

**IN THE HIGH COURT OF NEW ZEALAND  
WELLINGTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA  
TE WHANGANUI-A-TARA ROHE**

**CRI-2018-085-792  
[2019] NZHC 3209**

**THE QUEEN**

v

**EUGENE JOHN DEMARCO**

Hearing: 26-30 August, 2-13 September 2019

Counsel: S C Carter and N R Greive for Crown  
M A Corlett QC for Defendant

Date: 5 December 2019

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**SENTENCING NOTES OF CLARK J**

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**Introduction**

[1] Mr DeMarco, you appear for sentence today a jury having found you guilty of four charges of theft by a person in a special relationship and two charges of obtaining by deception. In respect of each of the charges the maximum penalty is seven years imprisonment.

[2] In sentencing you, I will:

- (a) set out the nature of your offending.
- (b) identify the purposes and principles relevant to your sentence;

- (c) outline the appropriate starting point for your offending;
- (d) explain any adjustments to that starting point; and
- (e) impose an end sentence.

[3] You may sit while I go through these matters. I will ask you to stand when I reach my sentence.

### **Overview of offending**

[4] You are a United States citizen, resident in New Zealand. You have a passion for piloting vintage aircraft. For many years you were employed as the Production Manager of The Vintage Aviator Ltd, a company established by Sir Peter Jackson and Ms Fran Walsh to manufacture reproduction and replica World War I aircraft. You managed the production of aircraft, test flying and arranging sales. As a senior member of staff and trusted employee, you enjoyed a large degree of autonomy.

[5] The first set of offending relates to the sale of three aircraft owned by Vintage Aviator. In April 2016, you were contacted at Vintage Aviator by Mr Reg Field who was inquiring about purchasing two aircraft from The Vintage Aviator to donate to New Zealand Warbirds Association (Warbirds).

[6] As matters progressed, it was decided that Mr Field would instead donate the funds to Warbirds and Warbirds, using Mr Field's funds along with other donations, would purchase three aircraft from The Vintage Aviator.

[7] The total price you quoted for the three aircraft was just over \$2.1 million. This was \$622,000 more than the price The Vintage Aviator would have typically charged for these aircraft. For convenience, when I refer to the price that The Vintage Aviator would typically charge for its planes, I will use the term "list price". Believing it was purchasing the three planes from The Vintage Aviator, Warbirds agreed to pay the \$2.1 million for the aircraft.

[8] You told Mr Corke, the CEO of The Vintage Aviator, that you were charging more than the list price, because Mr Field was a friend of yours and he wanted to pay extra to assist you financially and if he could not pay more than the list price he would not go through with the transaction.

[9] None of this was true. Mr Field was not a friend. He had never met you prior to travelling to The Vintage Aviator to select the aircraft. And he believed he was paying The Vintage Aviator's asking price. You invoiced Warbirds for the aircraft and directed it to pay the funds into the account of a company you controlled and owned, The Old Stick and Rudder.

[10] Between 1 July 2016 and 21 July 2017, Warbirds and Mr Parker<sup>1</sup> transferred \$2.1 million into your company's bank account. In November 2016, you arranged for the BE2 aircraft to be collected by Warbirds and taken to Auckland without the knowledge or consent of The Vintage Aviator. None of the funds transferred into your company's account was on-paid to The Vintage Aviator.

[11] The second set of offending relates to an agreement you entered into in February 2012 with Mr Oliver Wulff, a friend of yours and a client of The Vintage Aviator. Mr Wulff understood he was purchasing a P-40 Kittyhawk aircraft and a share in your company, The Old Stick and Rudder, in exchange for USD 500,000. Unfortunately for Mr Wulff, the reality was quite different. You and he entered into what was referred to as a "shareholder agreement", to record your agreement. Although the agreement clearly contemplated the P-40 would continue to be owned by The Old Stick and Rudder, the agreement purported to "assign ownership" of the P-40 to Mr Wulff. This "assignment" was legally meaningless, and Mr Wulff never became a registered shareholder.

