IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CRI-2010-085-2538
[2012] NZHC 575

THE QUEEN

v

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

Hearing: 29 March 2012

Counsel: C R Carruthers QC and D R La Hood for Crown
P J Davison QC and R C Woods for Graham
S M Henderson for Reeves
D G Hurd and D H O'Leary for Jeffries

Sentence: 29 March 2012

SENTENCING NOTES OF DOBSON J

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[1] At the conclusion of an eight week trial I found each of you guilty of four counts under s 58 of the Securities Act 1978 (the Act). The charges related to your responsibility as directors of Lombard Finance & Investments Limited (Lombard). Those were for misstatements in offer documents issued by Lombard in December 2007. Consistent with the guilty findings in my verdicts, I now formally enter convictions on each of those counts.

[2] The Act makes no attempt to limit the risks that directors might lawfully take with money raised from the public. Nor, obviously, does it impose anything in the

nature of a guarantee by directors that investors will get their money back. What it does is to require directors to make adequate disclosure to the public when seeking money for investment in their company, to enable potential investors to make an adequately informed decision about the risks involved in making any such investment.

[3] The high importance of adequate disclosure was reinforced by the creation of a criminal offence for issuing offer documents that did not provide that. That has been the law in New Zealand since 1978. You, as a board, would have been as aware of those provisions 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 August 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.

[4] Reference has been made to the prospect that this part of the securities law may soon change, with the Financial Markets Authority proposing to restrict criminal conduct to cases involving deliberate or reckless misstatements or some such formula that is still subject of debate. However, I am obliged to deal with your offending on the law as it stands and, more importantly, to reflect the consequences of the offending in light of the law as it stood at the time.

[5] 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 that the Lombard Board had serious and constant concerns at the liquidity squeeze confronting the company at the time. Further, in the months before December 2007, predictions of the level of loan repayments had been highly unreliable when Lombard depended critically on projections as to the level and timing of major loan repayments in order to maintain its liquidity. You had decided over previous months to conserve liquidity as much as possible and in absolute terms the cash in the bank was showing a substantial and virtually uninterrupted downwards trend. The offer documents made no mention of these important factors. As a result, readers of the offer documents had to form their

views about the liquidity risk they would expose themselves to on inadequate and misleading information.

[6] The prosecution does not have to establish reliance on a misleading offer document as an element of charges under s 58 of the Act. 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.

[7] Investors did, however, subscribe for some $10.45 million of secured and unsecured debenture stock and capital notes in Lombard during the currency of the offending offer documents between 24 December 2007 and early April 2008. Of that amount, some $8.7 million amounted to re-investment by existing investors, so that some $1.7 million were by way of new investments.[1]

[8] The amounts I have just cited exclude the $2 million re-invested as a result of your decision on behalf of Lombard's parent company, to invest in secured debenture stock of $2 million at the end of March 2008.

[9] The very serious range of consequences for those who relied on the misleading offer documents are graphically illustrated by the 39 victim impact statements that have been completed by people who invested in Lombard between the end of December 2007 and early April 2008. The majority are retired people who were critically reliant on getting their money back, if not the interest they anticipated earning. The crushing impact of the financial losses, and the emotional stresses caused by it, should not be underestimated. In a small number of cases, the pressure of the losses has been aggravated by the investors being Christchurch residents who have suffered further in the Christchurch earthquakes. In one case, investors were a share-milking couple. They were some distance up that classic ladder towards becoming dairy farmers that involves years of hard slog to achieve

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1 DV3/8.

financial independence. That couple had trusted all of the savings from years of hard work, and which were earmarked to begin the process of acquiring a herd of their own, only to have their dreams shattered. And there are a range of other variants on the experience of Mrs Hooker, whose victim impact statement was read to the Court this morning.

[10] I intend no disrespect to the victims in describing them, as a group, as relatively unsophisticated investors, many of whom would not have had sufficient money available for investment to warrant retaining a sharebroker or other full service investment adviser to manage their investment decisions. Many, sadly, did not spread their investments, so that the loss of their nest eggs is an even harsher blow.

[11] The financial harm inflicted predictably leads also to emotional stress and potentially to depression.

[12] Those victim impact statements also include trenchant criticisms alleging deceit and dishonesty on your part, when I am bound to say that such criticisms are not borne out by the findings at the trial. A possible explanation for those criticisms from aggrieved investors may be that their impressions depend on fragments of media reporting which has, at times, been at least misleading. The more objective of the victims might not attack your honesty had they sat through the whole trial.

[13] On a broader front, there is the harm done in an institutional sense to the New Zealand community's confidence in savings and investment. You cannot be singled out for any responsibility in that regard because loss of confidence is an industry-wide phenomenon. However, as the victim impact statements illustrate, your personal reputations meant that Lombard was trusted by many small investors above other finance companies. The greater part that a sense of unjustified reliance on trusted directors plays in losses, the greater the impact in denting confidence in savings and investment generally.

[14] Parliament's view of the relative seriousness of offending against s 58 is reflected in the current maximum penalties provided in s 58(5) of the Act for

convictions on indictment which are imprisonment for a term not exceeding five years or a fine not exceeding $300,000, plus $10,000 a day for continuing offences.

[15] Section 7 of the Sentencing Act 2002 specifies eight purposes for the sentencing exercise that a court undertakes. These include, for instance:

- holding an offender accountable for harm done to victims and to the community;
- promoting a sense of responsibility for, and acknowledgement of, harm done;
- denouncing the conduct involved in the offending;
- deterring offenders and others from committing similar offences; and
- providing reparation for harm done by the offending.

