IN THE SUPREME COURT OF NEW ZEALAND

SC 59/2013
SC 60/2013
SC 61/2013
SC 62/2013
[2014] NZSC 55

BETWEEN	DOUGLAS ARTHUR MONTROSE GRAHAM, MICHAEL HOWARD REEVES, WILLIAM PATRICK JEFFRIES AND LAWRENCE ROLAND VALPY BRYANT Appellants
AND	THE QUEEN Respondent

Hearing:	11 February 2014
Court:	Elias CJ, William Young, Glazebrook, Arnold and Blanchard JJ
Counsel:	J A Farmer QC, M A Corlett and M A Sissons for Appellants C R Carruthers QC and D R La Hood for Respondent
Judgment:	7 May 2014

JUDGMENT OF THE COURT

A The appeals are allowed.

B The sentences imposed by the Court of Appeal are set aside and the sentences imposed by Dobson J are restored.

REASONS

(Given by William Young J)

The appeals

[1] The appellants were the directors of Lombard Finance & Investments Ltd ("Lombard"). Sir Douglas Graham was the chairman of directors and Mr Michael Reeves the chief executive. Lombard was a finance company which raised money

from the public pursuant to prospectuses which were registered under the Securities Act 1978. The last of these was an amended prospectus which was issued on 24 December 2007 (to which we will henceforth refer as "the prospectus").

[2] Following a lengthy trial before Dobson J (sitting alone) the appellants were found guilty on four counts laid under s 58 of the Securities Act.[1] Count one was premised on the contention that the prospectus contained statements which were untrue in a number of respects. The Judge concluded that this was so as to the liquidity of Lombard. He also held that the appellants had not established that they had reasonable grounds to believe that the prospectus was true and had therefore not made out the defence provided for under s 58(4). The other three counts on which the appellants were found guilty focused on advertisements distributed by Lombard. The underlying issues as to untrue statements and the s 58(4) defence were the same in relation to all four counts.

[3] Dobson J sentenced the appellants as follows:[2]

(a) Mr Reeves and the Honourable William Jeffries were both sentenced to 400 hours community work;

(b) Sir Douglas Graham and Mr Lawrence Bryant were both sentenced to 300 hours community work and ordered to pay reparations of $100,000.

[4] The appellants appealed against their convictions and the Solicitor-General sought leave to appeal against the sentences which were imposed. The Court of Appeal dismissed the conviction appeals but granted leave to the Solicitor-General to appeal against sentence, allowed the appeals[3] and ultimately imposed sentences on the appellants as follows:[4]

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1 *R v Graham* [2012] NZHC 265, [2012] NZCCLR 6 [HC judgment].
2 *R v Graham* [2012] NZHC 575 [HC sentencing remarks] at [117]–[121].
3 *Jeffries v R* [2013] NZCA 188 (Randerson, Wild and French JJ) [CA judgment].
4 *Jeffries v R* [2013] NZCA 274 (Randerson, Wild and French JJ).

(a) Mr Reeves: nine months home detention and 250 hours community work;

(b) Mr Jeffries: eight months home detention and 250 hours community work;

(c) Sir Douglas Graham: six months home detention and 200 hours community work (along with reparations of $100,000);

(d) Mr Bryant: six months home detention (along with reparations of $100,000).

The key conclusion of the Court of Appeal was that the offending warranted sentences of imprisonment, albeit that it was prepared to commute those sentences to home detention.

[5] This Court subsequently dismissed applications by the appellants for leave to appeal against their convictions but granted leave to appeal against the sentences imposed in the Court of Appeal.[5] The key issue on appeal is whether the offending warranted sentences of imprisonment. It is only if sentences of imprisonment were otherwise appropriate that sentences of home detention could be imposed.[6]

The key statutory provisions

[6] Section 58 of the Securities Act is relevantly in these terms:

> **58 Criminal liability for misstatement in advertisement or registered prospectus**
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> …
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> (3) Subject to subsection (4), where a registered prospectus that includes an untrue statement is distributed, every person who signed the prospectus … commits an offence.
>
> (4) No person shall be convicted of an offence under subsection (3) if the person proves either that the statement was immaterial or that he or she had reasonable grounds to believe, and did, up to the time of

5 *Graham v R* [2013] NZSC 104.
6 See s 15A(1)(b) of the Sentencing Act 2002.

the distribution of the prospectus, believe that the statement was true.

