directors' role to make them themselves."

Then in paragraph 44 of the submissions we deal with the contemporaneous documents and then again set out the finding of the Court of Appeal at 195 in particular, "The contemporaneous documentary evidence showed that the appellants were well aware of the three key matters the Judge identified. The serious delays in the recovery of loan repayments, the significant discrepancies between the projected timing of loan repayments and their actual receipt and the obvious downward trend in the cash on hand. Importantly the evidence showed that the appellants knew that these matters were critical to the liquidity of the company and had serious concerns in that respect yet the amended prospectus did not sufficient convey any of these matters. Given the appellants own knowledge of the critical state of Lombard's liquidity neither reliance on the views of the company's executive nor the advice of professional could avail the appellants. It was open to the Judge to conclude they could not have had reasonable grounds to believe that their expressions of confidence in the company's liquidity were true without reference to the omitted matters which demonstrated clearly the vulnerable state the company was in. Nor could they have reasonably relied on the advice and assurances of management in the circumstances. That is because of the non-delegable nature of the duty imposed by section 58 and because the ultimate responsibility to govern and manage the company is theirs. While the directors are entitled to delegate management responsibilities to the company's executives the prevailing conditions in the last quarter of 2007 and the obvious lack of reliability in the critical cash flow projections meant that there was evidence from which the Judge could properly conclude that the directors could not reasonably rely on the executive's advice and were obliged to take a much more direct personal interest in the company's affairs than might have

been the case in a more favourable market. Although Mr Foley's advice," he was the advisor on the prepared of the prospectus and we've dealt with his evidence in the written submissions, "although Mr Foley's advice was a factor relevant to the existence of reasonable grounds of belief it could not have been decisive in the circumstances. It is a reasonable inference that the directors had much more detailed knowledge of the company's affairs than Mr Foley possessed or for that matter the company's auditors or the Companies Office personnel whose advice was also relied upon to support the appellants' belief that the statements in the amended prospectus were true."

And Your Honours that just brings me to the submissions that my learned friend made when he was taking you through the amended prospectus. Of course the answer to his argument is this. That to the extent that the amended prospectus said anything it identified what the risks were. Now what the prospectus did not do was identify what the reality was. So it was saying there were risks but it was not disclosing what the real position is which is why, in my submission, the Court of Appeal took a different view from the Judge about the seriousness of the omission to disclose.

I've dealt with the Court of Appeal's judgment on the conviction appeals to the extent that it reflects on the seriousness issue. I now want to go to –

ELIAS CJ:

I'm still struggling a little bit to and wonder whether you can identify why you say the Court of Appeal took a different view from the Judge on the seriousness? I don't really see much different between them on this point. There would not have been a conviction if both hadn't accepted that there had been omission to disclose. What are the circumstances that make it more or less serious?

MR CARRUTHERS QC:

The issue that I think it comes down to is that the Court of Appeal put a greater emphasis and a greater focus on the importance, of the integrity of the scheme of the Securities Act in relation to disclosure.

ELIAS CJ:

But that's why there is a criminal offence. There's a legislative assessment that that is required. What's the additional factor that makes this, makes it possible for you to say this was more serious than simply a breach?

MR CARRUTHERS QC:

Well I think I can say this in relation to the Chairman, Sir Douglas Graham and to Mr Jefferies that as the trial Judge records they had previously been ministers of justice with part of their portfolio being the administration of this very legislation. So for my learned friend to submit that really this is a misunderstanding of what the law relating to disclosure was it is in my submission a hollow submission. So if Your Honour is asking me to point to the difference between my friend's argument and mine as to the seriousness, my submission is that there was no room for misunderstanding about what was required. In fact the passage that I read to you from the trial Judge said that they were well aware of what their responsibilities were.

ELIAS CJ:

Well for myself I can't see how one could, how there would ever be room for misunderstanding as to the necessity for disclosure, that's what a disclosure regime is.

MR CARRUTHERS QC:

Yes it is.

ELIAS CJ:

There might be – yes, I'm sorry. If there is anything that you can emphasis in terms of the seriousness, I don't see it in the Court of Appeal decision.

GLAZEBROOK J:

Or would you say that paragraph 246 which I tend to agree with, of the Court of Appeal decision puts the consequences and seriousness of the omissions at a higher level arguably than Justice Dobson did?

MR CARRUTHERS QC:

Your Honour –

GLAZEBROOK J:

So that the gravity of the offending indicated by what they say in terms of the number of investors, the serious impact, the amounts of money invested. In the light of the serious issues about liquidity and the tightening of financial markets makes this a much more serious omission than might be in other cases where somebody might say we've never been late with an interest payment and they have by one and a half days or something of that nature which is effectively de minimus in the circumstances.

MR CARRUTHERS QC:
Well, Your Honour, I do in the next section in the second paragraph I was going to come to was paragraph 246. So I do say that that paragraph captures the more serious, or captures the serious of the offending.

ELIAS CJ:
Well is that, then, a contextual assessment that this was at a time of particular risk and that this was a – there was a lot of money. It doesn't seem to go much beyond that.

MR CARRUTHERS QC:
It's hard to know how to go beyond that because – I'll come to deal with the regime in a moment, but it is essentially a strict liability regime.

ELIAS CJ:
Yes.

MR CARRUTHERS QC:
It provides a substantial and serious penalty for breach of the regime.

ELIAS CJ:
Yes.

MR CARRUTHERS QC:
It doesn't have any of the qualities of – or overtones of honesty or dishonesty about the conduct. It applies irrespective of that conduct and the – this is why I want to make some submissions about Justice Heath's categorisation because while one can see that one could prosecute under section 58 if there was dishonesty, the cases show and the logic is, as we've submitted, that you would look at the Crimes Act for

cases involving dishonesty. So in that strict liability regime, it is a question of just, well, what were the factors that were going into it and –

ELIAS CJ:

Well one would think that the factors in a strict liability regime would be factors that related to individual culpability. So the extent of knowledge, that sort of thing.

MR CARRUTHERS QC:

Yes.

ELIAS CJ:

But those are not emphasised in the judgments that we're considering. Instead there is the context of – there is the wider context which on one view may be, itself, reflected in the strict liability effects.