[16] Then in s 8, the Sentencing Act sets out 10 principles that a court must take into account, with the relative importance of various of those principles depending on the circumstances of each sentencing. For instance, the Court must take into account:

- the gravity of the offending in the particular case, including the degree of culpability of the offender;
- the seriousness of the type of offence in comparison with other offences;
- the relative severity of this offending compared with the most serious cases involving the particular type of offending;
- the effect of the offending on victims; and then
- ultimately, that the Court is to impose the least restrictive outcome that is appropriate.

[17] That last principle involves taking into account the hierarchy of sentences and orders that can be imposed by a Court which is set out in s 10A of the Sentencing Act. The various forms of sentences, listed from the least restrictive to the most restrictive, include sentences of a fine and reparation, community-based sentences of community work and supervision, community-based sentences of intensive supervision and community detention, home detention and then, ultimately, imprisonment.

[18] The process for sentencing requires me first to identify the appropriate starting point which is intended to reflect the relative seriousness and circumstances of the offending. Having done that, I am then required to consider any circumstances personal to you as the offender, that either aggravate the relative seriousness and therefore justify an increase in sentence, or mitigate against its seriousness and therefore justify a discount. The sections I have referred to provide a statutory context for a reasoned consideration of both the starting point, and then the end sentence.

[19] Guidance on sentencing levels is generally drawn from cases treated as comparable and courts do strive to achieve consistency between sentences for comparable offending. Here, the Crown and counsel for each of you take very different views as to the comparability of the sentencing of directors of other finance companies convicted of offences under the same section. I am sorry but to relevantly consider those, I have to give you a sketch of the circumstances of those cases that have been urged on me.

[20] First in this regard is the approach of both the trial Judge and the Court of Appeal in sentencing directors of Nathans Finance Limited after a Judge alone trial.[2] In that case, a series of misleading offer documents were before the public from 14 December 2006 until 20 August 2007. Heath J calculated that as a period of 250 days, and observed that where an offence under the section is a continuing one, a further fine not exceeding $10,000 per day may be imposed. If that approach to the maximum penalty was adopted in the present circumstances, the offending offer documents were before the public from 24 December 2007 until either 2 or 3 April

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2 *R v Moses* HC Auckland CRI-2009-004-1388, 2 September 2011; *Doolan v R* [2011] NZCA 542.

2008, which, as Mr Hurd calculated, amounts to either 100 or 101 days and therefore conceptually continuing offences throughout that period would raise the maximum financial penalty to some $1.3 million.

[21] In terms of the relative seriousness of offending within the categories that might arise under s 58, Heath J observed a ranking:[3]

> … 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.

[22] 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.

[23] Added to that will be the length of time for which an offending offer document is before the public and the extent of money invested in reliance on it, related to the extent of losses suffered by those who invested in reliance on the offending offer documents. Heath J treated a range of circumstances as amounting to gross negligence on the directors' part, that in the circumstances at least of Nathans he saw as akin to recklessness.[4] The aspects of the performance by those Nathans directors that troubled the sentencing Judge were:

- their failure to meaningfully consider whether the offer documents conveyed materially accurate information;

- the directors' undue reliance on others; and

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3 At [15].
4 At [16], [94].

- their failure to see anything wrong in using monies provided by investors for Nathans' business, being diverted for the purposes of Nathans' parent company.

[24] The Judge acknowledged that there was no element of dishonesty but that the directors were inept. The gross sum invested in Nathans whilst the offer documents were before the public was approximately $66 million.

[25] Heath J settled on starting points of between two years and nine months' and three years four months' imprisonment.[5] In the case of each of the three directors, he found mitigating factors personal to the offenders that resulted in final sentences between nine months' home detention and 300 hours' community work, and two years and four months' imprisonment. In all cases, reparation was ordered and those amounts ranged from $150,000 to $425,000. Those sums reflected relative abilities to pay, rather than any measure of relative responsibilities for the losses involved.

[26] The Court of Appeal decision on two of the Nathans directors' appeal against sentence essentially upheld the approach that had been adopted by Heath J. In the context of a starting point for one of those directors, Mr Moses, of three years and three months, the Court of Appeal commented that "if anything, it was on the light side".[6]

[27] Although Heath J accepted there was no intention to mislead, the misstatements involved an undisclosed extent of related-party transactions. However those circumstances are viewed, it raises the spectre of a measure of moral opprobrium in the directors' judgement being compromised by having interests on both sides of the fence.

[28] A further sentencing treated by the Crown as comparable is that of Mr Bruce Davidson on his convictions as chairman of Bridgecorp Limited and Bridgecorp Investments Limited. The factual circumstances on which Mr Davidson was sentenced in October 2011 were as agreed between the parties for the purposes of

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5 A further director, Mr Hotchin, had earlier pleaded guilty. At his sentencing, the Court adopted a starting point of three years' imprisonment (see [48]).

6 *Doolan v R* [2011] NZCA 542 at [43].

that sentencing and may not reflect the findings that are made in respect of Mr Davidson's co-directors who have defended the charges in a Judge alone trial that has proceeded in the Auckland High Court.

[29] The charges Mr Davidson pleaded guilty to under s 58 of the Act related to offer documents that were before the public for more than six months, and resulted in new investment and re-investments of more than $118 million. There were four types of misstatement in the offer documents. First, undisclosed related-party lending which, had it been correctly categorised, would have triggered a breach of the Bridgecorp Trust Deed. Secondly, a claim to have followed good commercial practice and internal credit approval policies when significant lending did not comply with such policies. 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.

