IN THE COURT OF APPEAL OF NEW ZEALAND

CA293/2012
[2013] NZCA 547

BETWEEN	CORNELIS ROBERT ROEST Appellant
AND	THE QUEEN Respondent

Hearing:	10 and 11 September 2013
Court:	O'Regan P, Ellen France and Randerson JJ
Counsel:	Appellant in Person B H Dickey and T M Molloy for Respondent P E Dacre QC as Amicus
Judgment:	8 November 2013 at 9:30 am

JUDGMENT OF THE COURT

The appeal against conviction and sentence is dismissed.

REASONS OF THE COURT

(Given by Randerson J)

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Introduction

[1] The appellant Mr Roest was one of five directors of Bridgecorp Ltd and Bridgecorp Investments Ltd. We will refer to these companies as Bridgecorp and BIL respectively. The Bridgecorp group of companies suffered a financial collapse in mid-2007. The directors were later charged with a variety of offences which, in broad terms, related to the making of false statements about the financial position of the companies in prospectuses issued in December 2006, which sought investment funds from the public, as well as in later certificates the companies were required to provide.

[2] Mr Roest and two other directors were tried before Venning J sitting without a jury. On 5 April 2012, Mr Roest was convicted on a total of 18 counts laid under s 242 of the Crimes Act 1961, s 377 of the Companies Act 1993 and s 58 of the Securities Act 1978.[1]

[3] Mr Roest was subsequently sentenced to a total of six years and six months imprisonment.[2] He now appeals against both conviction and sentence on grounds we detail below.

[4] The other directors tried with Mr Roest were Mr R Petricevic and Mr P Steigrad. Mr Petricevic was convicted on 18 counts and sentenced to six years six months imprisonment.[3] He has not appealed. Mr Steigrad was convicted on 6 counts and sentenced to nine months home detention and 200 hours community work. He was also ordered to pay reparation of $350,000.[4] He only appealed against his sentence but was unsuccessful.[5]

[5] The other two directors were Mr B N Davidson and Mr G Urwin who each pleaded guilty to counts 9 to 18 laid under the Securities Act. Mr Davidson was

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1 *R v Petricevic* HC Auckland CRI-2008-004-29179, 5 April 2012 [verdicts judgment]. See also *R v Petricevic* [2012] NZHC 665, [2012] NZCCLR 7 [reasons judgment].
2 *R v Roest* [2012] NZHC 1086.
3 *R v Petricevic* [2012] NZHC 785.
4 *R v Roest*, above n 2.
5 *Steigrad v R* [2012] NZCA 417.

sentenced to nine months home detention and 200 hours community work. He was also ordered to pay reparation of $500,000.[6] Mr Urwin was sentenced to two years imprisonment.[7]

Background

[6] Bridgecorp was a wholly owned subsidiary of Bridgecorp Holdings Ltd (BHL), an Australian registered company. Bridgecorp's principal activity was lending money to property developers. It funded that activity primarily through investments from the public. Bridgecorp issued debentures as well as redeemable preference shares in BIL.

[7] BIL was a vehicle to raise further funds for Bridgecorp. It issued capital notes to the public and invested the proceeds from those activities in redeemable preference shares issued by Bridgecorp.

[8] Bridgecorp and BIL had common directorships. Mr Petricevic and Mr Roest were the two executive directors. Mr Petricevic was the managing director and Mr Roest the finance director at material times. The non-executive directors were Mr Davidson (who chaired the board), Mr Steigrad and Mr Urwin.[8]

[9] BHL also had a common directorship with Bridgecorp and was substantially owned by the directors or interests associated with them. Notably, Mr Petricevic's interests owned about half of BHL's shares and Mr Urwin's interests about one quarter.[9] Mr Roest had a lesser stake.