MR CARRUTHERS QC:

Well, awareness and knowledge are the subject of a specific finding by the trial Judge at sentencing. In paragraph 3 which is on page 94 of the case, the Judge says, "The high importance of adequate disclosure would reinforce by the creation of a criminal offence for issuing offer documents that did not provide for that, having described what should be provided for. That has been the law in New Zealand since 1978. You, as a board, would have been as aware of those provision in the Act as the board of any company in New Zealand because you, Mr Jeffries, were responsible for the administration of the Act throughout your term as Minister of Justice between 1989 and November 1990 and you, Sir Douglas, were responsible for the administration of the Act throughout your tenure as Minister of Justice between November 1990 and February 1999 –

BLANCHARD J:

Just on that point. That sounds significant but Justice is a very big portfolio. Was there any evidence that either Mr Jeffries or Sir Douglas actually had to put their mind to the administration of the Securities Act?

MR CARRUTHERS QC:

No Your Honour.

BLANCHARD J:

I mean was the Act amended in a significant way during either of those periods? My point is –

MR CARRUTHERS QC:
Yes.

BLANCHARD J:
– the Minister of Justice is administering a large number of Acts and, particularly in the case of Mr Jeffries, who was Minister of Justice for only just over a year. It may be that the Securities Act simply didn't come up. So it's a bit – in one sense it's a bit tough to say, well you were Minister of Justice and you above all people should have known.

MR CARRUTHERS QC:
Well, on the other hand, you know, in promoting the prospectus, they were attributes that both recorded in the prospectus. So –

ELIAS CJ:
But how is that relevant really?

MR CARRUTHERS QC:
Well I was simply dealing with the issue of knowledge and awareness of what the responsibilities were and drew attention to factors that on their face one would expect them to have a greater knowledge perhaps than other directors in other companies.

ELIAS CJ:
But it really can't be, it can't be seriously being put forward that they didn't have an understanding of the disclosure obligations surely. I mean any of the directors.

MR CARRUTHERS QC:
Well that's what my learned friend submitted.

ELIAS CJ:
Well, yes but it didn't really – it wasn't that convincing.

MR CARRUTHERS QC:

Well, with respect Your Honour, I agree with you but what - that has been advanced as the reason why this should not be treated as serious offending and my submission is is the way in which it's been categorised by the Court of Appeal in the terms that I put, it is a serious case in the category of carelessness and the way in which I have read the trial Judge's sentencing, the carelessness was to the point that it wasn't a decision that was reasonably open to them. So it puts it into a significant category. Perhaps I can just –

GLAZEBROOK J:
Actually, that wasn't a decision reasonably open to them isn't actually a – well, I suppose to a degree it's a – but that doesn't go to the reverse onus part of it, does it, because –

MR CARRUTHERS QC:
No.

GLAZEBROOK J:
– you have to prove that you had reasonable belief that it was proved.

MR CARRUTHERS QC:
Reasonable grounds.

GLAZEBROOK J:
Then I suppose it wasn't a decision reasonably open to them goes to whether there was an omission but, in fact, given there was an omission that made the prospectus misleading, it becomes difficult to see – well that seems to be a comment that's not really going to culpability because if the prospectus is misleading, then you can't put it out.

MR CARRUTHERS QC:
No, no.

WILLIAM YOUNG J:
Can I – there's a problem with the defence in that it doesn't apply very easily to statements that are untrue by omission.

MR CARRUTHERS QC:

No.

WILLIAM YOUNG J:

If they had to prove that the statement was true in the sense that it was construed by the High Court Judge they never could be they knew it wasn't true, because they knew all the facts which made it untrue. But if they thought that it wasn't untrue and didn't recognise it was misleading and, therefore, did not recognise that it was untrue, and if you quote that believing it was true, which perhaps you can't, perhaps you can, then the case comes down to whether they could have reasonably had that belief and I think that's the way the High Court Judge and the Court of Appeal dealt with it.

ELIAS CJ:

Yes. I think you have to read the section like that, the defence.

WILLIAM YOUNG J:

Yes, so that a recog – that a belief that it's not misleading is treated as a belief that it is true.

GLAZEBROOK J:

Yes.

WILLIAM YOUNG J:

A non-recognition that it's misleading is a belief that it is true.

ELIAS CJ:

Yes.

WILLIAM YOUNG J:

Well that's the way the Judges in the Court dealt with it.

ELIAS CJ:

And I think they're right to do that myself.

GLAZEBROOK J:

Can I just check with you what you say the standard of appellate review was in this case and does the Criminal Procedure Act 2011 apply or the old Crimes Act?

ELIAS CJ:

What, for sentence appeal?

GLAZEBROOK J:

No, for a sentence appeal.

MR CARRUTHERS QC:

Can I deal with that after luncheon?

GLAZEBROOK J:

Well that's why I raised it now. I wasn't expecting it to be dealt with on the hop. I thought you might need to check.

MR CARRUTHERS QC:

Yes.

GLAZEBROOK J:

But certainly in the old appellate review you would say error of principal law manifestly inaccurate.

MR CARRUTHERS QC:

Yes.

GLAZEBROOK J:

Under the Criminal Procedure Act it's an error only and otherwise you have to maintain the sentence. One assumes that manifestly inadequate would be subsumed under error.

MR CARRUTHERS QC:

Yes.

GLAZEBROOK J:

But it's just a question. So the question for me would be put in terms of, well was Justice Dobson's sentence one that was available, even if at the lower end of the scale and even if another Judge could have taken a different view? It might be that the Court of Appeal's decision was one available to a trial Judge had Justice Dobson

taken the same view as the Court of Appeal but is there actually an error or is there manifes – I know the Crown's submission is that it is manifestly inadequate.

MR CARRUTHERS QC:
Yes.

GLAZEBROOK J:
So that's the question.

MR CARRUTHERS QC:
Thank you.

GLAZEBROOK J:
And then why, I suppose, it is manifestly inadequate in terms of the seriousness of the offending and I'm assuming it's partly to do with paragraph 246.

MR CARRUTHERS QC:
Yes it is, yes.

ELIAS CJ:
All right, then, is that convenient?

