

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

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CRI-2017-004-010580
[2019] NZHC 2773**

THE QUEEN

v

STEVEN ROBERTSON

Hearing: 30 October 2019
Counsel B Finn, S O'Connor and C Brooke for Crown
T A Simmonds and O Cann for defendant
Sentencing: 30 October 2019

SENTENCING NOTES OF KATZ J

Solicitors: Meredith Connell, Office of the Crown Solicitor, Auckland
Financial Markets Authority

Counsel: Lorne Street Chambers, Auckland

Introduction

[1] Mr Robertson, you appear for sentence on 23 charges of theft by a person in a special relationship;¹ 11 charges of obtaining by deception;² and four charges of dishonest use of a document.³ Each charge carries a maximum penalty of seven years' imprisonment. The charges were brought by the Financial Markets Authority ("FMA") following an investigation into your affairs and those of your associated companies.

The offending

[2] The details of your offending are fully set out in the Reasons for Verdicts ("Verdicts") that I delivered on 19 August 2019.⁴

The "trading on behalf" charges

[3] In summary, during the period 2009 to 2015 you operated various companies that sold software packages to people to assist them to trade on share, foreign exchange and commodities markets. The software programmes were not easy to use, and some investors did not have the skills or time to master them or were not computer literate. When confronted with disgruntled investors, you would sometimes offer them an alternative. You (or sometimes one of your staff members) told them that if they gave you their money, you, or one of your companies, would trade it on their behalf by investing it for them in the financial markets. You painted a glowing albeit false picture of your prowess as a trader, for example telling one investor that you were "as good as John Key".

[4] You obtained significant funds for trading on behalf of clients in this way. You did not, however, trade any of those funds as you had promised. Rather, you used the money for your own purposes, including funding a lavish lifestyle involving expensive cars, frequent travel by private helicopter, luxury weekend getaways, overseas holidays (including by private jet), and expensive jewellery.

¹ Crimes Act 1961, s 220.

² Section 240.

³ Section 228(1)(b).

⁴ *R v Robertson* [2019] NZHC 2032 at [3]-[26] ["Reasons for Verdicts"].

The shareholding charges (obtaining by deception)

[5] You subsequently offered some of these “trading on behalf” clients a further “opportunity”. You invited them to become shareholders in one of your companies, or in a company you claimed that you were planning to set up overseas. A number of people took up these offers. This group of victims paid tens of thousands of dollars (and in some cases more than that) for fictitious shareholdings. I found in my verdicts that you never actually intended to transfer shares in the relevant companies, or anything else of value, to this group of investors. Rather, you continued to treat the relevant companies as exclusively your own. Most of these victims lost all of the money that they gave you.

Credit card charges (dishonest use of a document)

[6] Finally, on several occasions when you or one of your companies was low on funds you resorted to simply stealing money out of clients’ credit card accounts.

Victim impact statements

[7] In sentencing you I am required to hold you accountable for the harm you have done to your victims and to the community at large.⁵ I am also required to promote in you a sense of responsibility for that harm,⁶ to provide for the interests of your victims⁷ and take into account the effect of your offending on them.⁸

[8] Almost all of your victims who have provided victim impact statements express shame and embarrassment in their statements for falling prey to your schemes. The only person, however, who should feel any shame for what has occurred is you. You were clearly an extremely skilled and persuasive salesman, who used your considerable skills to deceive and steal from honest and trusting clients. It is only through the courage and tenacity of the victims, and the comprehensive investigation undertaken by the FMA, that your offending was brought to an end.

⁵ Sentencing Act 2002, s 7(1)(a).

⁶ Section 7(1)(b).

⁷ Section 7(1)(c).

⁸ Section 8(f).

[9] The victim impact statements make sad reading. Most of your victims were retired or approaching retirement. They had worked hard all their lives to acquire a small nest egg (or somewhat larger retirement fund) which they invested with you in the hope of making a little extra money to help them in their retirement. Almost all of your victims' say that they have lost trust in others as a consequence of your actions. They are now cautious and suspicious. One of them says that he will not even put his money in the bank now.

[10] One victim describes the trauma of having to re-mortgage his farm in his 60s, after having "worked for over 40 years on the farm earning every dollar that I have made through blood, sweat and tears". Another victim who is also a farmer, now in his 70s, has not been able to retire. He says that he is still working to pay off his mortgage, as a result of the funds you stole from him. Another victim in his early 70s also reports that he has had to continue working into his retirement years when he otherwise would not have.