[10] During 2006 and 2007, economic conditions in New Zealand and elsewhere were deteriorating. Bridgecorp, along with other finance companies operating in New Zealand, was experiencing cashflow issues. From about May 2006, it ceased all new lending in an attempt to consolidate its cash position. The Judge found that

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6 *R v Davidson* HC Auckland CRI-2008-004-29179, 7 October 2011.
7 *R v Urwin* HC Auckland CRI-2008-004-29179, 17 April 2012.
8 Mr Davidson and Mr Urwin pleaded guilty to counts 9 to 18 laid under the Securities Act 1978 and have been separately dealt with.
9 Through Urwin Fernandez (NZ) Ltd controlled by Mr Urwin and Mr J Fernandez.

from that point onwards, cashflow was continually reported as a major issue for Bridgecorp and that all directors were aware of that.

[11] On 21 December 2006, Bridgecorp registered a prospectus for the issue of secured debenture stock. Attached to the prospectus were the company's financial statements for the year ended 30 June 2006. On the same date, BIL issued a prospectus for the issue of unsecured debenture stock in the form of capital notes. The BIL prospectus advised that the funds raised by BIL were to be invested in Bridgecorp's secured debenture stock. BIL was said to be acting effectively as a funding conduit for Bridgecorp.

[12] Each prospectus and associated investment statements were signed by all the directors or their authorised agents. We describe these documents as the offer documents. They were distributed to the public on 21 December 2006 and remained in effect until 29 June 2007 when the Securities Commission suspended their distribution.

[13] The Crown alleged that from 21 December 2006 until 30 March 2007, Bridgecorp's financial position further deteriorated and that, on 7 February 2007, Bridgecorp began defaulting on its payment obligations to investors. The Crown further alleged that Bridgecorp and BIL continued to regularly default on payments to investors throughout the period from 7 February 2007 to 29 June 2007.

[14] On 30 March 2007, Bridgecorp and BIL registered extension certificates for each of the prospectuses under s 37A(1A) of the Securities Act. These were signed by Mr Petricevic and Mr Davidson on behalf of the other directors and had the effect of extending by nine months the period in which securities could be allotted under each prospectus. The directors certified that the financial position of Bridgecorp and BIL as stated in each prospectus when issued on 21 December 2006 had not materially and adversely changed between 30 June 2006 and 30 March 2007. Further, that the prospectuses were not, at the date of the certificates, false or misleading in a material particular by reason of failing to refer, or give proper emphasis, to adverse circumstances.

[15] Under the Securities Act, Bridgecorp and BIL were required to appoint a custodian trustee. Covenant Trustee Company Ltd (Covenant) was appointed for that purpose and entered into trust deeds with Bridgecorp and BIL. Under those deeds, the companies were required to file quarterly certificates with Covenant certifying, amongst other things, that interest and principal monies to investors had been paid or otherwise satisfied on due date. Mr Roest and Mr Petricevic signed directors' certificates to that effect for each of the two companies on 19 April 2007 and 30 April 2007 respectively. The Crown alleged that the statements made in these certificates were false and that Messrs Roest and Petricevic knew they were false.

[16] On 2 July 2007, Bridgecorp was placed into receivership by Covenant and on 6 July 2007, BIL was placed into liquidation. Investors in both companies suffered substantial losses which we later detail.

Summary of the charges

Counts 1 to 6 – s 242 of the Crimes Act

[17] These charges alleged that Bridgecorp and BIL had each made false statements in the offer documents issued on 21 December 2006 and in the extension certificates of 30 March 2007. It was alleged that the statements were made with intent to induce the public to subscribe for securities in the companies and that the statements were known to be false.

Counts 7 and 8 – s 377 of the Companies Act

[18] These two charges related to the certificates issued to Covenant on 30 April 2007 and on 1 May 2007. It was alleged that the certificates were false or misleading in the same respect as alleged in the Crimes Act charges and that the directors signing the certificates knew that to be so.

Counts 9 to 18 – s 58 of the Securities Act

[19] These charges relate to the Bridgecorp and BIL offer documents and the extension certificates. The Crown alleged that the offer documents and extension certificates contained untrue statements.