MR CARRUTHERS QC:
That's a convenient time. Yes I'd like to deal with that, thank you.

COURT ADJOURNS: 1.01 PM
COURT RESUMES: 2.16 PM

MR CARRUTHERS QC:
In answer to Your Honour Justice Glazebrook's question, the appeal is governed by the Crimes Act still. Section 397 of the Criminal Procedure Act is the section that applies and by virtue of that provision the Crimes Act continues to apply because the proceeding started before the introduction of the Criminal Procedure Act.

There will be an interesting issue for Your Honours on another day as a result of section 250 which brings the test into error. The Crown's case has been put on the

basis of manifest inadequacy in line with really the authorities that go in Crimes Act appeals.

WILLIAM YOUNG J:
And what's our function, do we effectively re-hear the Crown appeal or are we sitting on appeal from the Court of Appeal and reviewing their decision?

MR CARRUTHERS QC:
Well you are sitting on appeal from the Court of Appeal and section 385(3) applies in the sense of the powers of the Court are to dismiss the appeal if it thinks that a different sentence should have been passed , quash the sentence and replace it with another sentence warranted in law whether more or less severe that the Court thinks out to have been passed or vary within the limits warranted in law the sentence already part of it, or any condition imposed in it or remit the case to the Court that imposed the sentence with a direction that such Court take action of the kind described above in accordance with any directions that may be given. That's the same power that the Court of Appeal has –

WILLIAM YOUNG J:
So should our focus be on the High Court Judge's sentencing remarks rather than was the approach taken by the Court of Appeal open to it?

MR CARRUTHERS QC:
Well –

WILLIAM YOUNG J:
I'm not sure actually.

MR CARRUTHERS QC:
Well in terms of the section the focus of this Court would be on the Court of Appeal's judgment because that's what the appeal is actually from.

GLAZEBROOK J:
But what we do, would we say – well say we took the view that there was a range of sentences available here from community work through to home detention.

MR CARRUTHERS QC:

Yes.

GLAZEBROOK J:

And so therefore Justice Dobson was within the range and so was the Court of Appeal. Would we say, "Well seeing Justice Dobson was in the range the Court of Appeal should not have overturned the decision," or would we say, Well seeing Justice Dobson was in the range the Court of Appeal should not have overturned the decision, or would we say, well the Court of Appeal was also within range and therefore we won't disturb the appeal?

MR CARRUTHERS QC:

Well on the face of the section and in line with the grant of leave, my submission is the focus would be on the Court of Appeal decision because that's the –

GLAZEBROOK J:

So if we thought imprisonment was an available sentence we shouldn't overturn the Court of Appeal decision or?

MR CARRUTHERS QC:

No because the power that you've got is –

ELIAS CJ:

We're concerned with whether the Court of Appeal decision is right –

MR CARRUTHERS QC:

Yes.

ELIAS CJ:

– and the Court – built into that is whether the Court of Appeal went further than was necessary because there was no error in the Judge's approach?

MR CARRUTHERS QC:

Yes Your Honour, I would have to accept that –

ELIAS CJ:

Yes, all right.

MR CARRUTHERS QC:

– analysis of the way in which the appeal process would work.

ELIAS CJ:

Which really means that the principle emphasis has to be on Justice Dobson's sentence and whether the Court of Appeal was convincing in say that it was not one that was available to him.

MR CARRUTHERS QC:

Yes that it was manifestly inadequate.

ELIAS CJ:

Yes.

MR CARRUTHERS QC:

Yes, the analysis that I have made of the way that the Judge characterised the offending and the way in which I'm now looking at the Court of Appeal's characterisation requires me to establish that the Court of Appeal's characterisation was correct and justify the interference with the Judge's decision.

ELIAS CJ:

Yes.

MR CARRUTHERS QC:

Now Your Honours, in the analysis that I was making of the Court of Appeal's approach I had taken you to the written submissions and I now want to take you back to the decision of the Court of Appeal, that is the sentencing part. I'm in the case on appeal and it's the early part of the case under CA14 in the top right-hand corner, it's paragraph 245

My friend referred to this, the Court said, "We accept that most of the cases to date reflect more serious circumstances and degrees of culpability than the present case but we are satisfied the Judge erred in adopting a starting point short of imprisonment. There may be cases where culpability is properly assessed as being so low that a non-custodial sentence could be considered as the appropriate starting point but this case did not fall into that category." And the reasons for that and the essence of the harm and what, in my submission, makes this case more serious than

the trial Judge assessed it is this paragraph at 246. This was the first of two reasons that the Court of Appeal had for disagreeing with the Judge in the Court below and these were the factors.

First, "The sentences needed to reflect the gravity of the offending. By any measure the number of investors affected, the serious impacts upon them and the amounts of money invest or reinvested on the strength of the truth of the statements in the amended prospectus were substantial."

ELIAS CJ:
Just pause a moment. Does that mean that because they were aware of how many people were affected and how serious it would be and the amounts of money, the directors were under a higher duty to take care?

MR CARRUTHERS QC:
I think what the Court of Appeal I saying that this is the harm that resulted from the directors' failure to exercise their statutory obligation to make disclosure. So –

WILLIAM YOUNG J:
It's a consequence.

MR CARRUTHERS QC:
It's a consequence, yes –

ELIAS CJ:
Consequence, yes.

MR CARRUTHERS QC:
– but it actually captures the harm of their conduct.

WILLIAM YOUNG J:
Can I just ask you a question about this. The Judge did seem to think that the loss represented the totality of the new money and the reinvested money. I think he may have made a –

GLAZEBROOK J:

It's paragraph 7 I think of the sentencing notes or near the beginning. Here paragraph 7, it was paragraph 7.

MR CARRUTHERS QC:
It was paragraph 7 because I think I read to Your Honours paragraph 6 and then just drew attention to the investment in paragraph 7.

WILLIAM YOUNG J:
On thought that has occurred to me is whether the reinvested money was effectively lost anyway?

