IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CRI-2009-004-028345
[2013] NZHC 1600

THE QUEEN

v

WAYNE LESLIE DOUGLAS
AND
NEAL MEDHURST NICHOLLS

Charges:	Mr Douglas: Distributed advertisements which included untrue statement x1; Signed a registered prospectus that was distributed and included an untrue statement x 1 Mr Nicholls: Distributed advertisements which included untrue statement x1; Signed a registered prospectus that was distributed and included an untrue statement x 2
Plea:	Guilty
Appearances:	N R W Davidson QC, N R Williams and K Chang for Crown B D Gray QC and R J Sussock for Prisoners
Sentenced:	28 June 2013

SENTENCING NOTES OF VENNING J

Solicitors:	Crown Solicitor, Auckland Wilson Harle, Auckland
Copy to:	N R W Davidson QC, Auckland B D Gray QC, Auckland

[1] Wayne Leslie Douglas and Neil Medhurst Nicholls, you are for sentence having pleaded guilty to charges under the Securities Act 1978. In your case Mr Douglas you have pleaded guilty to one charge under s 58(1) and one under s 58(3). Mr Nicholls you have pleaded guilty to one representative charge under s 58(1) and two charges under s 58(3). The maximum penalty for the offending in each case is five years' imprisonment.

[2] The charges to which you have pleaded guilty to arise out of your involvement as directors of Capital + Merchant Finance Ltd (CMF).

[3] You are currently serving prisoners. You were sentenced by this Court to serve seven and a half years' imprisonment for offences under the Crimes Act following an investigation into the failure of CMF.

[4] CMF was a finance company. It funded its financing of property developments by inviting investments from and issuing debenture stock to members of the public under registered prospectuses and investment statements.

[5] Together with Messrs Ryan, Sutherland and Tallentire you were both directors of CMF at various material time periods. Relevantly for present purposes, Mr Douglas, you resigned as a director in February 2007.

[6] The s 58(3) offending relates to two prospectuses CMF issued. The first prospectus was on issue between 20 December 2006 and 9 September 2007. The second was on issue between 10 September 2007 and 23 November 2007. Both contained false and untrue statements. In addition while you were both directors CMF issued advertisements which included untrue statements. Those untrue statements and the advertisements support the s 58(1) charges. In your case Mr Douglas I accept that you are not responsible for statements in the prospectus that became untrue after February 2007. However, I accept Mr Davidson's submission for the Crown that to the extent the prospectus contained untrue statements as at February 2007 the effect of that carried on.

[7] CMF was placed into receivership on 23 November 2007. As at the date of receivership it owed approximately 7,000 secured debenture holder investors approximately $167 million. Between 20 December 2006 and until your resignation on 15 February 2007, Mr Douglas, the total amount invested and re-invested (together with interest to receivership) was in excess of $10 million. However, as noted the effect of the offending is not limited to that. In your case Mr Nicholls, the total amount invested and re-invested (together with interest to receivership) over the currency of both prospectuses was in excess of $105 million.

[8] From October 2006 CMF had a prior charge loan facility with Fortress Credit Corporation (Australia) Pty Ltd to obtain alternative funding facilities. That facility was extended in October 2007 and that is relevant to the charges you face.

[9] The 2006 prospectus included a number of untrue statements, which misrepresented the quality and risk of the investments in the CMF debenture stock. In particular, the prospectus contained untrue statements about lending to related parties, CMF's liquidity and cash flow and management of loans.

[10] The 2006 prospectus represented that related party investments would only be undertaken either with trustees' approval or in the ordinary course of business and on commercial terms. There were, however, a number of transactions with related parties that were not approved by the trustee and were not within the ordinary course of business. Nor were they arms length transactions.

[11] In particular, the Clyde 1 and 2 and Ultratone transactions breached that representation. The Clyde transactions resulted in the effective transfer of beneficial ownership and control of the CMF group of companies from both of you to Mr Tallentire.

[12] The Clyde transactions were not in the ordinary course of business and were not on commercial terms, or for consideration at arm's length. Ultratone was a related party funded by loans from CMF. You now accept that since 31 March 2005 Ultratone's financial position was one of an excess of liabilities over assets.