The statutory framework

[20] Mr Roest did not challenge the findings in the High Court in relation to the elements the Crown was required to prove for each of the charges. These are:

> *Section 242 of the Crimes Act (false statements in the offer documents and the extension certificates)*
>
> (a) The accused made or concurred in making, or published, a false statement in the relevant document;
>
> (b) Knowing that the statement was false in a material particular or being reckless as to whether it was false; and
>
> (c) The accused intended to induce any person, whether ascertained or not, to subscribe to a security in the relevant company.
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> *Section 377 of the Companies Act (directors' certificates to Covenant)*
>
> (a) The accused, when acting as a director of the relevant company, made a statement relating to the affairs of the company that was false or misleading in a material particular; and
>
> (b) Knew the statement to be false or misleading.
>
> *Section 58(3) of the Securities Act (untrue statements in the offer documents and the extension certificates)*
>
> (a) The relevant offer documents included one or more statements that were untrue;
>
> (b) The offer document was distributed; and
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> (c) The accused signed the offer document or it was signed on his behalf.

[21] Under s 55 of the Securities Act, a statement in an offer document may be untrue by reason of an omission.

[22] A defence is available under s 58(4) if the accused can establish on the balance of probabilities that:

(a) The statement was immaterial; or

(b) He had reasonable grounds to believe and did believe that the statement was true.

[23] The statutory framework and the elements of the offences under s 58 are discussed in more detail in this Court's decision in *Jeffries v R*,[10] but need not be repeated here since the grounds of appeal are essentially factual in nature. We note that the Supreme Court has recently dismissed an application for leave to appeal against the convictions at issue in that case.[11] The Supreme Court also accepted that, for the purposes of the defence under s 58(4), the reasons why the prospectus is untrue are relevant to whether the directors believe on reasonable grounds it was untrue.[12]

Grounds of appeal against conviction

[24] Mr Roest was unable to obtain legal aid for his appeal and represented himself in this Court. However, his trial counsel, Mr P Dacre QC, was appointed as amicus to assist him in the preparation of detailed grounds of appeal. These ran to some 97 pages and were essentially prepared by Mr Roest with some editing and other assistance from Mr Dacre. The detailed grounds of appeal formed the basis for the formal submissions. These extended to 122 pages and were signed by Mr Dacre as amicus. We are grateful to Mr Dacre for his assistance which has enabled Mr Roest to prepare his submissions clearly with appropriate cross-referencing to the evidence and exhibits.

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10 *Jeffries v R* [2013] NZCA 188 at [13]–[24].
11 *Graham v R* [2013] NZSC 104.
12 At [18].

[25] The Crown also assisted Mr Roest by compiling and copying two volumes of exhibits by Mr Roest at his request. These were filed for the purpose of the appeal.

[26] The grounds for Mr Roest's appeal against conviction may be broadly summarised as follows:

(a) He did not receive a fair trial due to difficulties over legal aid and inadequate time for his counsel to prepare.

(b) The Crown's expert witnesses were not appropriately qualified.

(c) The statements alleged to be untrue were in fact true or were not material.

(d) The Crown did not prove beyond reasonable doubt that he knew any of the statements were untrue.

(e) He had reasonable grounds to believe and did believe that the statements were true.

[27] We will deal with these grounds in turn but, before doing so, we record that Mr Roest also made several other submissions that we do not regard as relevant to this appeal. First, he argued that the Securities Act and related legislation was insufficient to protect investors. Second, he submitted that the Government should have intervened to protect investors. Third, he submitted that the directors had very limited options realistically available to them: they could have put the company into receivership; they could have prepared a prospectus in terms so negative that the company would be forced into receivership; or they could have tried to manage their way through the crisis. He submitted that the first two options would not have assisted the investors but the third might have.

[28] The essential difficulty with all these points is that the law must be applied as it is enacted and not in some other way that a litigant might prefer. Further, as we made clear in *Jeffries v R*, the obligations to ensure that statements made in offer documents under the Securities Act are true and are not misleading by omission,

must be complied with irrespective of the consequences that might then flow.[13] The objective of the legislation is to ensure that investors have the opportunity to make their investment, or to reinvest, on an informed and accurate basis.