MR CARRUTHERS QC:
No I heard Your Honour make that observation –

WILLIAM YOUNG J:
I don't know –

MR CARRUTHERS QC:
– before and on reinvestment there is still the requirement, and I'm sure I'm right in this, the reinvestment required the signature of the –

WILLIAM YOUNG J:
Absolute, my sort of counterfactual I suppose is that Justice Dobson's form of the prospectus is issue and the company then goes into receivership.

GLAZEBROOK J:
On the basis presumably that most would not have invested under 6 and at that stage there would have been real issues with liquidity?

MR CARRUTHERS QC:
Yes.

GLAZEBROOK J:
Paragraph 6 I mean of the findings.

MR CARRUTHERS QC:

Yes, but the same would apply – I see, so of how much money was available at that point to deal with those who were entitled to have their investment paid out.

WILLIAM YOUNG J:
Yes.

MR CARRUTHERS QC:
Yes, but Your Honour must be right, that potentially there would be at least some, if not most, of those who were already investors would lose –

WILLIAM YOUNG J:
Money.

MR CARRUTHERS QC:
– in the event that the amended prospectus was not issued.

WILLIAM YOUNG J:
Or was issued in the terms proposed by the Judge because it's – I don't know if there was evidence about it but it's plausible in my way of thinking to imagine that a prospectus in those terms would have attracted some attention.

MR CARRUTHERS QC:
Yes.

WILLIAM YOUNG J:
Publicity and a set of events would have been put in train and it may have resulted in receivership.

MR ARNOTT:
Well the trustee may have intervened.

WILLIAM YOUNG J:
Yes.

MR CARRUTHERS QC:

That's the reason that I referred to the passage from the Court of Appeal judgment that really that doesn't actually go to the obligations of the directors –

WILLIAM YOUNG J:
Absolutely not, absolutely not. I just, I mean it's whether it's an 11 and a half million dollar loss or whether it's a – it's actually a bit more than that because there was some money that went into the unsecured notes.

MR CARRUTHERS QC:
Yes.

WILLIAM YOUNG J:
But it's whether it's a loss of that magnitude or perhaps a loss of, say, one and a half to two million or something of that sort.

MR CARRUTHERS QC:
Whether you're looking at the new money –

WILLIAM YOUNG J:
Yes.

MR CARRUTHERS QC:
– and eliminating the whole of the reinvestment or whether you must take account of potentially some of the reinvestment being redeemed.

WILLIAM YOUNG J:
And perhaps it would have been better of the company had stopped trading then, there may have been less –

ELIAS CJ:
Loss.

WILLIAM YOUNG J:
– so it's quite a complex, I mean I've put in terms that are far too simplistic because there are a whole lot of variables that change.

MR CARRUTHERS QC:

Yes. Well I'm just reminded that while I'm not detracting from Your Honours' analysis reminded that all the comparator cases of course looked at sentencing by reference to the reinvestment where much the same issue would have arisen and Bridgecorp I expect would be the outstanding example on that or Nathans would have been in the same category as well.

So I was dealing with paragraph 246 and I'd got to the top of page CA15. Second, "While we accept the Judge's characterisation of the directors' culpability as a misjudgement we cannot overlook the Judge's finding that the amended prospectus was misleading by omitting to identify the unreliability of the forecast dates for the known repayments, the serious deterioration in the company's cash resources and the level of the directors' concerns about those matters. All these factors were critical to Lombard's liquidity at the time of the major tightening of the financial markets that gave rise to a string of corporate collapses and led to the directors to place the company into running down mode. These factors showed that the company was in a particularly vulnerable state yet these matters were not brought home to the investors as they should have been."

Now my submission, as a result of that analysis, is that harm in the context of a strict liability regime designed to protect investors is the primary consideration. It's the major factor that makes this a serious case warranting the approach that the Court of Appeal took. So really in answer to Your Honour the Chief Justice asking me to identify what it was that underpinned my submission about the seriousness of the case, it is captured in that paragraph 246.

ELIAS CJ:
So that's the seriousness of the effect and the fact that the company was known to be in a particularly vulnerable state?

MR CARRUTHERS QC:
The directors knew those facts –

ELIAS CJ:
Yes.

MR CARRUTHERS QC:

– and nonetheless did not disclose those facts to the investing public so that the investing public could make an informed decision as to whether they would invest or reinvest.

GLAZEBROOK J:
Do you place reliance on the seriousness of the failures in the case as well ie the importance of liquidity and the fact that they knew those matters and didn't disclose them?

MR CARRUTHERS QC:
Yes I do, I do place reliance on that.

ELIAS CJ:
That's the vulnerability point is it?

MR CARRUTHERS QC:
Yes.

GLAZEBROOK J:
So your submission is that those were particularly – not only was there serious harm but there were serious omissions and in fact almost a seriously misleading statement in terms of confidence because that indicated absolutely confidence and that wasn't actually true?

MR CARRUTHERS QC:
Yes, yes, in my submission, yes. As I put it a little while ago, the amended prospectus, on my learned friend's analysis, identified risk and to a certain extent it did, but as I submitted what it failed to do was to disclose reality which is the criticism that's made in that paragraph. Just to support the analysis that the Court of Appeal has made in that passage, and really to answer my learned friend's submission that the directors had informed information about cash flow projections, can I draw attention to paragraphs 114 and 115 of the Judge's reasons for verdict where he analyses the cash flows.

I'll read it quickly to Your Honours. Paragraph 114, "A detailed cash flow projection provided to the directors included an additional column reflecting the position if no further loan repayments were received at all. The form of that projection prepared for

the directors' meeting on 19 December 2007 showed on that pessimistic projection that LFIL would run out of money on 16 January 2008. That projection was not given any serious consideration. However, if, for example, the directors had recognised the pattern of over-estimation of loan recoveries by the loan managers, and added a further column to the projections in that document at, say, 50 per cent of the loan managers' predictions (reflecting approximately the average level of recoveries over the previous three months), then it would have projected LFIL as briefly running out of money shortly before 18 January 2008, thereafter having sufficient cash to survive until the end of February, but being unable to meet its commitments from then on. In fact, LFIL had sufficient cash to meet its obligations for another month after that. However, eliminating hindsight and reflecting on a reasonable prospective view as at 24 December 2007, some such projection applying the company's recent experience would have been prudent. Any acknowledgment of the poor quality of projections about loan repayments would have raised doubts about the confidence expressed in the adequacy of cash resources."