[11] Many other victims describe the impact your theft has had on their standard of living in retirement, including an inability to assist family members, upgrade aging vehicles, or visit gravely ill relatives overseas. One victim describes finding it difficult to pay rent. Another victim, who is raising a young grandchild, had to place his property on the market because he could not pay his rates. A common theme of the victim impact statements is that due to their age, most of your victims will not have the opportunity to try and make back the money that you took from them.

[12] Your exploitation of one particular victim (now aged 79) was particularly egregious. You stole over \$200,000 from him. As a result, he and his wife had to sell their family home and move into an apartment in a different town. In about three years he says that they will run out of money to pay their Body Corporate rates. As a result, in their early 80s, they will need to move again, to somewhere even cheaper. You have robbed them of the comfortable retirement they had worked hard for and left them stressed and anxious about their future. It was apparent from the evidence at trial that you recognised this victim as particularly vulnerable and exploited him shamelessly.

The starting point

[13] You have been found guilty of 38 charges, all of which carry a maximum penalty of seven years imprisonment.

[14] Your sentence must reflect the overall criminality of both the offending and the offender.⁹ I will determine a starting point that reflects the totality of your offending, with reference to any particular aggravating features. I will take into account the overall gravity of your offending and your level of culpability.¹⁰ I will also consider any broadly comparable cases.¹¹

[15] After I have set the starting point I will consider whether any deductions from that starting point are appropriate for personal mitigating factors.

Aggravating features of the offending

[16] I consider the following to be the key aggravating features of your offending:¹²

(a) *The nature/extent of the offending* – Your offending involved three different categories of fraud. This was not impulsive one-off offending. Your conduct was premeditated and calculated and took place over a period of approximately six years. The current net loss to the victims stands at approximately \$1.2 million and AUD\$271,200. I take into account, however, the prospect that your victims may well recover some of their losses from assets that are currently held by receivers/liquidators. The quantum of any likely recoveries cannot be accurately assessed at this stage.

(b) *Sophistication of the offending* – I consider your offending to be moderately sophisticated. I note, for example, your creation of false documentation, such as shareholder agreements, to create the illusion

⁹ *R v Xie* [2007] 2 NZLR 240 (CA) at [18].

¹⁰ Sentencing Act 2002, s 8(a).

¹¹ Section 8(e).

¹² I have had particular regard to the aggravating features set out in *R v Varjan* CA97/03, 26 June 2003, cited with approval in *Arnott v R* [2015] NZCA 236 at [8].

of genuine commercial transactions. Further, you set about creating an extensive false paper trail in May and June 2015 in an attempt to conceal your offending from the FMA. You also deceived investors with a comprehensive web of verbal lies, over an extended period. You did this both to induce them to make initial investments with you, and then to persuade them not to withdraw their money or, at times, to persuade them to “invest” further funds with you.

- (c) *The motivation for the offending* – The motivation for your offending was greed. Wealth and the appearance of it was clearly extremely important to you.¹³ You spent hundreds of thousands of dollars of the money you stole on funding an extravagant personal lifestyle.

- (d) *Vulnerability of the victims and serious breaches of trust* – Most of your victims were retired or approaching retirement, having worked hard all their lives including as farmers, a butcher, construction contractors, a warehouse manager, a caregiver and a port worker. You clearly targeted people who were, on the whole, elderly, trusting, and naïve and unsophisticated when it came to investments. Although you are not an authorised financial advisor I accept Mr Finn’s submission that you held yourself out as a skilled and trusted advisor in relation to financial matters including in particular, trading on the financial markets. You (or occasionally one of your staff members) in effect groomed many of your victims to obtain their trust in relation to financial matters. Having obtained their trust you abused it in the most egregious way.

- (e) *Impact on the victims* – I have already summarised the victim impact statements I have received. It is clear from those statements that there has been a very significant impact (both financial and emotional) on your victims. The consequences of your offending have been severe for many of them.

¹³ See Reasons for Verdicts at [65]-[73].