[29] Mr Roest also argued that he was obliged to act in what he considered to be in the best interests of the company, invoking s 131(1) and (2) of the Companies Act. He also submitted, relying on the definition of "due inquiry" under s 2B of the Securities Act and s 138 of the Companies Act that he had made due inquiry on relevant matters and was entitled to rely on reports from others.

[30] As this Court held in *Jeffries*,[14] the statutory obligation under s 58 of the Securities Act to ensure that statements in offer documents are true falls upon the directors and is non-delegable. Reliance on others (where it is established on the facts and is reasonable) may assist an accused person in establishing a defence of belief on reasonable grounds in the truth of the statements for the purposes of s 58(4) of the Securities Act, but cannot be relied upon to avoid the primary and non-delegable duty under s 58(3).[15]

The fair trial issue

[31] Mr Roest's submissions under this heading may be summarised as follows. After being adjudicated bankrupt in September 2009, he first applied for legal aid in November 2010. At that time, the trial was set down for a period of 12 weeks commencing 4 July 2011. Mr Roest experienced lengthy delays in dealing with the legal aid authorities including appeals and requests for review.

[32] The commencement of the trial was delayed until 8 August 2011 but, on 1 July 2011, Mr Roest's solicitors applied for leave to withdraw as legal aid had been refused and Mr Roest no longer had any funds. Mr Roest says that his solicitors had acted for him from 2008 and had substantial knowledge of the relevant facts. He was prejudiced when Venning J granted the solicitors leave to withdraw on 12 July 2011.

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13 *Jeffries v R*, above n 10, at [172].
14 *Jeffries v R*, above n 10, at [172], [173] and [196].
15 See the fuller discussion of this topic by Heath J in *R v Moses* HC Auckland CRI-2009-004-1388, 8 July 2011 at [74]–[87].

[33] Mr Roest also complains that Venning J refused applications he made in early July and early August 2011 for a stay or adjournment of his trial for three to six months. However, he accepts that, on 12 July, Venning J further postponed the commencement of the trial by four weeks until 5 September 2011.

[34] Legal aid was finally granted to Mr Roest on 1 September 2011, shortly before his trial was scheduled to commence. Mr Dacre was appointed as Mr Roest's counsel. The Judge further delayed the commencement of the trial until 25 October 2011. At that point, the Crown delivered its opening address. A written copy of this was given to all counsel and the trial proper was adjourned to 14 November 2011. The appellant was represented at trial by Mr Dacre and his junior Mr Butler who had been assisting Mr Roest from at least May 2011.

[35] Mr Roest said Mr Dacre did not have adequate time to prepare and that his trial was unfair in consequence. Matters were made worse, he said, by the very late decision by the legal aid authorities to grant legal aid. Mr Roest relies on the rights identified in ss 24(f) and 25 of the New Zealand Bill of Rights Act 1990 which he says were breached.

[36] We do not accept that Mr Roest did not receive a fair trial. We accept the Crown's submission that the Judge made every effort to accommodate Mr Roest and his counsel, once appointed. The Judge had no choice other than to accede to the request by Mr Roest's solicitors to withdraw. They could not have been expected to attend the trial unpaid for 12 weeks.

[37] We also consider that the Judge properly concluded that further applications for a stay or adjournment beyond those already detailed above were not justified. In a judgment delivered on 12 July 2011 the Judge determined a number of pre-trial applications including an application for stay or adjournment by Mr Roest and a similar application by Mr Petricevic. At that stage, both had been declined legal aid. The Judge considered that a fair trial was still possible even if they did not have legal representation. He noted that, as executive directors, they could be expected to have knowledge of the relevant documentation. He concluded that an adjournment of the scheduled trial date for a further four weeks was appropriate to provide further time

to Mr Petricevic and Mr Roest, if indeed they were to be unrepresented, to prepare for trial. It was at that point that the Judge directed that the trial should commence on 5 September 2011.

[38] A further application for an adjournment was refused by Venning J on 12 August. This application was made on medical grounds but Mr Roest did not seek to make any point about this on appeal.