[30] As chairman, Mr Davidson accepted numerous relevant omissions in not monitoring the company's performance, although he complained that in some respects he had positively been misled by others.

[31] Andrews J, who sentenced Mr Davidson, drew analogies with the relative seriousness of the offending by the Nathans' directors and adopted a starting point of three years and three months' imprisonment. Because Mr Davidson and Bridgecorp had not traded on his previous good character in raising money, she saw that as a mitigating factor able to be taken into account with his deep remorse and preparedness to pay $500,000 in reparation. In addition, he was given credit for his guilty pleas, resulting in what would have been an end prison sentence of one year and eight months. That was substituted with nine months' home detention plus 200 hours of community work, together with his commitment to pay $500,000 in reparation.

[32] A further sentencing under this section of the Act is that of the sole director of National Finance 2000 Limited.[7] The case involved a smaller scale of losses but a

[7] *R v Ludlow* [2012] NZHC 360, 26 January 2012.

greater level of personal culpability because of deliberate dishonesty involved in making misstatements for the purpose of covering up the fraudulent use of investors' funds.[8] The Judge there adopted a starting point of four years' imprisonment.

[33] By using these recent sentences as comparators, and ranking the relative seriousness of your offending in this case, the Crown submits that the appropriate starting point for the non-executive directors is between two to two and a half years' imprisonment, and that in the case of Mr Reeves a higher starting point ought to be in the vicinity of two years and nine months' imprisonment. The Crown argued that your offending is only marginally less serious than that of the Nathans' directors and Mr Davidson, appropriately reflected in the somewhat lower starting point for you between two and two and a half years' imprisonment. Although the only misstatement I found established here related to Lombard's liquidity, Mr Carruthers QC has today argued that because of its over-arching importance, that did not make this case less serious than the others where multiple topics were the subject of material omissions or misstatements. I cannot accept that characterisation.

[34] On your behalves, counsel have submitted:

- First, that your convictions result from errors of judgement that reflect substantially lower culpability than any case of gross negligence or conduct bordering on recklessness.

- Second, that the offending here is less on the criteria of the period during which the offer documents were before the public, and the amount of money raised during the relevant period.

- Third, that the numerous respects in which the offer documents in both the Nathans and Bridgecorp cases were found to be misleading reflect substantially more serious forms of misleading than the single matter of liquidity, about which all of the Lombard directors had genuine views.

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8 At [23].

- Fourth, the Nathans and Bridgecorp directors had acted in dereliction of their duties as directors with relatively widespread impact on the quality of the offer documents, whereas the Lombard directors conscientiously attended to a detailed consideration of the content of the prospectus.

- Fifth, in the Nathans case, the directors had rejected professional advice on the appropriate scope of disclosure, said to occur in relation to content where greater disclosure was seen as prejudicing the prospects of raising money, whereas the Lombard directors were scrupulous in seeking and following expert professional advice.

[35] In addition, it was submitted that in a sentencing indication hearing that had preceded Mr Davidson's sentencing, relevance had been attributed to extensive criticisms of him in his role as chairman of Bridgecorp by Miller J in a separate decision upholding a ban on Mr Davidson from holding positions as a company director.[9] No such criticism of the directors' conduct could be made here, and instead reference was made to comments on the competence of the directors by one of the auditors, Mr Dinsdale, and in a different context by the company secretary.

[36] I accept that cases involving deliberate dishonesty or fraud, such as that of the director of National Finance 2000 Limited, do not provide a helpful point of comparison. As to the Nathans and Bridgecorp offending, I accept that the context in which it occurred, and the numerous circumstances that your counsel have contrasted against more innocuous circumstances here, do require them to be recognised as involving substantially greater culpability. Mr Davison QC has submitted custodial sentences should be reserved for cases where there is moral culpability deserving condemnation and deterrence, and that your offending does not go that far. That approach oversimplifies the comparative analysis, and risks understating the seriousness of the offending here, but the materially different level of culpability certainly justifies considering the starting point afresh in this case.

[37] 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

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9 *Davidson v Registrar of Companies* [2011] 1 NZLR 542 (HC).

Nathans case.[10] 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.

[38] 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. 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.

[39] 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. 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.

[40] The Crown also characterised the misleading statement in the offer documents occurring in circumstances that it involved a breach of trust, which is a concept recognised as an aggravating factor in s 9(1) of the Sentencing Act. Some of you volunteered that you saw your position as directors being akin to the position of trustees in respect of investors' money. That was intended to convey that you assumed responsibilities in the governance of Lombard to protect their interests when investing their money.

[41] I do not accept that that aspect of the relationship between the directors and investors means that this offending involved a "breach of trust" in the sense that concept is used in the Sentencing Act. In commercial terms, the relationship between directors of a finance company and investors is far more at arm's length

[10] As quoted at [21] above.

than the traditional circumstances of professional adviser and client, where trust and reliance are fundamental to the relationship, and offending can sadly occur where the client is vulnerable if that trust is misplaced. Similarly, there are no possible overtones of abuse of position of trust which is an aggravating feature of offending involving abuse of young or vulnerable victims. Those are the sorts of situation contemplated as aggravating circumstances in the Sentencing Act and any relationship between the directors and investors here clearly falls outside it.