[7] Also relevant is s 55, which provides:

> **55 Interpretation of provisions relating to advertisements, prospectuses, and registered prospectuses**
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> For the purposes of this Act,—
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> (a) a statement included in an advertisement or registered prospectus is deemed to be untrue if—
>
> (i) it is misleading in the form and context in which it is included; or
>
> (ii) it is misleading by reason of the omission of a particular which is material to the statement in the form and context in which it is included:
>
> …

Factual background

[8] Given the limited nature of the appeal, we can discuss the factual background reasonably succinctly and starting with the position as it was in September 2007. By this time, a number of finance companies had collapsed (with associated significant losses to investors) and credit was very tight. Lombard was running down its loan book. Very little new money was being invested, no new loans were being made and there were only limited commitments to fund existing developments. As at mid-September 2007, Lombard had cash reserves of approximately $33 million.[7] At that time, six major loans to what were in effect five groups of borrowers represented 68 per cent of the total book.[8]

[9] Lombard's management prepared regular liquidity reports. These reports focussed on the key liquidity variables of:

(a) the reinvestment rate of maturing investments; and

(b) repayments by borrowers.

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7 CA judgment, above n 3, at [38].

8 At [72]–[73].

All the liquidity reports prepared between September and 19 December 2007 (which was the date of the last board meeting of the year) produced forward liquidity assessments which were distinctly more favourable than what was in fact achieved. By 19 December 2007, cash reserves were down to $7.3 million. And as at 24 December, the cash balance was around $8 million as compared to the most recent forecast figure of $17 million.[9] The running down of the cash in hand and the substantial negative variances from the forecasts were primarily a function of loan repayments not being made as expected.

[10] The prospectus addressed liquidity risk in this way:

> Liquidity risk is a risk of Lombard Finance not having enough cash liquidity to meet its obligations as they fall due. In the event that Lombard Finance failed to manage its liquidity, due to mismanagement of its own borrowings (deposits from investors) or matured loans failed to repay on time and should such loss of liquidity be of a magnitude to cause Lombard Finance to become insolvent, there could be insufficient funds to repay investors.
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> …
>
> Lombard Finance manages its liquidity by regularly updating its projections of:
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> - The maturity dates of amounts owed to investors
> - The proportion of investors that will redeem, as opposed to reinvest, their investments
> - Loan repayments received from borrowers (often from the expected sales of completed developments)
> - Further advances made to borrowers, including further advances made as part of funding of developments. At the date of this prospectus Lombard Finance does not have significant commitments to fund ongoing developments (funds committed for ongoing development will vary from time to time)
>
> Reports are provided to the Board weekly and are available to the Credit Committee whenever it assesses a loan proposal or any other dealing with a borrower.
>
> In common with other companies in the finance sector, Lombard Finance is currently experiencing a reduced level of reinvestment by borrowers that [sic] applied 12 months ago. Cash flow projections are completed on a conservative basis (meaning that a lower level of reinvestment is used for this purpose than is currently being experienced and allowances are made for

[9] At [153].

> delays in borrowers repaying their loans which recognise that in current circumstances the sales of properties are being delayed).
>
> If market confidence in the finance sector continues to decrease (particularly if there are further failures of finance companies) new investment and renewals may decrease below the levels that Lombard Finance is currently achieving, which may impact on liquidity. The Board remains confident that, based on a range of conservative scenarios, Lombard Finance will have the required cash resources to fund all repayments to investors when due and that are not reinvested.
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> …
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> **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 by Lombard Finance. If that was extreme, Lombard Finance would not be able to fund its repayment obligations unless other funding was available or asset realisations/borrower repayments were accelerated.**

The last paragraph was in bold in the prospectus.

[11] Lombard's financial position continued to deteriorate after Christmas 2007. On 2 April 2008, it suspended repayments to investors and receivers were appointed on 10 April 2008.

[12] A total of $10.45 million was invested in Lombard after 24 December 2007, of which approximately $1.7 million was new money. At the date of its receivership, Lombard owed approximately $125 million to investors. Those who invested in debenture stock are unlikely to receive back more than 15–22 cents in the dollar and there will be no recoveries for capital and subordinated note holders.