[39] On or about 19 August 2011, the Judge proposed to appoint Mr D Chisholm (previously counsel for Mr Urwin) as amicus to assist the Court. That proposal was rejected soon afterwards by both Mr Petricevic and Mr Roest.

[40] Thereafter the Judge rejected a further application by Mr Roest for an adjournment on 2 September 2011. Very shortly after that, Mr Dacre was instructed. As the Judge noted in a minute of 7 September 2011, Mr Butler was available to assist Mr Dacre with preparation.

[41] The commencement of the trial was then adjourned to enable Mr Dacre to have further time for preparation. Effectively, Mr Dacre had from 7 September 2011 until 14 November 2011 before the trial started in substance. Mr Roest did not dispute the Crown's submission to us that, at no point, did counsel for the appellant raise with the court that he had insufficient preparation time. Mr Roest has not presented any evidence to this court to that effect. We also note that the trial was adjourned on a number of occasions for various reasons after it had commenced and that it was not until 23 February 2012 that Mr Roest was required to give evidence.

[42] Two other points are important. First, Mr Roest was only one of three accused, all of whom were represented by senior counsel. There were substantial commonalities of interest amongst the accused. All three could be expected to benefit from the combined strengths of all counsel. Second, and most importantly, Mr Roest does not identify any specific respect in which he was prejudiced other than the observation that no investors were questioned. He asserts that the victims should have been asked about whether they had read the prospectus and sought financial advice. Plainly, however, a defence along those lines would have been

doomed to failure. Mr Roest could not have advanced his defence by endeavouring to shift blame to the investors.

[43] We conclude that there is no basis for Mr Roest's assertion that his trial was unfair.

The qualifications of the Crown expert witnesses

[44] Mr Roest submitted that the Crown's expert witnesses did not have expertise in relation to the accounting standards relevant to the issue of whether a company named Barcroft Holdings Ltd (Barcroft) was a related party to Bridgecorp. The Crown relied on the evidence of two chartered accountants, Mr D D Crichton and Mr G R Graham. Each gave evidence on a range of issues including the Barcroft related party issue. They concluded, by reference to the accounting standard NZ IAS 24, that Barcroft was a related party and that the offer documents ought to have treated substantial loans to Barcroft as related party lending.

[45] Mr Roest submitted that Mr Crichton's background was primarily in the field of insolvency rather than the preparation of financial statements requiring compliance with accounting standards. He also submitted that Mr Graham's principal area of expertise was in insolvency issues and that he did not have the required background as an expert in accounting standards. Mr Roest submitted that the evidence of these two experts on this topic was inadmissible.

[46] We are unable to accept Mr Roest's submission on this topic. While it is true that the primary experience of each of these witnesses was in insolvency matters, both had extensive experience over many years as chartered accountants in a variety of fields. Mr Crichton had over 40 years experience in insolvency work as well as providing accounting and managerial support services to a client base of business and individual taxpayers. He also undertook a number of specialised assignments including litigation support and forensic accounting. He was appointed by the Securities Commission in April 2008 under s 67A of the Securities Act to carry out an inspection into Bridgecorp and BIL for the purposes of the Securities Act and the Financial Reporting Act 1993. In particular, he was asked to ascertain whether the

offer document contained any untrue statements in breach of the Securities Act and whether the companies otherwise breached the securities or financial reporting laws.

[47] He was questioned about his expertise in relation to the relevant accounting standards and maintained that he had sufficient experience and expertise to offer an opinion on that issue. In cross-examination, Mr Crichton confirmed that Bridgecorp was the third finance company that he had been called upon to inspect in the period leading to Bridgecorp's collapse. The first was National Finance and the second was Nathans Finance. The second of these was a major financial institution in New Zealand.

[48] Mr Graham holds a Bachelor of Commerce degree. He is a chartered accountant and a partner in the accounting practice of KordaMentha (formerly known as Ferrier Hodgson & Co). He specialises in valuation, litigation support, insolvency and financial restructuring. In evidence, he said that, over the past 16 years, he had acted as receiver or liquidator in several hundred company failures including some of New Zealand's more significant insolvencies. He had examined the books of some 24 finance companies in the two years prior to trial. Mr Graham was engaged by the Securities Commission to peer review Mr Crichton's report and to review a number of Bridgecorp's larger loan files to determine whether they complied with good commercial practice.