[42] The Crown argues that you must have appreciated the need to withdraw the offer documents, or at least qualify the confident assurance that had been provided in December 2007 about Lombard's liquidity, when that should have been plainly obvious to all of you by mid or late February 2008. The Crown argues that is an aggravating factor in the offending. The anguish and anger expressed in some of those victim impact statements where investors invested or re-invested their money with Lombard in its last month before receivership reflect the added concern that you must all have appreciated that the liquidity assurance was wrong by then, but you failed to act. Arguably, a moratorium would only be considered when there was a real prospect of not being able to meet Lombard's obligations as they fell due, and a moratorium was in prospect for some weeks before you stopped accepting money.

[43] The opposite construction of events between February and early April 2008 has been advanced on your behalf: it is argued that you competently recognised the need for an independent review of the recoverability of the major loans, and moved in a responsible way to get better information by giving fresh instructions to KordaMentha. Further, that you moved promptly and in a responsible way once KordaMentha was able to provide an initial report. I consider there is some scope for the Crown to argue that the nature of the misleading or inadequate information conveyed by the offer documents was made worse by the passage of time. However, it is again an error of judgement and is not deserving of any material weight as an aggravating factor in assessing the relative seriousness of the offending. As with the other aspects of this analysis, I make these observations solely to evaluate the relative seriousness of the conduct in breach of s 58 of the Act, and they cannot have application in assessing the quality of your conduct in any other context.

[44] 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.

[45] As to aggravating circumstances of the offending, the circumstances of Messrs Moses and Davidson as chairmen of directors of the respective Nathans and Bridgecorp companies was treated as attributing a higher degree of responsibility for organising meetings, ensuring that the board was adequately informed and had adequate opportunities to consider and debate matters likely to be relevant to the accuracy of offer documents issued. I am not satisfied in the present case that Sir Douglas was responsible for any omission to lead the Board and afford it sufficient opportunities to consider matters relevant to the accuracy of the content of the offer documents. None of the directors suggested any deficiencies in this regard and the company secretary was impressed that Sir Douglas did his job as chairman in a thorough way. The Crown did not contend for any additional level of responsibility for the omission in the case of Sir Douglas. Therefore your role as chairman does not warrant any greater sentence.

[46] As to the need to assess deterrence and denunciation, in your cases I cannot do that without having regard to your previous reputations and the impact on them of the fact of these convictions. Considering first the consequences for Sir Douglas and Mr Jeffries, the blight caused by these convictions on your previous good reputations as former Ministers of the Crown, holders of other public offices and leaders of your communities is measurably more punitive than for previously respected businessmen or professional advisers.

[47] In the Nathans case, any sentence short of imprisonment was seen as inadequate to reflect the purposes of holding the offenders accountable for the harm done, to denounce the conduct and to deter the offenders and others. Whilst it is invidious to rate the relative value of pre-conviction reputations of company directors from different backgrounds, I am satisfied that the fact of convictions in the case of each of the non-executive directors in this case is of itself a more potent form of deterrence and denunciation than the additional consequences following from whatever sentence is imposed. I am satisfied that until now, each of you has jealously guarded good reputations as possibly your single most valued asset in your professional careers. These convictions will severely dent those good reputations, whatever gloss you or your supporters may put on the circumstances in which the convictions have occurred.

[48] I accept that your convictions will deter others in similar situations to yours, from taking on directorships at all where such offer documents are likely to be involved. That is not deterrence in the form contemplated by the Sentencing Act, for example, for dishonest and violent offenders. For those individuals qualified to take on such directorships, and who do so, then the extent of your sentences will be secondary as a deterrent consideration to the fact that you have been convicted.

[49] So, too, as a matter of denunciation, I consider the level of denunciation reflected in the fact of conviction bites harder on you three than it does for those who have been in the mêlée of fund raising as a core part of their commercial lives. It is more important in this sentencing exercise that the sentence be proportionate to the offending, than that its apparent severity needs an additional deterrent signal to be sent to other directors.

[50] Mr Bryant, your public reputation cannot be seen in the same light as that of former Cabinet Ministers and holders of other public offices. However, it is abundantly clear to me that in all of the array of assignments you have taken on in your professional life, you have traded more than anything on your reputation for integrity and careful attention to detail. Whether it is relevantly justified or not, the inevitability is that these convictions will seriously dent your former reputation. So, for anyone in vaguely similar circumstances to yours, again the fact of the

convictions is a compelling deterrent, irrespective of the extent of penalty imposed in relation to them.

[51] I am accordingly not inclined to treat the requirement for deterrence and denunciation as warranting any increase from what would otherwise be the appropriate starting point for your sentences. Having regard to all of these considerations, I see the appropriate starting point for the non-executive directors as being a combination of community detention and community work. The maximum period of community work to which I could sentence you is 400 hours. Having rejected any more restrictive sentence up the hierarchy of sentences as not being necessary, I treat a combination including community work as appropriate because, notwithstanding the concerns I have for the victims who invested during the period of the misleading offer documents, there is a sense in which such offending should be recognised as offending against the community, and completing a sentence of community work will require each of you to confront some aspects of the community, as directed by those supervising your sentence.

[52] Having settled that starting point, it is appropriate to consider any aggravating or mitigating factors personal to each of you.

[53] I am satisfied that there are no relevant aggravating factors.

[54] You each claim as a significant mitigating factor your previous good records. Each of you has previously enjoyed very widespread respect, including recognition for significant public service in the case of Sir Douglas and Mr Jeffries, and high personal integrity in the case of all of you. I have received testimonials that summarise your good repute in fulsome terms.

[55] Sir Douglas, yours has been an extraordinary and special contribution to the processes for settlement of Māori grievances, as the highest point in a distinguished political career.