[17] I have carefully considered the cases referred to by both the Crown and your counsel.¹⁴ The starting points in those cases varied between five years' imprisonment and eight and a half years' imprisonment. With reference to those cases, and the aggravating features I have identified, I consider that a starting point of seven years' imprisonment appropriately reflects your culpability, for the totality of your offending.

Personal mitigating factors

[18] I now turn to consider whether there are any personal mitigating factors that warrant a discount to your sentence.

Previous good character

[19] You have no relevant previous convictions. Mr Simmonds submitted that you should be given a modest discount for your previous good character. He noted that up until 2009, you were a person of good character. He submitted that should be acknowledged in the sentencing process. Given the scale of your offending, its prolonged nature, and the degree of sophistication and premeditation involved, I have not been persuaded that any good character discount is warranted.

Family circumstances

[20] I have carefully read the references you have provided. You have a young son. Although his mother is his primary caregiver, it is clear that you have a close and positive relationship with him. Your referees speak of the efforts you have made to turn your life around since your arrest, including addressing your alcohol issues and rebuilding your relationship with your son. Mr Simmonds submitted that a modest discount should be afforded to reflect your personal circumstances, including in particular, the impact that imprisonment will have on your son. The Court of Appeal has recognised, however, that where fraud offending is serious and premeditated, particularly where it occurs over a lengthy period of time, the impact of the sentence

¹⁴ *R (SFO) v Robinson* [2015] NZHC 1673 (starting point of seven years six months' imprisonment); *McGregor v R* [2015] NZCA 565 (starting point of five years' imprisonment); *Bourton v R* [2014] NZCA 151 (starting point of eight years and six months' imprisonment); *Mount v R* [2015] NZCA 489 (starting point of six years' imprisonment); and *R v Scott* [2017] NZHC 2510 (starting point of seven years' imprisonment).

on the family of the offender will usually play little, if any, role in sentence.¹⁵ While you are to be commended for the efforts you have made, and your commitment to being a good father, there is nothing in your circumstances that in my view warrants a discrete sentencing discount. Your imprisonment and consequential separation from your son is a sad, but inevitable, consequence of the decisions you have made.

Remorse and reparation/recoveries

[21] You also seek a discount for remorse and your co-operation with the liquidators/receivers appointed to your financial affairs including the provision of a binding undertaking.

[22] In your letter to the Court you claim that you are truly remorseful and are motivated to become a better person. In a letter to the victims you state that:

... On reflection, which I have had plenty of time to do, I am embarrassed and ashamed in the way I conducted myself in our dealings... I am truly sorry for all I have done.

[23] Your pre-sentence report states that you have accepted the Court's verdicts and have now come to accept that how you conducted your business was "wrong." The report writer says that you indicated insight into your offending and a degree of remorse, although he queried whether your remorse may be primarily self-pity.

[24] The Crown case against you on the charges that I convicted you of was overwhelming. As Mr Finn noted, at no stage prior to trial did you take any responsibility for your actions. In your interview with the FMA you denied the alleged offending and were evasive, and repeatedly untruthful. You maintained not guilty pleas on all charges through to the conclusion of trial. As a result, your victims, most of them elderly and some of them in poor health, were put through the stress of having to appear as witnesses at trial. Even now, some of your comments in the pre-sentence report clearly minimise your offending.

[25] On a standalone basis, I would not give you a discount for remorse. I suspect that any remorse you feel is primarily for the situation you now find yourself in. You

¹⁵ *McGregor v R* [2015] NZCA 565 at [46].

have, however, offered binding undertakings that are relevant in this context, and I now turn to consider these.

[26] Receivers and liquidators currently have control of your assets and those of your family trust and associated assets, pursuant to an order of the Court. You have provided a binding undertaking that you will in effect, co-operate in those funds being made available to meet the claims of your creditors (who include the victims in this proceeding). You have also undertaken that you will not oppose any application by the receivers/liquidators or the FMA to release those funds.

[27] You deserve credit for the undertakings you have given, which may well help streamline the legal process in relation to the distribution of your assets, and those of your family trust and associated companies, to creditors. I also see your undertakings as a tangible and important acknowledgement of your wrongdoing. Having considered the level of discount afforded in several broadly comparable cases,¹⁶ it is my view that a discount of four months (approximately 5 per cent) would appropriately reflect this factor.