[13] Mr Nicholls, in your case there was a further relevant transaction, the Numeria transaction in March 2007. It was also not in the ordinary course of business and not at arm's length value.

[14] Further, you now also accept that from July 2007 there was a material dispute with Fortress that should have been disclosed.

[15] You both now accept you did not have reasonable grounds to believe the statements regarding related party lending were true at the time the 2006 prospectus was signed.

[16] The 2006 prospectus also misrepresented that CMF monitored its liquidity and cash flow. While regular cash flow monitoring was undertaken by management, formal cash flow reports to the board were not presented until April 2007. After that, in your case Mr Nicholls from July 2007 it should have been clear that the cash flow of CMF was unsustainable.

[17] Next, the prospectus represented all loans were actively monitored and managed by CMF's credit committee on a regular basis. However, CMF adopted a practice of rolling over loans which were due to expire, and which otherwise would have defaulted. You were both members of the lending committee which made these decisions from time to time. A stark example of the bad lending was the loan to Walters Trustees Ltd and Mr Bryers.

[18] The 2006 investment statement also made false misrepresentations as to the lending to related parties, untrue statements relating to liquidity and cash flow and the management of loans.

[19] Mr Nicholls, in your case apart from the above failings, the 2007 prospectus also included further untrue statements about the provision for impairment. It wrongly stated there were no circumstances that materially adversely affected CMF's profitability, the value of its assets or its ability to pay its liabilities.

[20] The 2007 investment statement made similar misrepresentations about CMF's liquidity, cash flow and its management of loans. In addition, there are two other investment statements that are relevant. The first, a newspaper advertisement of 15 September, and the second, a letter to members of the public on 19 November 2007. The advertisement of 15 September included an untrue statement regarding the insurance of capital secured debenture stock and the letter of November 2007 included an untrue statement regarding liquidity and cash flow.

[21] I turn to your personal positions. Mr Douglas you will turn 60 in November this year. As noted you are currently a serving prisoner. You remain supported by a number of close friends as well as your partner of 30 years and children.

[22] You began your involvement in the finance industry in 1987 with Allied Farmers. You founded CMF with Mr Nicholls in 2002. You intended to exit it in 2006 but events rather overtook that. You are in no position to pay any reparation to the victims of your offending.

[23] The pre-sentence report records that you agree with the summary of facts, but maintained you were unaware the prospectus and investment statement contained the untrue statements. You acknowledge you failed in your duties to assess the related party loan applications and address the issues of insolvency, negative equity and inadequate security. You told the probation officer that by 2006 your focus was compromised by your intent and interest in withdrawing from and retiring from CMF.

[24] The probation officer reports you as being articulate, remorseful and insightful about your offending and as at a low risk of any further or future offending, particularly in light of the position you will be in when you are released from prison. Essentially your offending occurred because you wanted to maximise your own personal financial position when you exited and you were blinded to your obligations as a director. You put your own interests ahead of your obligations as a director. I do have regard to the thoughtful and insightful letter you have written to the Court to explain the position and your appreciation of the effect your offending has had on others.

[25] Mr Nicholls you are 57 years old. You have spent all your life after university working in business and property management, through consultancies and financial markets to ultimately CMF. You remain supported by your wife and family and a number of other people. Your wife reports you accept the situation and take responsibility for the offending. However, as noted the probation officer recorded you said the offending was as a result of the financial crisis rather than a deliberate attempt to deceive investors. As discussed with your counsel, I consider that could suggest an attempt on your behalf to minimise your role in the offending. However, I accept his submission that in context and as he explained it, read with your letter, you do now accept that as the situation changed the statements in the prospectus and investment statement became untrue. The probation officer does record you as being very remorseful which is consistent with the letter you wrote to the Court. Like Mr Douglas, your letter to the Court shows insight into the effect your offending has had on others. I accept you are at a low risk of reoffending, again, because of the situation you will be in on your release.

[26] Again, like Mr Douglas, you are in no position to pay reparation.

[27] As I indicated to counsel I have also had the advantage of receiving and reading the large volume of letters of support for both of you.