[56] Mr Jeffries, you have contributed over the majority of your adult life to local and national politics, culminating in a range of Cabinet positions for which you are

widely respected. Since leaving Parliament you have led regulatory bodies in relation to real estate agents and motor vehicle dealers, and have headed the Transport Accident Investigation Commission.

[57] There is no doubt that those good reputations have been relied on by Lombard as a powerful tool in soliciting funds from investors. Sir Douglas, I am satisfied that your reputation was a very important, and possibly the single most important, factor relied upon by investors in Lombard. That is consistently demonstrated by the terms of the offer documents, incidentally by the DVD, by the witness statements admitted without challenge, and by the victim impact statements. The comfort that investors could rely on you was supplemented to a material extent by the additional assurance from the presence of Mr Jeffries on the Board.

[58] Mr Bryant, you would not claim to be as widely known as the former Cabinet Ministers, but the aspects of your professional and personal background emphasised in the description of you in the offer documents similarly invited trust, particularly in the company of those other non-executive directors.

[59] The Sentencing Act requires the Court to take into account any evidence of an offender's previous good character as a mitigating factor.[11] There has been some difference in judicial views on the relevance of previous good character when sentencing finance company directors for convictions under s 58 of the Act. One view is that previous good character cannot count in the conventional way as a mitigating factor when that good character has itself been relied on in raising money in reliance on offer documents that are subsequently found to be misleading. That concern was raised in respect of Mr Hotchin, a director of Nathans who elected to plead guilty and was sentenced prior to trial of his co-directors by Lang J. Although the point did not apply, agreement with that approach was suggested by Andrews J in sentencing Mr Davidson.

[60] Heath J took the opposite view in sentencing the remainder of the Nathans' directors:[12]

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11 Sentencing Act 2002, s 9(2)(g).

12 *R v Moses* HC Auckland CRI-2009-004-1388, 2 September 2011 at [54].

> … It is one thing to deny credit for past good character in a case where an offender has used a prior reputation to instil confidence in a person from whom he or she obtains money by dishonest means. In such a case the prior good character is used for a dishonest purpose. In a case such as this, there was no intention to use your good reputation to cause loss to others. It happened because of your failure to meet required statutory standards of competence. In those circumstances, I see no reason why some allowance should not be made for past good character.

[61] The concern not to give credit in a way that lessens the sentence on account of good character, when it is precisely that good character that encouraged victims of the offending to invest, is more acute here than in previous cases. I agree with Heath J that there is no justification for disregarding previous good character entirely, merely because its existence was a contributing circumstance to the offending. On the other hand, it would be invidious, and potentially in conflict with the obligation to acknowledge the interests of victims, if the sentence that was otherwise appropriate is avoided on account of previous good character, even although the existence of the offender's good character contributed to the scale of the offending.

[62] Mr Hurd has cautioned me against double-counting against the credit available for previous good character. He suggested that the amount of money raised by an offending offer document is one of the objective measures of the relative seriousness of the offending, but if that amount has been substantially contributed to by the draw-card of the claimed good character of the directors, then the starting point does reflect the consequences of use of that good character. He argues it would be "double-counting" to deny the director the credit of his personal circumstances as a mitigating factor, if the measure of that discount is then reduced by virtue of the fact that it was exploited by the company in seeking investments.

[63] His point is a subtle one. Here, I am satisfied that Lombard would not have raised the amount of approximately $10 million when it did, were it not for the involvement of Sir Douglas and, to a lesser extent, Mr Jeffries. However, the amount of $10 million has not itself featured largely in the way I rate the relative importance of the offending, and I am satisfied that consideration of previous good character as a mitigating factor should take into account the exploitation of that good

character in a way that appropriately reflects the starting point may also have been influenced by it.

[64] Without downplaying the importance that good character and public service in previous life can have as a mitigating factor in sentencing, I am satisfied that it should not apply here to reduce the appropriate sentence to the full extent that exemplary character would otherwise attract, if the good character of the non-executive directors had not played such a material part in raising funds from the victims. Although your previous good characters are particular to each individual, in the end I can treat each of the non-executive directors in the same way on this point. I recognise your previous good character as a mitigating factor warranting a 15 per cent reduction from the starting point.

[65] Now, demonstrated remorse for offending is a discrete factor to which the Court must have regard under s 9(2) of the Sentencing Act, where it applies. In the criminological analysis, credit for remorse is linked to recognising the wrongdoing, acknowledging the harm that that offending has done to victims, and the step it may represent towards rehabilitation of the offender. Classically, remorse is indicated by relatively early guilty pleas and may be associated with offers to make amends.

[66] Each of you here claim to have shown remorse in ways that justify it being taken into account as a mitigating factor. In the cases of Sir Douglas and Mr Bryant, acknowledgements of remorse are linked to your indications of preparedness to pay reparation to the victims and I will deal with it in that context.

[67] For Mr Jeffries, relevant remorse is said to be demonstrated by the grave regrets he has for the losses suffered by all those who invested in Lombard, by the ways in which he "fronted up" to investors in the parent company, made himself available to the receivers to assist in realisation of the assets, and has expressed his deep regret for all the losses.

[68] The Crown does not accept that that constitutes remorse that is relevant as a mitigating factor for the offending because it is only regret for financial losses suffered, which Mr Jeffries prefers to characterise as caused by circumstances either

beyond his control or, at least to an extent, unrelated to the content of the offer documents. It is remorse or regret in the sense that Mr Jeffries shares and identifies with investors' predicaments because of the failure of Lombard. It does not amount to any acknowledgement of wrongdoing on his part that has harmed the victims, and I am satisfied that the Crown is correct in excluding the sentiments in the form he conveys them as a form of remorse that ought to be recognised as a mitigating factor on sentencing.