[13] In the next section of this judgment, we will discuss the key findings of fact as to the culpability of the appellants. We record, however, that there has been dispute as to contextual matters related particularly to the standard of the governance of Lombard generally and events between 24 December 2007 and early April 2008. We do not see these disputes as particularly significant. It is sufficient to say that we accept that the governance of Lombard during the period up to 24 December 2007 was generally of reasonable quality. The directors had their minds on the job and were generally attentive to their responsibilities. There were no related-party loans. External advice was taken from reputable advisers and this extended to the language of the prospectus. There may be scope for criticism of some of the actions of the

directors in early 2008, but no findings of fact were made against them and neither Dobson J nor the Court of Appeal regarded their conduct in this period as particularly material to sentence.[10]

The basis upon which the appellants were found guilty

Untrue statements

[14] Dobson J concluded that the prospectus was untrue as to Lombard's liquidity position in three respects:[11]

(a) the omission of statements as to the lack of reliable forecasts about the timing of loan repayments;

(b) the omission of any acknowledgment of the reduction in cash on hand; and

(c) the omission of any reference to the concerns which the directors had as to liquidity.

On the Judge's approach, the general and conditional language of the relevant section of the prospectus understated the liquidity risk as perceived by the directors.[12] As he put it, their actual view was along the lines of:[13]

> … yes, it's likely to be very tight and we are worried about it, but we think we'll squeeze through, so we needn't raise unnecessary concerns.

The Judge gave an example of what he considered might have been said in the prospectus:[14]

> Since mid 2007 [Lombard] 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

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10 HC sentencing remarks, above n 2, at [42]–[43]; and CA judgment, above n 3, at [247].
11 HC judgment, above n 1, at [123].
12 At [92].
13 At [127].
14 At [121].

> 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 [Lombard'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, [Lombard] will be able to continue to meet its obligations as they fall due.

As the Judge recognised, there would not have been much point in issuing a prospectus in "such cautionary terms".[15] Doing so would probably have resulted very quickly in receivership. On our appreciation, the same consequence would have been probable if the directors had not issued a prospectus.[16]

[15] The Court of Appeal construed the relevant section of the prospectus as a statement to the effect that Lombard would be unable to meet its repayment obligations only if the level of reinvestment was extremely low, an assertion which the Court considered to be incorrect.[17] It also considered that the reference in the prospectus to the Board being "confident" that Lombard would have sufficient cash to fund all payments to investors was incorrect as not sufficiently or accurately conveying to investors the vulnerable state of Lombard and the directors' actual concerns.[18] As well, the Court placed emphasis on the failure to record the deteriorating position in relation to cash on hand[19] and the delays in loan repayments and associated discrepancies between forecasts and actual receipts.[20]

The section 58(4) defence

[16] Dobson J rejected the defence based on s 58(4) of the Securities Act. In doing so, he accepted that each of the defendants believed that the prospectus was

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15 At [122].

16 As the Court of Appeal pointed out, without a prospectus, Lombard would not have been able to raise funds from the public after 31 December 2007: see CA judgment, above n 3, at fn 54.

17 CA judgment, above n 3, at [143].

18 At [144].

19 At [150]–[152].

20 At [153]–[166].

true when it was issued and that they had confidence in the forecasts which were prepared by management.[21] He accepted that the directors acted honestly at all times and had given careful attention to the contents of the prospectus, as to which they had taken advice. However, he concluded that it was not reasonable for the directors to omit reference to the relative inaccuracy of the previous projections and likewise it was not reasonable for them to believe that they could omit references to the trend of reduced cash on hand.[22] As well, he considered that the reliance placed by the directors on the advice given by competent external advisers was not enough to provide a basis for reasonable belief which did not independently exist.[23]

[17] The Court of Appeal dismissed the challenge to this part of the Judge's reasons. It recognised that references by the Judge as to whether it was reasonable for the directors to believe that they could omit certain material did not coincide with the text of s 58(4), which is addressed to whether the directors believed on reasonable grounds that the prospectus was true. They saw this, however, as coming down simply to "infelicities of language" and were "not persuaded that the Judge misunderstood the correct statutory question".[24] The Court also concluded that Dobson J's rejection of the defence on the facts was open to him.[25]

The level of the appellants' culpability

[18] The judgment of the Court of Appeal is, in tone at least, more critical of the appellants than the sentencing remarks of Dobson J. The Court of Appeal referred more than once to the statement in the prospectus that the Board remained "confident" as to liquidity.[26] It may be that it is not easy to reconcile that statement with the findings made by Dobson J as to the actual states of mind of the appellants at the time.[27] The reality, however is that:

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21 HC judgment, above n 1, at [125].
22 At [126]–[127].
23 At [145].
24 CA judgment, above n 3, at [189].
25 At [194]–[198].
26 See [57], [97], [107], [142] and [144].
27 HC judgment, above n 1, at [125].