Minimum period of imprisonment

[28] The final issue I must consider is whether to impose a minimum period of imprisonment (“MPI”) on you. The Court may impose an MPI if it considers that the normal non-parole period (here, one third of your sentence) would be insufficient to: hold you accountable for the harm done to the victims or community; denounce your conduct; deter you or others from similar offending; or protect the community from you.¹⁷

[29] Mr Simmonds, in opposing the imposition of an MPI, relied in particular on the cases of *Mount v R*¹⁸ and *Chen v R*¹⁹ where MPIs imposed at first instance were quashed on appeal, and *R v Scott*²⁰ where no MPI was imposed at sentencing.

¹⁶ *R v Scott* [2017] NZHC 2510; *R (SFO) v Robinson* [2015] NZHC 1673; and *R v Rose* [2016] NZHC 1109.

¹⁷ Sentencing Act 2002, s 86(1).

¹⁸ *Mount v R* [2015] NZCA 489.

¹⁹ *Chen v R* [2019] NZCA 299.

²⁰ *R v Scott* [2017] NZHC 2510.

[30] I see your case as being materially different to *Chen*. That was a mortgage fraud case, where the victims were major trading banks. Due to the rising housing market they incurred little or no losses. One of the defendants (Mr Chen) received no financial benefit from the offending. The other defendant consented to a forfeiture order which appears to have exceeded the direct financial benefit he received. The offending in that case occurred over a two-year period, as opposed to the six-year period involved in this case.

[31] Generally, banks and other major corporate entities will be better placed than private individuals to deal with the consequences of dishonesty offending. The impact on private individuals of suffering financial loss, however, can be devastating, as we have seen in this case. The element of breach of trust is also generally not present where the victim is a financial institution but is present in this case.

[32] I have also considered the cases of *Mount* and *Scott*, referred to by Mr Simmonds, but do not find them sufficiently analogous to the current situation to be particularly helpful. I have also reviewed number of cases where MPIs were imposed for fraud offending.²¹ For example, in *R v McKelvy*, an MPI of over 60 per cent was imposed.²²

[33] As I have previously outlined, the harm to the victims in this case is significant. You have robbed many of them of the level of security and comfort they were entitled to expect in their retirement, having worked hard all of their lives. As I have previously noted, it is clear that you targeted elderly, unsophisticated and somewhat vulnerable victims. The existence of multiple and/or vulnerable victims has been recognised by the courts as a relevant factor when considering an MPI, with the targeting of vulnerable victims warranting special condemnation.²³

[34] Deterrence is a particularly important sentencing consideration for repeated dishonesty offending for financial gain.²⁴ I note Mr Simmonds' submission that you

²¹ Including in particular *D'Villiers v R* [2010] NZCA 85; *R v McKelvy* [2007] NZCA 340; and *Devoy v R* [2017] NZCA 213.

²² *R v McKelvy* [2007] NZCA 340.

²³ *R v Brown* [2002] 3 NZLR 670 (CA) at [32]; and *R v Patterson* [2008] NZCA 75 at [20].

²⁴ Sentencing Act 2002, s 7(1)(f). See also s 7(1)(e) and *Arnott v R* [2015] NZCA 236 at [8].

are at low risk of future offending. The Court of Appeal has observed, however, that even if the risk of reoffending by the particular offender is not great, the safety of the community may require a sentence which will serve as a deterrent to others.²⁵ Both general and specific deterrence are important factors here.

[35] If the standard non-parole period were to apply in this case, you would be eligible for parole after you had served a little under two years and five months of your sentence. In my view that is not sufficient to hold you accountable for the serious harm you have done to the victims, to denounce your conduct, or to deter you or others from similar offending.

[36] In reaching this conclusion I have taken into account your lack of previous relevant offending. That factor, however, can carry only limited weight in circumstances where your offending involved 22 mostly elderly victims and continued for a period of approximately six years. Your personal circumstances are significantly outweighed by the other factors I have referred to. I have accordingly concluded that an MPI of 50 per cent is appropriate.

Sentence

[37] Mr Robertson, please stand. On each charge you are sentenced to six years and eight months' imprisonment, to be served concurrently. You are to serve a minimum period of imprisonment, on each charge, of three years and four months' imprisonment.

Katz J

²⁵ *R v Rose* [1990] 2 NZLR 552 (CA) at 556.