[69] As I indicated by way of a Minute issued at the beginning of this week, the provisional indication I gave at the time of delivery of the verdicts in this case that I was likely to find non-custodial sentences to be adequate, depended on the expectation that each of you were in a position to make meaningful payment as a part of the sentencing exercise. I had gathered that impression of your financial capacity from the description of your situations and your other work interests that had been traversed during the trial. I also made an assumption that your stance on sentencing was likely to include an offer of reparation as has occurred in other cases. I now accept that that was an inappropriate assumption.

[70] You will all know that a convicted person cannot buy him or herself out of a sentence at the appropriate level of seriousness by making significant reparation. However, the extent of reparation in a particular case can be a relevant factor in determining the overall outcome.

[71] In cases where a conviction has resulted from honest conduct in a strict liability situation with no intention to mislead, and where the primary consequence of that criminal conduct is a financial loss, the appropriateness of acknowledging the harm caused by that conduct or omission by payment of money is, in my view, more relevant than in virtually all other sentencing contexts. Because the context is a financial transaction initiated in the broad sense by the directors issuing offer documents, reparation is more relevant in assessing an overall outcome than, for example, an offer to pay reparation for physical injury caused in the course of dangerous driving.

[72] Substantial sums in reparation were a feature of the sentencing for Mr Davidson and the Nathans' directors. Given the scale of losses in such cases, the amount paid to each of the victims may appear to be token, but where the offending has primarily caused financial pain to the victims, it is appropriate that the offenders also experience a measure of financial hardship. Reparation, whilst compensatory rather than punitive, is the more appropriate form of a financial component of sentences in cases like this one.

[73] Each of you has provided a statement of your financial position. Whilst not formally making it as an offer of reparation, Mr Davison's submissions on behalf of Sir Douglas and Mr Bryant have indicated that in each case you would commit to a payment of $100,000 by way of reparation if the Court considered that appropriate.

[74] In Sir Douglas's case, you characterise the impact of paying that amount as "pretty well cleaning me out" in the sense of exhausting your presently available resources. Your statement of financial position does not suggest that further assets are likely to become available to you in the foreseeable future.

[75] Mr Bryant, in your case, you have not disclosed assets that would enable you to make a payment of that amount from your own resources, but you are prepared to borrow to make such a payment, again if the Court considers reparation of that amount an appropriate and material element of the end sentence for you.

[76] The Crown questions whether amounts of $100,000 are at the limit that each of you could fund, if pushed. In Sir Douglas's case, the residential property you live in is owned by a trust in which you are not a beneficiary, it having been transferred into the trust by your wife. I am satisfied from your overall position that the commitment of $100,000 does represent a meaningful commitment that puts your financial resources under substantial pressure. The Crown does not appear to contest the submission that these convictions will largely wipe out your ability to earn substantial income from now on.

[77] In Mr Bryant's case, the Crown's concern is that assets in a trust in which you are a discretionary beneficiary are sufficient for that trust to borrow more than will

be needed for you to fund the $100,000 reparation payment. Again, that concern is somewhat over-reaching. It will cause substantial pressure on the Bryant family's financial situation for you to raise $100,000, and you too are reflecting a measure of sharing the financial pain by paying that amount.

[78] The prospect of payments to victims of the offending, in the way which you two have suggested, is an acknowledgement of the harm that has been caused to them. It can be seen as a form of remorse, when accompanied by an acknowledgement that the loss follows from conduct found by the Court to be criminal. Having rejected the prospect of a discrete mitigating factor on account of the regret you have expressed for the predicament of all investors in Lombard, it is appropriate to add somewhat to the significance of reparation in your cases, because it demonstrates a form of remorse, even if the acknowledgements you have otherwise made do not qualify as remorse in the sense relevant for the Sentencing Act.

[79] Mr Jeffries, you resist any payment by way of reparation. First, on the basis that you do not have the financial resources to make such a payment. Secondly, on the basis that you philosophically disagree with a payment being volunteered to victims as involving the imposition of different standards of justice depending on means, which Mr Hurd has described as being anathema to you. You also resist paying reparation because you consider my verdict wrong and intend appealing it, so reparation is, on your view, not sincerely and responsibly open to you.

[80] You would also resist paying reparation because you do not accept that any of your conduct for which you are convicted is causative of loss to the investors. You treat their losses as arising from a whole range of factors, implicitly the majority of them at least being beyond your control. I have considered the causal link between the misstatement in the offer documents for which you have been found guilty, and the losses suffered subsequently by those who invested and re-invested whilst the offer documents were on issue. I am satisfied that there is a more than sufficient clear causal link between the relevant omissions that I have found were made out by the Crown, and the investors making their investments during the currency of your assurance that you were confident of the adequacy of Lombard's liquidity.

[81] I do not accept that a commitment to pay reparation in the context of an intended appeal could in any way compromise the scope of arguments that might be pursued on appeal, both against conviction and, if appropriate, against sentence.

[82] A further reason for resisting an offer to make reparation is that you are concerned, in the context of civil proceedings against the directors, that any offer of reparation might be treated as an admission of liability affecting your absolute position in those proceedings, and also risking an impact on the availability of any insurance cover in respect of such civil liability. None of those fears is warranted, at least in the circumstances where reparation is ordered by the Court as will be the outcome here.