(a) Dobson J found that the appellants had acted honestly and the Solicitor-General did not challenge that conclusion in the Court of Appeal; and

(b) Dobson J also held that the appellants had not been grossly negligent but rather had been guilty of misjudgement only, a conclusion which was upheld on appeal.

It would be neither practicable nor fair for us to go behind those concurrent findings of fact. The result is that the appeal must be dealt with on the basis that the fault of the appellants is at the level of misjudgement.

The sentencing approach of Dobson J

[19] In his sentencing remarks, the Judge reviewed the facts briefly and then discussed the consequences of the offending. He referred to the many victim impact statements which had been provided to him from people who had invested in Lombard (often by renewing existing investments).[28] The Judge, however, noted that much of what was said in these statements was on the supposition that the directors had been fraudulent, which was not the basis upon which he had found them guilty.[29] He also made it clear that he did not place much weight on the amount of money invested after 24 December 2007.[30] On the other hand, he accepted the point made in a number of the statements that the trusted public reputations of the directors – presumably primarily a reference to Sir Douglas Graham and Mr Jeffries (both former Ministers of Justice) – influenced investor perceptions of Lombard.[31] He also noted that the failure of so many finance companies, including Lombard, had had implications in terms of general public confidence in financial institutions.[32]

[20] After noting the relevant purposes and principles of offending as stipulated in the Sentencing Act 2002, the Judge then discussed sentences which had been

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28 HC sentencing remarks, above n 2, at [9].
29 At [12].
30 At [63].
31 At [13].
32 At [13].

imposed in other cases arising out of failed finance companies.[33] He put to one side cases involving fraud and dishonesty. Of the other cases, he relied on the approach taken by Heath J in relation to a number of directors of Nathans Finance NZ Ltd:[34]

> 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.

[21] The Judge held that Sir Douglas Graham and Messrs Bryant and Jeffries had not intended to mislead, had set out to deal honestly with potential investors and had committed personal care and attention to the prospectus.[35] He was a little critical of their conduct between February and early April 2008 on the basis that "there is some scope for the Crown to argue that the nature of the misleading or inadequate information … was made worse by the passage of time".[36] He did not, however, see this as being of "material weight" in relation to culpability.[37] His critical conclusion was that he was not required to sentence on the basis of a starting point of imprisonment as their culpability was at the level of an error of judgment or carelessness rather than gross negligence.[38] He did not see any aggravating features in relation to the offending and he was also conscious of the adverse consequences for them of conviction.[39] On this basis, he considered that a combination of community detention and community work orders would be appropriate.[40]

[22] The Judge discussed at some length the relevance of the good character of the appellants.[41] He noted the reality that the investors who relied on the prospectus were also relying on the good reputations of the non-executive directors and that this

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33 *R v Moses* HC Auckland CRI-2009-004-1388, 2 September 2011 (affirmed in *Doolan v R* [2011] NZCA 542); *Davidson v Registrar of Companies* [2011] 1 NZLR 542 (HC); and *R v Ludlow* HC Auckland CRI-2008-004-20412, 26 January 2012 (affirmed in *Ludlow v R* [2013] NZCA 196).

34 *R v Moses*, above n 33, at [15]. This was referred to by Dobson J at [21] of the HC sentencing remarks, above n 2.

35 HC sentencing remarks, above n 2, at [38]–[39].

36 At [43].

37 At [43].

38 At [44].

39 At [45]–[46].

40 At [51].

41 At [54]–[64].

was particularly so in the case of Sir Douglas Graham. He decided in the end to make some allowance in their cases for good character.[42] He also made allowances for the offers by Sir Douglas Graham and Mr Bryant to pay reparation of $100,000 each.[43]

[23] In the case of Mr Reeves, the Judge noted that (a) he was in day-to-day management and control of Lombard, (b) some features of his conduct were not exemplary, and that (c) he had a prior conviction under the Securities Act for which he had been fined $1,000.[44] He considered that it might have been appropriate to adopt a starting point of imprisonment[45] but did not do so for reasons which in part related to Mr Reeves' health (both at the time of the offending and subsequently) and family responsibilities.[46]