So –

GLAZEBROOK J:
I'm sorry, I actually missed the paragraph numbers?

MR CARRUTHERS QC:
I'm in the reasons for verdict and it's paragraph 114 and 115 Your Honour. The next point of difference between the Court of Appeal and the trial Judge is on this issue of denunciation and deterrence. My learned friend really submitted that well this was the principal difference. In my submission that does not capture fairly the Court of Appeal's decision. My submission is that paragraph 246 captures the difference in seriousness that the Court of Appeal attributed to the conduct as opposed to the analysis that the High Court Judge made and there is a second reason for the Court of Appeal's disagreement and that is the issue of denunciation and deterrence and that leads to a consideration of what the trial Judge did and that is paragraph 248 of the Court of Appeal's decision shows the trial Judge focused on personal deterrence rather than on general deterrence which the Court of Appeal deals with at paragraph 249 and in my submission this is important and I'll come on to deal with the Financial Markets Conduct Act in a moment in this context.

But this is the second reason why the Court of Appeal differed from the trial Judge. "The Judge did not sufficiently focus on general deterrence and holding the offenders accountable. The starting point ought to have reflected the purpose of the Securities Act, namely, to protect the investing public through the timely disclosure of material information. The investing public is highly dependent upon the truthful disclosure of relevant information and offer documents. This is required to facilitate the raising of capital and to promote confidence by the investing public in financial markets. Failure to meet the required standards has a number of potential consequences: loss of investor confidence; a lack of trust in this country's financial institutions; damage to capital markets and the wider economy; and loss of funds invested by the public. Although the Judge noted some of these points he did not give sufficient weight to them." And then they conclude, "We are satisfied these factors," and my submission is that's the two concepts, "ought to have led the Judge to adopt a starting point of imprisonment in the case of each of the directors." And then the Court of Appeal raises another point that I'll come to in a moment, that is the question of consistency.

So the conclusion that the Court comes to on the issues that I have been submitting is at CA19 in the case, paragraph 262 where the Court concludes, "By adopting a non-custodial starting point, the Judge did not give sufficient weight to the sentencing purposes of accountability, denunciation and general deterrence nor to the serious consequences to those who invested in reliance on the truth of the statements in the amended prospectus. The Judge also erred by failing to recognise the principle of consistency in sentencing." And –

ELIAS CJ:
Sorry, where are you? What paragraph?

MR CARRUTHERS QC:
I'm at 262, CA19, paragraph 262 and that's just the summary, you know, really of the points that have been raised.

Now I'd left open this question of consistency. You'll see in paragraph 250 the Court of Appeal is saying well, unless the starting point of imprisonment is adopted or, putting it the other way round. In order that it's necessary to start, to have a starting point of imprisonment because to do so gives effect to the important principle of consistency in sentencing.

And Your Honour's that brings me really to deal with the submission that my learned friend makes about the Financial Markets Conduct Act and in my submission it is wrong to simply pluck the offence provision out of the scheme of the Act and say that somehow that decriminalises conduct. First of all it doesn't decriminalise conduct at all. What it does is substitute another offence, another criminal offence in different terms in the context of an entirely different regime.

Now I'll just take a moment to deal with that because the Financial Markets Conduct Act is over 500 sections and has an entirely different concept, an entirely different disclosure concept from the previous regime. The starting point in dealing with it is this. That it is in two phases. Phase 1 came into force on the 1st of April this [*sic*] year, and that deals with provisions concerning general fair dealing obligations. It deals with initiatives, investment initiatives, including employee share schemes and it has provisions enabling market participants to become licensed and that's the part of the Act that's in force at the moment.

Phase 2 does not come into force until the 1st of December this year and that part, that phase contains the provision comprising the new disclosure requirements, the on-line register, licensing obligations and the remainder of the Act, including the substantial civil and criminal penalty provisions. Now by grouping those together, the focus is clearly on civil liability and – but there is also a clear imperative in the criminal liability as well.

So my starting point in answer to my learned friend is that first you have an entirely different concept and if one wants to compare the Securities Act and its strict liability penalty regime with the Financial Markets Conduct Act, one's got to look at the whole of the scheme and not just pick out one provision.

Your Honour, the Chief Justice, asked about the various provisions. The liability provisions are in Part 8 and I've had printed off sections 484 to 521 if the Court would like those. I can take you just very quickly through an overview of what the provisions are. Inevitably some of them include provisions that the Securities Act has but there is provision for pecuniary penalties, compensatory orders and other civil liability order, so pecuniary penalties, compensatory orders.

And Your Honour, the Chief Justice, asked about the civil penalties. The maximum amount of pecuniary penalty for contravention is the greatest of several amounts but the final one is a million dollars in the case of a contravention or involvement in a contravention by an individual, or $5 million in any other case. So you have a graduated scale. Now compensatory orders are in line with provisions in the Securities Act and there are other civil liability orders for refund of money, variation of agreements, cancellation of agreements, a requirement to take action to reinstate parties and general powers of restraint of transactions.

Coming to offences, the offence provision, which is at section 510 and 511, is in two parts. There's an offence relating to defective disclosure in a public disclosure statement or a register entry and the offence is, "If the offeror knows that or is reckless as to whether the statement is false or misleading or is likely to mislead, knows that or is reckless as to whether there is an omission, knows that or is reckless as to whether there is a circumstance of the kind that is defined in a previous section." Now – and there is provision for a director of an offeror to commit an offence in similar circumstances, and the penalties in the case of an individual is imprisonment for a term not exceeding 10 years and a fine not exceeding a million dollars or both, and in other cases, apart from individuals, a fine not exceeding $5 million.

Now there's another offence provision that deals simply with contravening other provisions relating to defective disclosure, and that is in broadly similar terms in terms of knowledge or recklessness and in that case the penalty for an individual is imprisonment for not exceeding five years and a fine not exceeding $500,000 or both. In any case, a fine not exceeding $2.5 million. So one can see that there is a different regime but equally a regime that is designed for protection of the investing public. So, in my submission, the submission made by my learned friend that the Financial Markets Conduct Act changes the whole landscape in terms of the Court of Appeal's analysis of deterrence and denunciation is quite wrong. In fact, it is probably every bit as important now to recognise deterrence and denunciation as at the time that we're looking at.