[83] The practical position, however, is that your statement of assets and liabilities raises a real issue as to whether you are in a position to pay any substantial amount by way of reparation, and I am not in a position to make an order for reparation unless satisfied of the reasonable prospects that the sum ordered can be paid. In those circumstances, I exclude the prospect of a reparation order in your case.

[84] The consequence is that I have to settle on the additional discount that is appropriate for Sir Douglas and Mr Bryant to reflect all aspects of what is involved in payment of reparation, which will be a discount that cannot apply to Mr Jeffries.

[85] I have carefully considered the relevance of reparation here, and what is signified by the commitment to pay it. I have had regard to the discount that Andrews J recognised for Mr Davidson's commitment to pay $500,000 of reparation in the Bridgecorp situation. I consider that the reparation aspect of sentence for Sir Douglas and Mr Bryant warrants a further discount of 25 per cent. I have had regard to Mr Davison's plea that, in proportionate terms, sums of $100,000 are more in relation to the losses suffered by investors in the period of the Lombard offer documents than the portion that reparation in the Nathans and Mr Davidson's cases will contribute to the losses suffered by the comparable group of investors in those cases. I am not persuaded that the materiality of reparation can be measured by any comparison on an arithmetic basis, but it is certainly a counter against the Crown's reluctance to recognise these sums as sufficient.

[86] As to other personal circumstances, Sir Douglas, you are now 70 and have a diabetic condition that is controlled in part by regular exercise. You live in a home in Auckland owned by a family trust. The Probation Officer's recommendation was for community detention, together with community work and reparation, and yours is an appropriate address for an electronically monitored sentence.

[87] Mr Bryant, you are 68 and reside in Masterton. You have two serious health conditions, one of which is potentially life-threatening. Your condition appears to require on-going medical attendances, but you are otherwise in a position to serve a community sentence. The Probation Officer's recommendation in your case was for a sentence of community work, and a fine.

[88] Mr Jeffries, you are 66 and reside in Upper Hutt. You have no physical impediment to serving a community sentence and in terms of the pre-sentence report you expressed the hope that you could continue in your practice as a barrister. Your address is currently not assessed as appropriate for an electronically monitored sentence because of an issue with cell phone coverage. The Department of Corrections is in a position to explore possible alternative arrangements to enable an electronically monitored sentence to occur there. In recommending only a sentence of community work, the Probation Officer in your case sees no purpose in community detention.

[89] All three of you have the advantage of support from your wider families, and I note that each of you have the support of wives to whom you have been married for at least 40 years.

[90] It is not possible to measure the movement from a starting point including components of community detention and community work, to a final sentence by simply applying the arithmetical consequences of recognised percentage deductions for mitigating factors. In Sir Douglas and Mr Bryant's cases, those mitigating factors amount to a total of 40 per cent in each case. The discount for Mr Jeffries is 15 per cent.

[91] I am satisfied that the 15 per cent which is common to the three of you is sufficient to remove the requirement for the additional sentence of community detention which would have involved you being effectively curfewed to your homes for a period up to six months, effectively from 7 o'clock in the evening to the 7 o'clock in the morning.

[92] In the case of Sir Douglas and Mr Bryant, I consider that the additional 25 per cent discount from the starting point is appropriately reflected in a proportional reduction of the length of community work sentence. I will revert at the end of these remarks to formalising the terms of sentences in accordance with that indication.

[93] I say immediately that the impact of reparation in contrasting the end sentences of those who pay it against those who do not cannot be measured just by the dollars. That would suggest that to avoid the last 25 per cent of their community work has somehow cost Sir Douglas and Mr Bryant $100,000. But the sentencing exercise cannot be looked at in that way. The capacity to pay is the trigger for that part of the sentence and it does not leave, I am satisfied, a material inconsistency.

[94] Now Mr Reeves, the Crown has submitted that you should be dealt with differently from the non-executive directors, and the Crown has contended for a starting point of two years and nine months' imprisonment, on the basis that as chief executive in day-to-day control of management of Lombard, you were closer to the events that ought to have been reflected in the prospectus. Further, that there were other examples in your conduct in the relevant period where you promoted the raising of money for Lombard inconsistently with the wish of the chairman. In addition, you have a previous conviction for breach of the same section of the Securities Act that occurred in 2000, and the Crown argues that that amounts to an aggravating factor.

[95] The Crown urges that there are no sufficient mitigating factors to bring an end sentence down materially from the starting point of two years and nine months, plus an uplift for the aggravating factor of a previous conviction so that a prison sentence would be inevitable.

[96] 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.

[97] Mr Henderson argued against that, saying that the transparency at Lombard means that you should be treated just the same as the others. However, transparency is no substitute for hands-on opportunity and greater familiarity with what were, in the end, the causes of concern.

[98] As to the materiality of the prior conviction, Mr Henderson has submitted that it can be disregarded because of the relatively innocuous circumstances in which it occurred, as reflected in the penalty of only a $1,000 fine that was imposed.

[99] I am not satisfied that that is entirely the case. The point that the previous conviction was not sufficient to deter you from further offending is somewhat artificial when the current offending has not occurred in circumstances reflecting any intentional conduct on your part. Nonetheless, there is a valid concern that you have allowed your conduct to contribute to further offences under the section when a previous conviction reflecting responsibility for misleading offer documents could be expected to make you even more vigilant about any contentious content of subsequent offer documents.

[100] Given the starting point for the non-executive directors at the top end of community detention and community work sentences, 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.

[101] As to mitigating factors, a prior conviction would classically prevent you calling in aid previous good character. Notwithstanding that, Mr Henderson has urged on me the work you have done in helping others in need. I accept the

convictions which you have are blips in the context of your character, and some allowance can be made for your good character.