[12] The shareholder agreement referred to a security interest that would be registered against the P-40 in favour of Mr Wulff, to protect his payment of USD 500,000. On its proper interpretation, the agreement also prohibited further charges

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<sup>1</sup> Mr Parker is the President of Warbirds and was technically the purchaser of one of the three planes in his personal capacity.

or loans from being made against the assets of The Old Stick and Rudder, including the P-40, without the consent of Mr Wulff.

[13] Yet, in April 2016, around the time you were approached by Mr Field, you met with the Bank of New Zealand to refinance your home loan and obtain additional finance to pay off a much earlier loan from a trust associated with Sir Peter and Ms Walsh. You offered the P-40 to the bank as security for the bank loan. You did not inform the bank of the existence of the shareholder agreement or your obligation to obtain consent from Mr Wulff before offering the P-40 as collateral. In that sense, you falsely represented to the bank that you had unqualified authority to offer the aircraft as collateral. Nor did you obtain, or even seek, Mr Wulff's consent. You also falsely represented to the bank you were entitled to earn commissions on the sale of aircraft for The Vintage Aviator.

### **Purpose of sentence**

[14] In terms of the Sentencing Act's purposes, those I have in mind in sentencing you today are: to hold you accountable for the harm you have caused;<sup>2</sup> to promote in you a sense of responsibility for that harm;<sup>3</sup> to denounce your conduct;<sup>4</sup> to deter others from committing similar offending;<sup>5</sup> and to protect the community.<sup>6</sup>

### **Starting point**

[15] There is no tariff decision for fraud, but the relevant considerations were established by the Court of Appeal in a decision called *R v Varjan*.<sup>7</sup> Your culpability by reference to that case is to be assessed by reference to:<sup>8</sup>

- the magnitude and sophistication of your offending;
- the type, circumstances and number of victims;

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<sup>2</sup> Sentencing Act 2002, s 7(1)(a).

<sup>3</sup> Section 7(1)(b).

<sup>4</sup> Section 7(1)(e).

<sup>5</sup> Section 7(1)(f).

<sup>6</sup> Section 7(1)(g).

<sup>7</sup> *R v Varjan* CA97/03, 26 June 2003.

<sup>8</sup> At [22].

- the motivation for your offending;
- the amounts involved;
- the loss caused;
- the period over which your offending took place;
- the seriousness of breaches of trust involved; and
- the impact on your victims.

[16] I take as the lead offences, the deception charge relating to the sale of the three aircraft from The Vintage Aviator and the three corresponding theft charges. The Crown accepts the charges relating to Mr Wulff can be considered as part of a continuing course of conduct, and that sentences may be served concurrently. Accordingly, I proceed to assess the appropriate starting point by reference to both sets of offending.

[17] Your offending was relatively sophisticated in the sense it involved an elaborate series of lies to a number of different people. You put considerable thought and effort into devising and executing your fraud, which was carried out over a period of more than 12 months. The amounts involved were significant. The P-40 is said to be valued at around USD 1.6 million and over NZD 2.1 million dollars was involved in relation to the sale of the three aircraft, although I accept immediately that was not the actual amount of loss.

[18] The sales of two of the three aircraft — the Sopwith Pup and the Albatros — were cancelled by The Vintage Aviator after your fraud was discovered. Those aircraft remained with The Vintage Aviator, and Warbirds and Mr Parker were repaid the purchase price. The third aircraft, however — the BE2 — remains with Warbirds, and The Vintage Aviator has not been paid the purchase price. Resolution of the outstanding amount is the subject of present civil proceedings. Your counsel,

Mr Corlett QC, submits that once all is said and done there will be either no loss or loss of only \$220,000.

[19] With respect to Mr Wulff, there is currently no actual loss, as your loan with the Bank of New Zealand is not in default, so his security interest in the P-40 has not yet been jeopardised.