[49] We later review the Judge's findings on the Barcroft issue with reference to the relevant accounting standards. It is evident that whether Barcroft was a related party within the meaning of the accounting standard is essentially a question of fact. In our view, it did not require any particular expertise in accounting standards. Rather, it was an issue that called for a determination by the Judge. While the Judge's decision in this respect may have been informed by the evidence of highly experienced practitioners such as Mr Crichton and Mr Graham, in the end it was a matter of fact for judicial determination.

[50] The Judge recognised this in his decision. When dealing with the topic of expert witnesses generally, he observed that he should have regard to the relevant qualifications and experience of the expert witnesses but, ultimately, the issues in the

case were to be resolved by himself rather than the experts.[16] The Judge observed that it was a matter for him to decide how much weight or importance to give to the experts' opinions or whether they should be accepted at all in the context of all the evidence. He repeated the same observations when dealing specifically with the Barcroft issue.

The false statements alleged

[51] The Crown alleged that the relevant documents issued by Bridgecorp and BIL falsely stated that the companies had never missed interest payments or repayments of principal when due. The allegation was common to the following counts under the Crimes Act and the Companies Act:

Counts 1–3	Bridgecorp prospectus and investment statement dated 21 December 2006 and the prospectus extension certificate dated 30 March 2007.
Counts 4–6	BIL prospectus and investment statement dated 21 December 2006 and prospectus extension certificate dated 30 March 2007.
Counts 7 and 8	Director's certificates issued to Covenant by Bridgecorp and BIL dated 19 and 30 April 2007 (the certificates related to the state of affairs of each company at 31 March 2007).

[52] Counts 9 to 18 alleged breaches of the Securities Act in the Bridgecorp and BIL offer documents distributed on 21 December 2006. It was said there were a number of untrue statements made in these documents when first issued. It was also alleged that the "never missed payments" statement in the offer documents had become untrue when defaults occurred from 7 February 2007[17] and that there were further untrue statements made in the extension certificates registered on 30 March 2007 and in the directors' certificates dated 19 and 30 April 2007.

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16 At [39].

17 The proposition that the prosecution could rely on a statement becoming untrue at a later date was approved by this Court in *R v Steigrad* [2011] NZCA 304, [2011] NZCCLR 24 at [116].

[53] The allegedly untrue statements were:

Offer documents of 21 December 2006

(a) That Bridgecorp would/did not provide credit or advance loans other than in accordance with good commercial practice and internal credit approval policies;

(b) That Barcroft was not a related party;

(c) That Bridgecorp's financial position was as set out in the registered prospectus, which omitted a material particular, namely the deterioration in Bridgecorp's financial position from the reported financial position for the year ended 30 June 2006;

(d) That in the period 30 June 2006 to 21 December 2006 no circumstance had arisen that would adversely affect the trading or profitability of the Charging Group; or the value of its assets; or the ability of the Charging Group to pay its liabilities due within the next 12 months.

(e) As to "liquidity risk":

(i) That Bridgecorp managed "liquidity risk" by maintaining a minimum cash reserve on bank deposit; and

(ii) The omission of a material particular being the actual deterioration in Bridgecorp's liquidity since the year ended 30 June 2006.

From 7 February 2007

(f) That Bridgecorp had never missed an interest payment or, when due, a repayment of principal.

From 30 March 2007

(g) That the financial position shown in the statement of financial position in the registered prospectus had not materially and adversely

changed between 30 June 2006 and 30 March 2007 (extension certificates).

(h) That the registered prospectus was not, at 30 March 2007, false or misleading in a material particular by failing to refer, or give proper emphasis, to adverse circumstances (extension certificates).

[54] The allegations in (a) and (c) were found not to have been proved to the required standard or to be immaterial. The focus is therefore on particulars (b), (d), (e), (f), (g) and (h) which were found to be proved.