[28] In sentencing you I am required to consider the purposes and principles of the Sentencing Act 2002. In this case the particularly relevant purposes are:

- to denounce your offending and to deter others from committing the same and similar offences;

- to hold you accountable to the members of the community for your actions and omissions;

- to provide for the interests of the victims of your offending who number up to 7,000 investors; and

- to promote in you a sense of responsibility for and acknowledgement of the harm your offending has caused those victims.

[29] In particular I do have regard to the impact of your offending on the investors, who were the victims of your offending. Some of them would have been known to you and would have invested because of their relationship with you. It is sufficient for present purposes to refer to just some of the statements. For example:

- An elderly couple in their early eighties lost just under $140,000 of "hard earned tax paid money" in their words. They had invested with CMF intending to provide interest income for their retirement. At their age they have no hope of replacing that loss. The emotional effect on them has been considerable. The stress and worry associated with that loss and the drastic effect on their income has exacerbated existing medical conditions.

- Another elderly couple reduced to living on a benefit feel betrayed and angry, and are continually worried and anxious about the future.

- Yet another couple in their seventies say they lost approximately $50,000. For them that was a significant sum of money. They had lived modestly all their lives in order to accumulate some savings towards retirement. That was lost. They have lost the ability to visit family overseas and grandchildren.

- Another couple in their seventies lost $500,000. They feel traumatised and feel a sense of shame and guilt that they are not able to help their family members when they need assistance and they have nothing to leave their children.

I could go on and on. Thousands of victims as I say are affected to a greater or lesser degree. The effect of your offending will still be felt by these victims, day in and day out for the rest of their lives.

[30] The relevant principles are:

- the need for the sentences to reflect the gravity of the offending, including your respective culpability;

- to take into account the seriousness of the type of offending in comparison with other offences; and

- the need for consistency in sentencing, which is particularly relevant in relation to this type of offending, given the number of sentences imposed by this Court, but also taking account of the direction from the Court of Appeal.

[31] In considering the gravity of the offending, the number of investors affected, the serious impact on them and the amounts of moneys re-invested on the strength of the truth of the statements in the prospectus and investment statements are particularly relevant.[1]

[32] I turn to the submissions. The Crown submit an uplift to the existing sentences is required. In the case of you Mr Nicholls, the Crown says 12 months would be appropriate, and for you Mr Douglas the Crown seeks an uplift in the vicinity of six to nine months, taking account that you were a director for the shorter period and face one less charge.

[33] Mr Gray has submitted that no effective additional sentence should be imposed and that the sentences I impose should be concurrent on the sentences you are currently serving.

[34] Alternatively he submits that the facts underlying your offending Mr Douglas largely coincide with those for the s 220 offences for which you have already been sentenced. He submits it would be consistent with ss 84 and 85 of the Sentencing Act for the sentence to be concurrent. For you Mr Nicholls, he submits that while there are further factual matters relevant to the current offending, given the severity of the sentence previously imposed by this Court for the Crimes Act offending, the lesser role you played in the company during 2007 and the fact the totality principle takes precedence over whether sentences should be cumulative or concurrent, a

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1 *Jeffries v R* [2013] NZCA 188 at [246].

concurrent sentence should also be imposed. He notes that you both were non-executive directors at the relevant time.

[35] As discussed with counsel I am not able to accept the submission the sentence should be concurrent. A similar submission was made and rejected by the Court of Appeal in *Ludlow v R.*[2] As Mr Gray acknowledged in his written submissions the s 58 charges for which you have pleaded guilty to and for which you are for sentence this morning, are directed at different behaviour than the s 220 charges.

[36] In its recent decision of *Jeffries v R*, the Court of Appeal reinforced the importance of denunciation and deterrence in cases of offending against the Securities Act, particularly the need to deter others generally from offending in similar ways in the future.[3] The sentence this Court imposes ought to reflect the purposes of the Securities Act, namely to protect the investing public through timely disclosure of material information. As the Court of Appeal noted, the investing public is highly dependent on the truthful disclosure of relevant information in offer documents. That is the purpose of the offer documents. The failure to meet the required standards has a number of serious potential consequences beyond individual cases: loss of investor confidence, lack of trust in this country's financial institutions, damage to capital markets in the wider economy and the loss of funds invested by the public. Those objectives would not be met by concurrent sentences.