In my submission, there's another point that must be made for the Crown too. My friend says, well – the effect of what he's saying is well, these directors would not have been convicted under a regime like this. Now my submission is that that isn't a necessary consequence for a moment. The concept of recklessness having regard

not only to the conduct prior to the issue of the prospectus but also conduct in the 2008 period, which we don't need to go into for the purposes of this case, would leave the way open for the Crown to put really quite a significantly different case based on a concept of recklessness. Now Your Honour's I don't want to take that submission too far because I recognise immediately there are issues that would arise as to just how one looks at the concept of recklessness in a criminal context in New Zealand by way of contrast with some other jurisdictions but I do make the submission that it doesn't follow that the whole conduct of the kind in this case has been decriminalised.

The third and final submission I want to make concerning the Financial Markets Conduct Act really concerns consistency and it arises from a passage from Justice Heath's judgment in the sentencing notes - Justice Heath's sentencing notes in the Moses, Doolan and Young appeal and that is under tab 4 in the cases and it's paragraph 94 where he deals with a similar submission to that made by my learned friend in relation to what was then the Financial Markets Conduct Bill and paragraph 94, "Mr Gedye has also referred to a likely change in the law that proposes criminal liability will only attach for "reckless" or "knowing" breaches. It will be plain to you," addressing the accused or the prisoners, "that I do not regard any proposed changes as relevant. I am required to sentence on the basis of the existing law. In any event, I have characterised the seriousness of the offending as falling towards the top end of the gross negligence category which can properly be regarded as akin to the type of recklessness that has been promoted as a basis for criminal action."

Now there are two parts to that, and let me deal with the second part first. I accept that Nathans was a different case and the conduct was different so I don't need to deal with that issue but what is important is the Judge's analysis that he ought to deal with it in accordance with the law as it stands, and my submission is that that has to be right for the – on the principle of consistency because there must be consistency with cases like Nathans and Davidson, recognising their differences, so my submission is that for the three reasons I have given the Financial Markets Conduct Act really cannot dictate any different approach to deterrence and denunciation than that adopted by the Court of Appeal.

So let me come and just develop consistency just a little further.

GLAZEBROOK J:

Can I, if you're moving off deterrence and denunciation, is it actually – was the Court of Appeal in fact right that Justice Dobson only looked at personal deterrence and denunciation given the comments in 48 and 49 of the sentencing notes and also 51 to a degree of recognising that work in the community recognised the community's interest in, as well as the individual investor's interest, in deterrence and denunciation effectively of the particular offending and the harm to the community that arises from it?

MR CARRUTHERS QC:

48 and 49 Your Honour?

GLAZEBROOK J:

Well they're talking about the deterrence on other people, 47 as well, effectively saying that it's to denounce the conduct and to deter the offenders and others and then moving on in 48 and 49 to explain why a conviction might do that in itself and is more probably more important than the length of the sentence.

MR CARRUTHERS QC:

I think the distinction that's drawn by the Court of Appeal is that the deterrence and denunciation, that the Judge speaks of in the paragraphs to which you've drawn attention, doesn't recognise the importance of the scheme of the Securities Act and the need to protect that as public welfare legislation, and I think that's really captured by the Court of Appeal in the way in which that analysis is down in paragraph 249.

GLAZEBROOK J:

Well it recognises that you have to have deterrence to other people, doesn't it –

MR CARRUTHERS QC:

Yes.

GLAZEBROOK J:

And then it says that in fact the length of the sentence is probably less important in that than the convictions themselves which will have that deterrent effect. You might say that's wrong but it's not a concentration only on –

MR CARRUTHERS QC:

No.

GLAZEBROOK J:
– the deterrence, as the Court of Appeal I think said, only on personal deterrence.

MR CARRUTHERS QC:
Yes. Yes, although I think in fairness to the Court of Appeal the way in which they did put it was that much of the Judge's discussion, on paragraph 248, much of the Judge's discussion on deterrence was focused on personal deterrence. They Judge accepting they were unlikely to re-offend. So I think Your Honour is right in drawing – is correct with respect in drawing attention to the paragraphs where the Judge goes outside personal factors but, with respect, what I think the Court of Appeal is saying is that the emphasis or the focus was on personal deterrence whereas as articulated in paragraph 249 there as a much more important and wider consideration in relation to the protection of the investing public under the regime under the Securities Act.

Just in the submissions I was making as to the application of the Financial Markets Conduct Act I referred to the principle of consistency which the Court of Appeal recognised in paragraphs 250 and then again in 262. If I can just make this submission, my learned friend described Nathans and Bridgecorp as much more serious cases, or of more serious cases, and that's so but that's recognised by the Court of Appeal by making the allowances that they did, that is by differentiating between those two cases and the present case form the point of view of the level of starting point. But in my submission it's actually important to look at consistency and to look at really what were some of the considerations in those cases in relation to other offenders and let me deal with the Nathans case which involved, well it involved Hotchin who'd pleaded guilty and it involved Moses and Doolan who were sentenced to imprisonment and those three were the key players, Hotchin, Moses and Doolan. But the other offender was a Mr Young and if I can take you to tab 4 and just look at what his position was and the way in which the Judge dealt with him because he had a starting point of imprisonment as well but his offending was such that the Judge decided that home detention was appropriate and in many ways Mr Young's case is a comparator.

I'm at paragraph 41 and let me say, what happened was that Mr Young had become a director about 18 months, I think, before the demise of – it might have been more than that, it would be nearly two years before the demise of Nathans but he was not

a director of the parent company VTL until about six months before the demise of the company and of course the related party lending that my learned friend talked of was entirely for the benefit of Hotchin, Moses and Doolan, or particularly Moses and Doolan, and that was lending that was between Nathans and VTL and this is what the Judge said about that conduct in relation to Mr Young. 41, "I accept that from your appointment as a Nathans' director until you were appointed to the VTL Board you had limited access to information from the VTL, IVL and AVS sides." Those were companies in America and Australia that were funded by Nathans, they were franchise companies. "You were reliant on your co-directors to provide relevant information. You were trusting of them to do so. You were not copied into much of the email correspondence that passed among other directors of Nathans and VTL and members of the senior management team. You were not involved in signing documents to lend or to rollover VTL business related debts. However, you were involved in the email chain that deal with the risk section of the prospectus and investment statement, in particular the emails of 30 November and 1 December 2006 that assumed much importance at trial. In addition, the assiduous way in which you prepared for and asked questions at Board meetings meant that you were well aware of Nathans perilous financial position around this time."