The approach of the Court of Appeal as to sentence

[24] The Court of Appeal was not prepared to differ from Dobson J's assessment that the culpability of the appellants should be categorised as involving misjudgement only. It thus rejected the contention that they should have been sentenced on the basis of gross negligence.[47]

[25] The more important of the sentencing decisions which Dobson J had relied in the High Court, along with some subsequent decisions,[48] were reviewed by the Court of Appeal. In this exercise the Court identified the roles played by the offenders, their levels of culpability, the losses to investors and the starting point and end sentences. It is fair to say that none of the cases provided a particularly close analogy with the appeals before the Court of Appeal. In the cases discussed, the offenders had usually acted either fraudulently or with gross negligence, the losses tended to be greater and there had often been related-party lending.

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42 At [64].
43 At [85].
44 At [94].
45 At [100].
46 At [103]–[106].
47 CA judgment, above n 3, at [230]–[231].
48 Including *R v Ryan* [2013] NZHC 501; and *R v Banbrook* [2013] NZHC 462.

[26] The key reasoning appears in the following passage from the Court of Appeal judgment:

> [245] 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 starting points 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 does not fall into that category.
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> [246] 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 invested or reinvested on the strength of the truth of the statements in the amended prospectus, were substantial. 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 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 a major tightening of the financial markets that gave rise to a string of corporate collapses and led the directors to place the company into "running down" mode. These factors clearly showed that the company was in a particularly vulnerable state yet these matters were not brought home to investors as they should have been.
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> …
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> [248] … we accept the submission made on behalf of the Solicitor-General that 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 they were unlikely to re-offend. But, as Mr La Hood pointed out, the Solicitor-General does not contend that the sentence in this case needed to take into account personal deterrence. What was important was the need to deter others generally from offending in a similar way.
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> [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 in 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.
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> [250] We are satisfied these factors ought to have led the Judge to adopt a starting point of imprisonment in the case of each of the directors. To do so would have given effect to the important principle of consistency in sentencing. The differences we have noted from the circumstances of the

> offending in Nathans Finance and Bridgecorp do not mean that a starting point short of imprisonment was appropriate. Rather, those differences should have led to a reduction of the starting point from those adopted in those cases.
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> [251] We consider that the starting point should have been two years imprisonment for the three non-executive directors (Sir Douglas Graham, Mr Jeffries and Mr Bryant) and two and a half years imprisonment for Mr Reeves as executive director. Any lower starting points would be manifestly inadequate. Given the long established principle that, upon a successful appeal by the Solicitor-General, a sentence is adjusted by no more than the minimum extent necessary to remove the element of manifest inadequacy, we agree with the Solicitor-General's submission that the starting point should be adjusted to 18 months for the non-executive directors and to two years for Mr Reeves.

[27] The sentences of home detention which were eventually imposed were dependent upon sentences of imprisonment otherwise being appropriate. As will become apparent, we are of the view that such sentences were not appropriate. Accordingly, there is no necessity for us to refer to the steps by which the Court of Appeal arrived at the final sentences which were imposed.

Our approach

Overview

[28] The Court of Appeal considered that Dobson J had given insufficient weight to the sentencing purposes of accountability, denunciation and deterrence, the serious consequences for investors and the principle of consistency.

[29] We will discuss each of these points in turn.

The sentencing purposes of accountability, denunciation and deterrence

[30] On the findings of fact, the appellants honestly believed that the prospectus was true. They had taken their responsibilities seriously. Lombard had taken advice on the wording of the prospectus from external advisers. There were no related-party loans and the company was, at least in general, properly run. The trial judge assessed their culpability at the level of misjudgement. In the case of Mr Reeves, whose general culpability might otherwise have been thought to have been

somewhat greater than that of the other appellants, the prospectus was issued at a time when he was in bad health.

[31] Overall, the picture which emerges from the judgment and sentencing remarks of Dobson J is of honest men who took their responsibilities seriously but nonetheless, by reason of a misjudgement made in circumstances of pressure, were responsible for the issuing of a prospectus which was untrue as to liquidity.