[37] Further, on this point and in response to Mr Gray's submission that the previous sentences imposed for the other offending are particularly material in relation to the appropriate sentences in this case, while I accept the offending for which you are for sentence occurred during your time as directors of CMF as did your other offending, it is in my judgment of a quite different nature to the offending under the Crimes Act. The Court of Appeal recognised that difference in the case of *Ludlow*.[4] Also there are factors relevant to the offending in this case that were not addressed in the Crimes Act offending, particularly the issues of the Ultratone transaction, liquidity and the underwriting issue.

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2 *Ludlow v R* [2013] NZCA 196.
3 *Jeffries v R*, above n 1.
4 *Ludlow v R* at [28].

[38] Next, while Wylie J and the Court of Appeal may have observed that the sentences he imposed on the s 220 charges were stern, the Judge's observation was in the context of declining to impose minimum terms of imprisonment. The Court of Appeal, while noting the sentencing Judge had recorded the sentences as stern confirmed that such sentences were required to hold you accountable as well as for denunciation and deterrence purposes in relation to the s 228 Crimes Act charges. I note the Court of appeal went on to record:[5]

> [180] ... Messrs Nicholls and Douglas have been convicted of theft by a person in a special relationship to the sum of $19.76 million. … Simply put, this is theft on a grand scale.

It is for that reason that the end sentences of seven and a half years were imposed at that time.

[39] Next, in terms of ss 84 and 85 of the Sentencing Act, the two types of offending are quite different. One is truly criminal offending under the Crimes Act, the other, your offending for which you are for sentence this morning under the Securities Act, is of a quite different nature. They cannot be described as of a similar kind or a connected series of offences as that phrase is understood and applied under s 84.

[40] The short point is that if this offending had been before the Court at the same time as the Crimes Act offending then an uplift to the Judge's starting point would have been required to reflect the totality of the offending then before the Court. It was not, but this morning this Court must now address that issue.

[41] However, I do accept the force of Mr Gray's submissions based on s 85 that the cumulative sentences must not result in a total period of imprisonment wholly out of proportion to the gravity of the overall offending.

[42] Mr Gray also made the point and referred to the need for consistency in sentencing and referred to the sentences imposed on a number of different company

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5 *Tallentire v R* [2012] NZCA 610 at [180].

directors for offending of this nature. I have had regard to the various cases cited.[6] However, the principles of sentencing in cases of this nature and for offending under the Securities Act have been well settled by the Court of Appeal.

[43] The Court of Appeal recently reviewed sentencing in offending of this nature in the case involving the directors of *Lombard*.[7] It confirmed that a starting point of imprisonment will generally be required in cases of this nature. The Court of Appeal had previously upheld the starting points in *Nathans* which ranged between two years, nine months' imprisonment and three years, four months' imprisonment observing that the sentences might be in part described as lenient.[8] In the sentencing of your co-directors in CMF the starting point ranged between two years, nine months' imprisonment for Mr Sutherland and three years, six months' imprisonment for Mr Tallentire.[9]

[44] To the extent Mr Gray relies on the sentencing of Mr Petricevic and the fact that an additional sentence of only four months for the additional s 220 offending was imposed, in that case I consider it to be readily distinguishable.[10] Although it involved four counts, the offending related to the purchase of a boat by the Bridgecorp Group of Companies for approximately $1.65 million. The loss to Bridgecorp and hence its investors ultimately was $1.8 million. It is quite different in scale to the offending under s 220 by you, which was for your personal benefit.

[45] In my judgment the starting point for your offending Mr Nicholls must be at the same level as Mr Tallentire – three years, six months. While you may not have been an executive director after November 2006, you had until then played a major role in the company and were fully aware of its financial position at that time. Part at least of the misrepresentation in the prospectuses and investment statements arose out of transactions that you had received a personal benefit from. You were in a

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6 *R v Smith* [2013] NZHC 1341; *R v Buckley* DC Auckland CRI-2011-004-017116, 30 August 2012; *R v Kirk and MacDonald* DC Auckland CRI-2009-004-024026, 21 December 2010; *R v Bowden* [2012] NZHC 1249; *R v Swann and Harford* HC Dunedin CRI-2007-012-004181, 11 March 2009; *Watson v R* [2012] NZCA 17; *R v Patterson* [2008] NZCA 75; and *R v Douglas, Nicholls and Tallentire* [2012] NZHC 2271.