So you can see that there's a distinction between his conduct and that of Moses and Doolan particularly but a similar approach to sentencing was adopted.

Can I deal with Mr Davidson's case because position is much maligned? In relation to related party transactions they were conducted under the auspices of one of the other co-accused Mr Urwin who was sentenced to imprisonment. Now the related party transaction. The way in which that transaction was performed was disclosed fully in the prospectus. Legal advice had been taken as to the description that should be given of that transaction and that was put into the prospectus. What was not in the prospectus was disclosure that it was a related party transaction. It was a Fiji based transaction that Mr Urwin was involved in. Now Mr Davidson had no part in that transaction, had no benefit of it – from it but of course what counted against him was the absence of proper inquiry as to the basis for that transaction.

The second matter that my friend raised was the non-payment of interest in February. Now Mr Davidson was actually lied to by the executives about the performance of the company. That failure in February was not disclosed to him until

June and it was as a result of his finding out that that had happened, that all of the Board meetings were called that brought the company to it's heels.

The third matter I want to raise is the prepared of the prospectus because in the Judge's sentencing notes there's a reference to suggest that, well there wasn't care taken in the preparation of the Bridgecorp propose. That's not so. Mr Davidson implemented a system, a special system for preparation of prospectuses and it applied to the relevant prospectus of getting a certificate from every head of department who was responsible for a particular part of the prospectus, that is, for all aspects of the financial performance and lending performance and other performance of that kind.

So while there has been a broad sword waved and describe Mr Davidson as bringing down the whole of the Bridgecorp empire, a little more thorough going analysis is required of that and not all of that appears in the sentencing notes in the way in which is sometimes the case.

So in my submission if one looks at Young, if one looks clinically at Davidson, they are proper comparators for the present case, allowing always for the differences and just on that note, that the Court of Appeal deliberately did allow for differences recognising in its judgment that both Nathans and Bridgecorp were more serious cases.

There is only one final submission I want to make and it's a little bit out of order but –

GLAZEBROOK J:
Can I just check you, you say there are differences in the starting points that were recognised as the –

MR CARRUTHERS QC:
Yes, yes I do.

GLAZEBROOK J:
Just checking.

MR CARRUTHERS QC:

One submission I want to make concerning the way in which Justice Heath has formulated his three categories and I've already made submissions that one needs to be careful because of the absence of any concept of honesty or dishonesty in section 58, but there's one passage that I also want to draw attention to because it goes to the way in which that formulation by the Judge is used. It's best picked up in the Court of Appeal sentence judgment at page CA11 going onto CA12. At paragraph 237 where the Court of Appeal in this case is referring to Nathans –

ELIAS CJ:
Sorry, what's the paragraph number?

MR CARRUTHERS QC:
237, Your Honour. In Nathans Finance, the starting points adopted ranged from two years nine months to three years four months' imprisonment. This Court later dismissed appeals by Messrs Doolan and Moses against their sentences. The Court accepted that, "Such offending must be carefully analysed to determine the level of seriousness and the degree of culpability that a particular offender bears. Such offending will fit along the continuum from the most serious dishonesty to the least, which would include cases of innocent misrepresentation or lesser degrees of carelessness. We are satisfied it is not appropriate to draw bright lines between types of offending along the continuum. As the Judge remarked later, offending falling towards the top end of the gross negligence category will be akin to recklessness, thus different categories will tend to shade into one another." So I just draw attention to that passage because of the way in which the conduct tends to be categorised in line with that passage from Justice Heath.

I suppose the only other comment about the Nathans Finance case is that the Court of Appeal did make the comment that the starting point for Mr Moses was, if anything, light.

Your Honours, the final topic I want to deal with is this sheet of factual allegations that my learned friend handed in. The Crown's position on that is that every single reference to those factual allegations comes from the judgments or is, in fact, footnoted in the Crown's submissions. Now, if anything turns on this, I can give Your Honours the reference, but I'd rather took up Your Honour the Chief Justice's point that it was really only if it is material.

ELIAS CJ:

Well, I think references in submissions are always sensible, Mr Carruthers. The point is made that your submissions don't cross-reference.

MR CARRUTHERS QC:

That's just simply not correct, Your Honour. Where we have relied on a passage we have actually footnoted the reference to the transcript. Now, where there are passages that I can identify that are simply taken from the various judgments, I think that some of those may not be footnoted, but if anything turns on the accuracy of this schedule, the Crown can provide references to each of those to support ...

ELIAS CJ:

Could you just pause for a moment? What we are most assisted by is references to the judgments.

GLAZEBROOK J:

Paragraph 14 of the Crown's submissions seem to have references, but it looks as though it's just a description.

MR CARRUTHERS QC:

That, I know, is one that comes from – we've actually gone through and done this exercise, Your Honours. If it's going to help, we can separately hand in, in tidy form, the references on a copy of my learned friend's submissions to the passages.

ELIAS CJ:

Well, what are they, Mr Carruthers? Are they references – these are taken from your submissions. I haven't gone through all of them. Are your submissions referenced to passages in the judgments?

MR CARRUTHERS QC:

No, Your Honour. I think that in some of the objection here is that we haven't referenced some of these passages to the judgments, but what I said to you a moment ago is that in relation to these passages, those that we have taken from the evidence are all footnoted with reference to the transcript. There are some references – the balance of the references that aren't in the transcript come directly from the judgments but they, I think, when we first had a look at this, this morning,

when my learned friend handed us this, we realised that there were some passages from the judgments that are not footnoted in the submissions.

ELIAS CJ:

Well, I think it would be sensible for you to take these nine references to your submissions and give us the references in the judgments in a memorandum put in.