[32] The culpability analysis in [246] of the Court of Appeal judgment is not factually incorrect but is expressed in a tone which, to our way of thinking, is not easily reconcilable with the findings of fact of the Judge which were either not in issue in the appeal or were upheld by the Court of Appeal. Although the principles of accountability and denunciation are engaged, we consider that their application must be tempered by the reality that, in the context of the culpability which customarily attracts sentences of imprisonment and home detention, the fault of the appellants was comparatively limited. And, as we will shortly explain, we are inclined to think that the Court of Appeal's assessment of the extent of the losses caused by the offending was too high.

[33] The consequences for the appellants of prosecution and conviction have been serious. There has been the expense and strain of the trial and subsequent appeal, and considerable reputational damage which has been exacerbated by some reporting of the case which has implied that they were found guilty of having acted dishonestly. The principles of deterrence are most applicable to offending which is either calculated or involves the offender having departed from what he or she recognised were appropriate levels of carefulness. They are not so obviously applicable to people who have tried to perform their duties but, as a result of a misjudgement, have failed to do so. As well, principles of deterrence must be applied in a proportionate way. Punishments which are disproportionately severe may result in too much deterrence, for instance discouraging people from taking on directorships.

[34] It is relevant too that the scope for deterrence is limited by changes in the finance industry and by new legislation which is likely to come into effect soon,

under which criminal liability for false statements in prospectuses will be confined to those who have acted dishonestly or recklessly.[49] In light of this, the scope for applying deterrence principles in the present context is problematic.

The serious consequences for investors

[35] On the basis of what was said earlier in the Court of Appeal judgment, it appears that the Court of Appeal may have treated as relevant the total losses suffered by investors in Lombard represented by the total amount owed as at 10 April 2008 of approximately $125 million less estimated recoveries of 15–22 cents in the dollar for secured investors.[50] And, in any event, the language of [246] of the judgment makes it clear that the Court of Appeal saw the consequences of the offending as extending to the money which was reinvested in Lombard after 24 December 2007.

[36] If a prospectus had either not been issued or, alternatively, had been issued in the terms proposed by the Judge, it is very likely that receivership would have soon followed. It is therefore far from clear that those who reinvested in the period 24 December 2007 to 2 April 2008 have necessarily suffered significant losses by reason of the prospectus having been issued in the terms that it was. For this reason, it is difficult to be confident that the actual losses caused by the appellants' offending much exceeded the $1.7 million of new money which was invested during this period (less any recoveries which may be made). Although such losses are considerable, they are less than those in other comparable cases.

The principle of consistency

[37] Offences under s 58 of the Securities Act can involve fraud. Characteristically, s 58 prosecutions are brought where substantial losses have been

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[49] The Financial Markets Conduct Act 2013, passed in September 2013, reduces the scope of criminal liability for disclosure contraventions. Whereas the (soon to be repealed) Securities Act 1978 criminalises material misstatements in offer documents regardless of whether there was an intention to deceive, the new sanction provisions under Part 8 of the Financial Markets Conduct Act place an increased emphasis on civil liability for contraventions of the regime. Serious criminal offences are reserved for only the most serious violations of the law, such as where there has been intentional or reckless misconduct.

[50] CA judgment, above n 3, at [205]–[206].

incurred. So the five year sentence maximum provided for by s 58 must encompass offending of far greater culpability than that of the appellants.

[38] On the basis of the comparable cases relied on by both Dobson J and the Court of Appeal, the sentences imposed by Dobson J were not out of line with existing practice. For this reason, the principle of consistency did not operate in favour of the Solicitor-General's appeals.

[39] It is not easy to think of cases from any area of the criminal law in which imprisonment has been seen as an appropriate response to offending where culpability arises out of a misjudgement by people who took their responsibilities seriously and where the consequences have been economic and have not involved physical injury or death. For this reason we consider that, if anything, the principle of consistency supports the approach taken by Dobson J.

Our overall assessment

[40] As will now be apparent, we are of the view that the reasons given by the Court of Appeal did not warrant their conclusion that sentences of imprisonment were appropriate for the offending of the appellants.

Disposition

[41] Accordingly, the appeals are allowed, the sentences imposed by the Court of Appeal are set aside and the sentences imposed by Dobson J are restored.

Solicitors:
Graham & Co, Auckland for Appellant D Graham
Henderson Reeves Connell Rishworth, Whangarei for Appellants M Reeves and W Jeffries
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