[102] As to remorse, your expressions of regret are closer to those of Sir Douglas and Mr Bryant than that from Mr Jeffries. Again, you could have some credit for that.

[103] However, the overwhelming mitigating factor in your case is your state of health, and the family responsibilities you continue to assume. Although such considerations have to be present in a genuinely meaningful way before they can count, the Court is obliged to recognise that if a sentence for you that would otherwise be the appropriate one would, in your particular circumstances, be disproportionately severe, then recognition of that outcome can alter the Court's final decision.[13]

[104] As to your own health, medical certificates attest to an on-going battle with cancer. You had major surgery in 2007 followed by a course of chemotherapy which stretched over the period in which these offer documents were drafted and released to the market. Your medical advisers and some of the testimonials provided in your support remark on your resilience and positive attitude throughout that seriously debilitating treatment. The surgery has left you with some permanent impairment of body functions and the sad reality is that you cannot treat yourself as free from a significant risk of further difficulties with cancer.

[105] In addition to difficulties in managing your own health, you are the sole caregiver of two children and the part-time caregiver of a third child. One at least of the children that is dependent on you is dependent on supervision to an unusual extent. I do not intend to go into the details, but I recognise it as significant. So I can recognise undue hardship in terms of your family circumstances if a sentence prevented you continuing with the provision of that care.

[106] Generally, courts are cautious in making any material allowance for an offender's ill health, or hardship caused to an offender's family, because sadly it can

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[13] Sentencing Act 2002, s 8(h).

routinely be raised.[14] I am satisfied that a reduction from what would otherwise be the appropriate sentence, which would be beyond community based sentences, is justified, given the combination of these two relatively compelling considerations in your case.

[107] As to reparation, notwithstanding a remuneration package in your last years at Lombard that ought to have enabled you to make meaningful reparation, the statement of financial position shows that you are not in a position to do so. Your attempts to accumulate assets have been hindered by the need to provide for two matrimonial property settlements, and latterly you had apparently placed faith in Lombard to an extent that all the money you had available was invested in Lombard and is now to be treated as gone. The Crown accepts that your financial position is not such as to expect substantial reparation.

[108] In addition to that, Mr Henderson opposed the appropriateness of reparation because of a provision in the Sentencing Act that requires the Court to have regard to the prospect of civil remedies being available to victims. I am bound to say that in cases like this, I do not see that as a factor deflecting the Court from reparation and, had you the means, I would have insisted that like the two others who can you would make reparation.

[109] So I will in a moment be confirming a sentence in your case of 400 hours' community work which is the maximum length that I can impose on you.

[110] Before formally passing sentence on each of you, there are two matters of detail that I need to address. The first is the process for payment and disbursement of the reparation I am ordering, and the second is to preserve the confidentiality of certain materials that you have filed with the Court for the purposes of sentencing considerations.

[111] I will be directing that the amounts of reparation ordered are to be paid to the Registrar of the High Court at Wellington by 31 May 2012. That is a longer period

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[14] See generally Bruce Robertson (ed) *Adams on Criminal Law - Sentencing* (looseleaf ed, Brookers) at [SA8.13(a)] and [SA8.14].

until the requirement to pay than is usual, but it takes account of the circumstances I have been advised of. Once received, the amounts are to be placed on interest-bearing deposit pending receipt of all amounts of reparation, at which time the Registrar is to disburse the total sum to the receivers of Lombard. In the event that either of those paying reparation pursue an appeal to the Court of Appeal, all reparation is to be held in the account under the Court's control, until the appeal is resolved.

[112] In a victim impact statement completed by the receivers of Lombard, they acknowledge their participation in the process of disbursing reparation payments where they are also acting in the receivership of Nathans Finance Limited. In the present case, I am satisfied that the class of victims who are to share pro rata in the payment out of reparation comprise all those investors who invested or re-invested amounts, whether on a secured or unsecured basis, with Lombard during the currency of the relevant offer documents.

[113] So far as those with secured investments in Lombard are concerned, the amount of reparation payable to them is to be excluded from sums treated as paid to them in the course of the receivership, until they have been repaid the full amount of principal sums invested in Lombard during the currency of the offer documents.

[114] And I will reserve leave to the receivers to apply for additional or different directions, as the circumstances arise.

[115] As to preserving confidentiality, all materials lodged with the Court on behalf of any of the defendants addressing their financial position, and in the case of Mr Reeves, matters of his health and the circumstances of dependent children, are to be placed in a separate sealed envelope, which is not to be available for search except with the leave of a High Court Judge.

[116] Would you all please stand.

[117] Sir Douglas Graham, you are sentenced on each of the four convictions to 300 hours' community work. You are also ordered to pay $100,000 by way of

reparation. That sum is to be lodged with the Registrar of this Court by 31 May 2012.

[118] Mr Bryant, you are similarly sentenced on each of the four convictions to 300 hours' community work, and you are also ordered to pay $100,000 reparation which is to be lodged with the Registrar of this Court by 31 May 2012.

[119] Mr Jeffries, in your case I am sentencing you to 400 hours' community work on each of the convictions.

[120] Mr Reeves, I am sentencing you to 400 hours' community work on each of the convictions.

[121] In every case, the sentences are to be served concurrently.

[122] Now there is paperwork which I hope the Registry can still process tonight but which has to be completed by you before you leave the Court so you may now stand down.

Dobson J

Solicitors:
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Morrison Daly, Wellington for Graham and Bryant
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