[20] In a recent Court of Appeal decision, *Ross v R*, the Court considered the approach to sentencing in cases where no actual loss resulted from the fraud.<sup>9</sup> The Court identified four categories of harm that may arise in cases of fraud:<sup>10</sup>

- (a) quantifiable actual loss;
- (b) quantifiable intended loss that does not materialise;
- (c) quantifiable potential loss which may not be intended; and
- (d) broader harm such as reputational loss.

[21] In *Ross v R*, where the defendant had obtained a credit facility valued at over \$40 million under false pretences, the Court found the defendant to be highly culpable. Although no loss had occurred, the sums at risk were very high and his offending had placed the reputation of the bank at risk.<sup>11</sup>

[22] I consider your offending involves harm falling into three categories:

- (a) There is quantifiable intended loss that did not materialise. At the expense of Warbirds and Mr Parker, and ultimately Mr Field, you stood to make a profit of over \$622,000. Had your fraud not been discovered, Warbirds and Mr Parker would have suffered this loss. While the harm from your offending was lessened because the intended loss did not materialise, nevertheless the potential for loss, and your intentions, are

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<sup>9</sup> *Ross v R* [2019] NZCA 455.

<sup>10</sup> At [49].

<sup>11</sup> At [50]–[51].

highly relevant to your culpability. Mr Corlett disputes this loss on two bases:

- (i) That as the sales were cancelled, The Vintage Aviator kept the planes, and Warbirds and Mr Parker were repaid their deposits in full.
- (ii) The second basis draws on evidence at trial that the aircraft were worth whatever someone wants to pay for them.

The first submission flies in the face of the jury's acceptance that there was a fraudulent stratagem. The further point is that, in terms of the Court of Appeal's analysis in *Ross v R*, while the harm suffered was not as serious as if there had been quantifiable actual loss, intended loss was involved and that is serious.

- (b) Your offending against Mr Wulff involved quantifiable potential loss that may not be intended. Had you defaulted on your loan to the Bank of New Zealand, the P-40, and Mr Wulff's security interest, may have been at risk. There remains a possibility this could still occur. The value of the loan was originally \$250,000 and is now around \$170,000<sup>12</sup> but the loss resulting to Mr Wulff from the realisation of the P-40 by the bank could be much greater.
- (c) The Vintage Aviator and the Bank of New Zealand have suffered reputational harm. In her victim impact statement, Ms Walsh describes the damage caused to The Vintage Aviator's good name in the vintage aircraft community. Reputation is key. You held yourself out as acting with the authority of The Vintage Aviator making it complicit by association in your offending. Specifically, you have destroyed The Vintage Aviator's relationships with Warbirds, a key player in the promotion and acquisition of vintage aircraft, and compromised The Vintage Aviator's relationship with Mr Wulff, a client of The Vintage

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<sup>12</sup> The actual outstanding balance is \$187,620.52.

Aviator.

[23] Further, The Vintage Aviator has suffered considerable loss. It lost the opportunity to make the sales to Warbirds, which had to be cancelled, and it had to cease production for 10 months while the Serious Fraud Office carried out its investigation into your offending. Several specialist staff members have left and are difficult to replace. The civil proceedings brought about by your fraudulent behaviour have cost the company hundreds of thousands of dollars. The harm to The Vintage Aviator has been substantial.

[24] Your offending is marked by serious breaches of trust and what has been described as a “catastrophic impact on morale” and, for Sir Peter, the “greatest betrayal” he has ever experienced.

[25] As the Court emphasised in *R v Rose*, “[n]umerous systems within society cannot function without placing trust in employees for the management and handling of money.”<sup>13</sup> Offending such as yours threatens that trust and confidence.

[26] In determining an appropriate starting point, I have had particular regard to four authorities relied on by the Crown, which are broadly comparable: [I have included a summary of the authorities in my written notes. The short point is that the starting points ranged from three to five years.]