7 *Jeffries v R*, above n 1.

8 *Doolan v R* [2011] NZCA 542.

9 *R v Ryan* [2013] NZHC 501.

10 *R v Petricevic* [2012] NZHC 785.

quite different position to that of the other Australian based non-executive directors Messrs Ryan and Sutherland.

[46] For you Mr Douglas the starting point can be somewhat less to reflect that your offending was for a lesser period and involves one less charge. But in my judgment it was still gross negligence and cannot be less than two years, nine months.

[47] However, as noted, while cumulative sentences are required, it is appropriate that in sentencing you I take into account the totality principle. I must ask myself what the appropriate overall sentence would have been if you had been sentenced on all charges, including the Crimes Act offences and these charges at the same time.

[48] In sentencing you on the Crimes Act charges Wylie J adopted a starting point of eight years, six months and reduced that in each of your cases by 12 months for mitigating factors. He gave you a credit of six months for your previous good records and character. He also gave you a further six months for remorse. I accept that 12 months (or just under 12 per cent) was an appropriate credit for those factors given the starting point adopted by the Judge.

[49] Mr Nicholls, for your offending in this present case a starting point for three years, six months would lead to a total starting point of 12 years' imprisonment if taken with that adopted by Wylie J. A reduction for the mitigating factors of 12 months would reduce that to 11 years. A further credit approaching 15 per cent for your guilty plea to this offending further reduces it to 10½ years.

[50] I then consider the totality aspect. I am satisfied an end sentence in total of 10½ years would be excessive for the totality of the offending that you have engaged in. A total term of eight and a half years would be sufficient to reflect your culpability in relation to the Crimes Act offences for which you were convicted by this Court on the previous occasion and the current charges you have pleaded guilty to. That requires an uplift on your existing sentence of one year. It is also consistent with the one year uplift imposed on Mr Tallentire. I see no principled reason to make a distinction between you and him in relation to these Securities Act offences.

[51] Mr Douglas, in your case, adding a starting point of two years, nine months to the starting point adopted by Wylie J of eight years, six months would lead to 11 years, three months. As noted, from that the Judge took into account mitigating factors of 12 months. Again I accept that as appropriate. A further credit of between 10 and 15 per cent for your guilty plea would reduce the sentence to nine years, 11 months. Again, having regard to the totality that would be excessive for your criminality and overall culpability. In the circumstances a total sentence of eight years, two months is appropriate. That would require an increase in your current sentence of eight months cumulative. It also recognises the offending you have pleaded guilty to is less extensive than the offending by Messrs Nicholls and Tallentire.

[52] I test that result by considering your present offending on its own. In your case Mr Nicholls from the starting point of three years six months a credit for previous good character and remorse of say eight months, or just under 20 per cent, and a further credit for your guilty plea of 10 to 15 per cent would lead to an end sentence of two years, six months. Added to your existing sentence that would mean a cumulative sentence of 10 years. In your case Mr Douglas a similar exercise applied to the starting point of two years, nine months would lead to end sentence of one year, nine months and a cumulative sentence of nine years, three months. Again I am satisfied that those sentences would be too severe, having regard to totality.

[53] Finally, at the end of the day, despite the above analysis, I remind myself that sentencing should not be an overly mathematical exercise. At the end of the day it is about judgment. In my judgment further cumulative sentences of the extent I have discussed are required to reflect the totality of your offending in this case, having regard to the sentence that I must impose this morning.

[54] Please stand.

[55] Mr Nicholls, on each of the charges you have pleaded guilty to, you are sentenced to a term of imprisonment of 12 months. That is to be served cumulatively on the current sentence you are serving.

[56] Mr Douglas, on each of the charges you have pleaded to you are sentenced to eight months' imprisonment. That also is cumulative on the existing sentence.

[57] In the case of each of those sentences they are of course concurrent with each other but cumulative on the existing sentence. The effective result is 12 months for you Mr Nicholls and eight months for you Mr Douglas. That is all, stand down.

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Venning J