MR CARRUTHERS QC:

I'll do that. Unless Your Honours have any questions of me, those are my submissions.

ELIAS CJ:

Thank you, Mr Carruthers. Yes, Mr Farmer.

MR FARMER QC:

I won't be very long at all. There's one matter I need to correct regarding Mr Jeffries. In our written submissions at the very end in paragraph 57, we said that Mr Jeffries faces a disciplinary investigation by the New Zealand Law Society. Since writing that, the New Zealand Law Society has taken a decision to discontinue that investigation.

ELIAS CJ:

Thank you.

MR FARMER QC:

A major part of my learned friend's submissions was to the effect that the Court of Appeal had taken a more serious view of the gravity of the offending than had the trial Judge, and great reliance was, of course, placed on paragraph 246. By comparison, I wanted to give you the references in Justice Dobson's judgment to paragraph 118 of the substantive judgment where His Honour said, in relation to the reduction of cash on hand, he said, having made the point in the previous paragraph that the cash balance on any particular date fluctuates and that there was a whole pattern of that over a long period of time, in the nature of things, that's what happens, in 118 His Honour said, "However, that does not relegate the trend in the company's cash position to immateriality given its importance as a component of the liquidity position which was of paramount importance in December 2007." So he's identifying the particular context, the particular time.

"The directors knew and were seriously concerned about the deteriorating cash position. In the end, the prospect of a cash crisis was just that. The less cash Lombard had the more vulnerable it was to not being able to meet its obligations. The trend in recent months showed the extent of cash dropping consistently to the extent that the chairman perceived the company as sailing very close to the wind. It was inarguably material to investors that the cash available to the company had reduced markedly in recent months and was a cause of concern to the directors."

Then in the sentencing notes – perhaps before we get to the sentencing notes just going back to 115. This follows the – my learned friend referred to this paragraph. This follows His Honour's point that when the management cash flow predictions were given to the directors at the board meeting of the 19th of December 2007 there was the worst case scenario where no loan repayments were ever received which, as His Honour noted, was not a realistic scenario and therefore it wasn't given serious consideration and then His Honour went on to suggest the if a 50% prediction error –

GLAZEBROOK J:
Sorry, whereabouts are you now?

MR FARMER QC:
That's 114 at the moment –

GLAZEBROOK J:
Of the?

MR FARMER QC:
Of the main judgment still.

GLAZEBROOK J:
Right, because you had said you were moving onto the sentencing.

MR FARMER QC:
I know, I did.

GLAZEBROOK J:

Sorry, you shifted back?

MR FARMER QC:

I think I said before I go there I will just stay with this substantive judgment. His Honour also –

ELIAS CJ:

But this is all directed showing that the Judge did treat it as serious, is it?

MR FARMER QC:

Yes it is. So 114 he postulated the possibility of a 50% error in predictions and that that would lead to the company also running out of cash at a particular point of time and then in 115, read by my learned friend, "In fact Lombard had sufficient cash to meet its obligations for another month, however, eliminating hindsight and reflecting on a reasonable prospective view as at 24 December some such projection apply in the company's recent experience would have been prudent. Any acknowledgement of the poor quality of projections about loan repayments would have raised doubts about the confidence expressed and the adequacy of cash resources." So His Honour linked there the quality of the projections with the confidence, the point that the directors has made in that prospectus that they were confident that the company would be able to pay it's debts as they fell due.

And now if I can go to the sentencing notes and give you the reference to paragraph 5 which possibly was referred to earlier. "Your offending involved issuing offer documents that expressed your confidence that Lombard had and would have sufficient liquidity to meet its obligations as they arose. The reality was the Lombard board had serious and constant concerns at the liquidity squeeze confronting the company at the time in the months before December," and then he goes on to deal with the points that we know about as to the trends that had occurred.

So the submission I would make is that the Judge did recognise with the appropriate degree of seriousness or severity, the seriousness, the severity of the sentences and that leads into another point which is the question of who – if it was open to the Judge to find that imprisonment was not an appropriate starting point should not the Court of Appeal in fact have then stopped at that stage. My learned friend, I think, tended to say that it was, posed the question at least initially in the discussion with Your Honours as to whether it was open to the Court of Appeal to pose imprisonment

as a starting point and my submission would be that that's perhaps putting the cart before the horse. That the appropriate focus here should be on the Judge's analysis and if it was open to him to take the view that he did the Court of Appeal should have so found, and that's the question then for this Court as to whether the Court of Appeal was in error in not so finding.

On the question of deterrence. Yes I would certainly agree with my learned friend that the Financial Markets Conduct Act the provisions set out the various remedies, civil and criminal for the more serious offending are important and a Court would regard them as necessarily being applied in a way that would deter similar conduct but the relevant point here is imprisonment and in terms of the particular kind of offending here imprisonment is simply not an option available under that new Act. My learned friend sought to, I think, deal with the point by suggesting, well, if we are running this case, if the Crown were running this case again under the new Act then they might well have been able to bring a recklessness charge and I would submit that's simply not a submission that's open to him to make here. We're dealing with something that was found not to be reckless, was found to be something considerably less than that.

Mr Young in the *Moses* case, my learned friend in effect presented him in a good light but it starts with the fact that he was found to be grossly negligent and so the analysis, the comparative analysis really falls down at that key point. And I think that possibly –

GLAZEBROOK J:
Was that grossly negligent from the time he became a director of the other company in the May and April advertisements or was that a more generic –

MR FARMER QC:
I can't remember whether – the detail on that I'm sorry Your Honour. Would Your Honours –

GLAZEBROOK J:
So he became a director of the parent as well?

MR FARMER QC:

Yes, yes that's right. Finally I'd just mention I've given the – because there was some question as to whether Mr Jefferies' references that were given to the trial Judge on sentencing had been provided to the Court. It rather seems they may not have been and we've given copies of those to the registrar today.

ELIAS CJ:

Thank you.

MR FARMER QC:

So those are the submissions in reply if the Court pleases.

ELIAS CJ:

Thank you Mr Farmer. Any questions? Thank you counsel for your help. We will reserve our decision in this matter.

COURT ADJOURNS: 3.27 PM