- (a) *Hall v R*<sup>14</sup> — a starting point of four and a half years imprisonment was adopted for obtaining a credit facility of about \$2 million by providing falsified documents to the bank.
- (b) *Serious Fraud Office v Ellis*<sup>15</sup> — a starting point of five years imprisonment was adopted for deception charges relating to the overcharging and collection of profits by senior executives at Wilson Parking over a period of two years, resulting in losses of \$460,000.

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<sup>13</sup> *R v Rose* [1990] 2 NZLR 552 (CA) at 556.

<sup>14</sup> *Hall v R* [2014] NZCA 38.

<sup>15</sup> *Serious Fraud Office v Ellis* HC Auckland CRI-2005-404-15827, 18 July 2006.

- (c) *R v Davis*<sup>16</sup> — a starting point of four years imprisonment was adopted for theft and overpayment of about \$290,000 by an officer manager over a period of five years.
- (d) *R v Colosimo*<sup>17</sup> — a starting point of three years imprisonment was adopted for forging a document showing inflated business profits and providing that document to the purchaser of the business, resulting in loss to the purchaser of \$433,000.

[27] Each of these cases bears similarity to the features and scale of your offending, especially as several involved breaches of trust by senior employees. Although actual loss eventuated in those cases, the potential loss of your offending was of a greater magnitude. I also have regard to *Ross v R*, in which a starting point of five and a half years imprisonment was upheld where the potential loss involved a \$41 million credit facility.

[28] The cases referred to by Mr Corlett I regard as less factually similar but, in any event, do not support a significantly lower starting point: [Again I have I have included a summary of these cases in my sentencing notes.]

- (a) *R v Sullivan*<sup>18</sup> — a starting point of three and a half years imprisonment was adopted for the dishonest failure to disclose related party transactions connected with South Canterbury Finance. Mr Sullivan was motivated by a misguided sense of loyalty to Mr Hubbard rather than greed, and the Judge accepted his actions were out of character.
- (b) *R v Bublitz*<sup>19</sup> — a starting point of four years imprisonment was substituted on appeal for four thefts arising from prohibited related-party transactions occurring over a four-month period resulting in loss of approximately \$860,000.

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<sup>16</sup> *R v Davis* [2009] NZCA 26.

<sup>17</sup> *R v Colosimo* [2012] NZCA 60.

<sup>18</sup> *R v Sullivan* [2014] NZHC 3201.

<sup>19</sup> *R v Bublitz* [2019] NZCA 364.

- (c) *R v Max*<sup>20</sup> — a starting point of two years, seven months imprisonment was adopted for the dishonest failure to disclose the false pretences under which a co-offender had obtained a gambling licence from the Department of Internal Affairs.

[29] In *R v Rose*, the Court of Appeal recognised that while in many cases of white collar crime the risk of reoffending by the particular offender is not great, the safety of the community nevertheless requires a sentence that will act as a deterrent to others.<sup>21</sup> In *R v Varjan*, the Court re-emphasised that imprisonment will be appropriate in cases of major defalcations, misappropriations and schemes dishonestly to obtain money or property.<sup>22</sup> More recently, in *Ross v R*, the Court of Appeal stressed the need for society, through the courts, to denounce offending where a person enjoying a privileged position in the community embarks upon an elaborate criminal scheme in the expectation of profiting from his offending.<sup>23</sup> The Court also explained that deterrence is particularly important in cases of fraud “where potential offenders can understand and reflect upon the consequences of offending”.<sup>24</sup>

[30] In setting a starting point for you, Mr DeMarco, I accept that the consequences of your deception are not as grave as in some of the cases, but your culpability is very high. You embarked on a calculated plan of deception for personal gain. You lied to, and misled, whoever it was necessary to lie to and mislead in order to achieve your fraudulent ends. And, as Ms Walsh described the effects of your actions, you showed contempt for the welfare of the company for its clients and for the 18 people who depended on the company for their livelihood.

[31] A starting point of three years, six months imprisonment reflects the gravity of your offending and the degree of your culpability overall.

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<sup>20</sup> *R v O'Brien* [2017] NZHC 1753.

<sup>21</sup> *R v Rose*, above n 13, at 556.

<sup>22</sup> *R v Varjan*, above n 7, at [25].

<sup>23</sup> *Ross v R*, above n 9, at [60].

<sup>24</sup> At [61].

### **Adjustments to the starting point**

[32] I now consider whether there should be any increase or decrease to the starting point by reference to any personal mitigating or aggravating factors. There are no aggravating factors.

[33] You have made two offers to the victims of your offending, which you characterise as offers of amends, although neither is unconditional. To The Vintage Aviator, you have offered to pay \$425,000 in settlement of your civil dispute, which you explain is less than the value of the BE2 to account for counterclaims you say you have against The Vintage Aviator. To Mr Wulff, you have offered ownership of the P-40 if he agrees to pay off your loan from the Bank of New Zealand. Neither offer has been accepted. I understand the counterclaims against The Vintage Aviator are the subject of dispute in the civil proceeding. And it is perhaps unsurprising that Mr Wulff does not wish to entertain a further deal with you, on entirely new terms, given your breach of his trust the first time.

[34] In deciding whether, and to what extent, an offer of amends is to be taken into account, the Court must assess whether the offer is genuine and capable of fulfilment, and whether the offer has been accepted by the victim as mitigating the wrong.<sup>25</sup> An offer will not be considered as genuine unless it demonstrates a genuine effort by the offender to accept responsibility for the offence and to put things right.<sup>26</sup> An offer will not be capable of fulfilment if it is unrealistic.<sup>27</sup> A further principle is that no credit will be available where recovery occurred due to enforcement actions.<sup>28</sup>

[35] Having read the relevant offer letters it is apparent to me that they do not constitute an “offer of amends”. The offers are made in the context of two sets of civil proceedings against you, one by The Vintage Aviator and the second by Mr Wulff. In relation to The Vintage Aviator, the offer is to settle all issues between the parties on a basis set out in the letter. If the settlement offer is accepted, the settlement is to be recorded in a settlement deed.

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<sup>25</sup> Sentencing Act 2002, s 10(2).

<sup>26</sup> *Adams on Criminal Law* (online ed, Thomson Reuters) at [SA10.02], citing *R v Singh* (2003) 20 CRNZ 158 (CA).

<sup>27</sup> *Prince v Police* [2017] NZHC 2523 at [26].

<sup>28</sup> *Patterson v R* [2008] NZSC 70.

[36] Similarly, you have offered to settle Mr Wulff's civil claim against you on a basis set out in that offer letter. The proposal is to transfer title to the P-40 to Mr Wulff, the consideration being the USD 500,000 he has already paid and that Mr Wulff will pay the outstanding loan which The Old Stick and Rudder owes to the bank. You undertake not to increase the loan prior to settlement.

[37] These are not offers of amends in the sense that they represent a genuine effort to accept responsibility and expiate or mitigate the wrong. Responses were requested within a few days. That is not atonement. These are classically offers to settle litigation for litigation purposes and they do not warrant a discount to the sentence. I reach that view regardless of the response to the offers put before me shortly before the hearing this morning.

[38] In any event, I see the offer to Mr Wulff as unrealistic, as it requires him to place his trust in you once more.

[39] Similarly, there is a basis for having real doubts about the genuineness of your claimed remorse. The Court looks for "hard evidence of genuine regret and remorse".<sup>29</sup> The pre-sentence report records that you appeared to show "genuine remorse when discussing the loss of good working relationships and friendships". That is not the relevant kind of remorse but tends towards self-pity for one's plight. The report also records that you continued to shift responsibility for your offending to others, including blaming your lawyers and other staff members at The Vintage Aviator. That position is consistent with what appears to be the mass email you sent to many people requesting references and which was included in the bundle of references put before me. You stated in the email that you were facing "the possibility of receiving a 4 year jail sentence for something [you] didn't do". That was written in September following the trial and the jury's verdicts. When I now consider the authenticity of your public expressions of remorse, through your counsel, I do so against the backdrop of that private denial of your wrongdoing.

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<sup>29</sup> *R v Brewster* [1998] 1 Cr App R 220 (CA).

[40] You have provided some 40 references. I have read all of them very carefully. There is also a Meritorious Service Award from the New Zealand Aeronautical Trusts Ltd given in recognition of:

the tremendous work you have achieved with the replica and restoration of aircraft, your obvious enthusiasm and the global reach of those efforts, and of course, your flying skills and leadership.

That was given in 2013.

[41] Your referees speak of your reputation in the aviation world; of your experience, work ethic, and achievements. They speak also of the mentoring you have provided to younger pilots. Some referees make job offers. The character references describe your offending as uncharacteristic and say they have always known you to act with “honesty” and “integrity”. There can be no doubt about your standing in the aviation world or the deep affection in which you have been widely held.

[42] It was this that made your betrayal all the more personal and devastating for those close to you. But I have not found the uniform testament to your honesty and integrity from so very many referees, to be particularly helpful. You did not simply ask for character references but sent what you, yourself, apologised for as an email that was a “bit generic”. You guided your referees as to the content of their references. This explains the remarkable similarity in content and language across so many letters. But the real point is the false premise upon which you requested the references: that you faced imprisonment when you had done nothing wrong.

[43] There is one reference that warrants particular mention, from Mr Field. Mr Field describes you as professional in your dealing with him and says you fulfilled your obligations promptly and with good will. Mr Field appears to blame the cancellation of the Warbirds purchases on The Vintage Aviator and the civil proceeding it has brought against you. With respect to your offending, Mr Field says you “erred in a private arrangement with The Vintage Aviator, of which [he] is not aware of the details”. That reflects a misunderstanding on Mr Field’s part of the seriousness of your offending and suggests Mr Field does not fully appreciate the nature and magnitude of what you have done, and the potential impact it may have had on Warbirds and ultimately Mr Field.

[44] No discount is available for remorse or good character.

[45] This is not your first conviction for dishonesty. In 1999, you were convicted in the United States for possessing a stolen aircraft. You received a conditional discharge. Mr Corlett submitted the conviction should be disregarded because it would be covered by the Criminal Records (Clean Slate) Act 2004 had it been entered in New Zealand. While that might be a relevant consideration if the Crown were seeking an uplift for previous offending (which it is not) it is less relevant when you are seeking a discount for claimed previous good behaviour. I am not satisfied any such discount is appropriate in your circumstances.

### **Hardship to family**

[46] In your letter to the Court, and in Mr Corlett's submissions, the profound impact of a sentence of imprisonment on your family is stressed. You have a very young daughter and your wife is four months pregnant with your second child.

[47] Sentences of imprisonment invariably cause hardship to the offender's family. Where the offender is the primary caregiver and the offending is less serious, significant reductions in sentence have been given.<sup>30</sup> I accept that you and your wife, jointly, have been the primary caregivers to your daughter. I accept as well your wife's deep anxiety about the prospect of your receiving a custodial sentence, leaving her as the sole caregiver. Her doctor has written to say that if you are sentenced to prison, it will have an adverse effect on her health and ability to look after the children.

[48] I propose to discount your sentence by 30 per cent in recognition of the hardship to your family. That reduces the sentence to two years and five months imprisonment.

[49] I am very conscious of the fact that prison is a measure of last resort. But if the Court determines that home detention is not available because the appropriate sentence is imprisonment for longer than two years, the Court cannot impose a lesser sentence.

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<sup>30</sup> *Ransom v R* [2010] NZCA 390, (2010) 25 CRNZ 163.

## **Result**

[50] Mr DeMarco, please stand.

[51] On the charge of deception under s 240 of the Crimes Act relating to Warbirds and The Vintage Aviator you are sentenced to two years and five months imprisonment. On the second charge of deception and each of the charges of theft by a person in a special relationship under s 220 of the Crimes Act, you are sentenced to 18 months imprisonment to be served concurrently with the sentence of two years and five months imprisonment.

[52] You may stand down.

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Karen Clark J