Approach on an appeal against disputed factual findings

[55] Mr Roest's conviction appeal focussed mainly on disputing the factual findings of the Judge. In *Jeffries v R*, this Court discussed the approach on appeal where factual findings by a judge sitting alone in a criminal case are challenged.[18] The relevant statutory ground of appeal is under s 385(1)(a) of the Crimes Act. The court must allow the appeal if it is of the opinion the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence. In *Owen v R* the Supreme Court confirmed that a verdict will be unreasonable if, having regard to all the evidence, the jury could not reasonably have been satisfied to the required standard that the accused was guilty.[19] The Supreme Court endorsed the following aspects of this Court's decision in *R v Munro*:[20]

(a) The appellate court is performing a review function, not one of substituting its own view of the evidence.

(b) Appellate review of the evidence must give appropriate weight to such advantages as the jury may have had over the appellate court. Assessment of the honesty and reliability of the witnesses is a classic example.

(c) The weight to be given to individual pieces of evidence is essentially a jury function.

(d) Reasonable minds may disagree on matters of fact.

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18 *Jeffries v R*, above n 10, at [90]–[96].
19 *Owen v R* [2007] NZSC 102, [2008] 2 NZLR 37 at [5].
20 *R v Munro* [2007] NZCA 510, [2008] 2 NZLR 87, endorsed at [13] of *Owen v R*, above n 19.

(e) Under our judicial system the body charged with finding the facts is the jury. Appellate courts should not lightly interfere in this area.

(f) An appellant who invokes s 385(1)(a) must recognise that the appellate court is not conducting a retrial on the written record. The appellant must articulate clearly and precisely in what respect or respects the verdict is said to be unreasonable and why, after making proper allowance for the points made above, the verdict should nevertheless be set aside.

[56] The authorities establish that the verdict of a judge sitting alone in a criminal trial is to be treated for appeal purposes as the equivalent of the verdict of a jury.[21] It has been posited that, where full reasons are given by the judge, an appellant may have the advantage of a "fuller" appeal.[22] Nevertheless, as this Court said in *Jeffries*, the statutory ground of appeal remains the same and, generally speaking, the court on appeal does not retry the appellant on the facts.[23] We acknowledge, however, that where full reasons are given, an appellate court is in a better position to assess the justification for, and correctness of, the judge's verdicts than in a jury case.

No missed interest payments or repayments of principal when due

Background

[57] The Bridgecorp prospectus stated:

> Bridgecorp has never missed an interest payment or, when due, a repayment of principal.

[58] The BIL prospectus repeated the same statement but said it applied to both Bridgecorp and BIL. The Crown allegation, accepted by the Judge, was that these statements were false as both Bridgecorp and BIL had defaulted on payments from 7 February 2007 onwards. The Judge rejected various arguments advanced by Mr Roest that payments were not missed but were merely delayed. He also found that Mr Roest knew of the default and that the truth or otherwise of the statements was plainly material to investors.

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21 *R v Connell* [1985] 2 NZLR 233 (CA) at 237; *R v Eide* (2004) 21 CRNZ 212 (CA) at 216; and *Wenzel v R* [2010] NZCA 501 at [39].

22 *R v Slavich* [2009] NZCA 188 at [33].

23 At [95].

[59] Mr Roest accepted that he signed the offer documents but contended that he was not involved with the prospectus extension certificates dated 30 March 2007. He also repeated his submission that the payments were not missed but merely delayed.

Did Mr Roest authorise the extension certificates?

[60] As to the first issue raised by Mr Roest, the Judge found that the extension certificates were signed on behalf of all directors by Mr Davidson and Mr Petricevic at a meeting of directors on 22 March 2007. He also found that Mr Roest was present at the meeting, knew the extension certificates were required to extend the prospectus for each company and concurred in Messrs Davidson and Petricevic signing the certificate on his behalf.[24] Mr Roest submitted there was sufficient doubt about the date the extension certificates were signed to make the Judge's finding on this point unreasonable. He submitted that the minutes of the Board meeting of 22 March 2007 did not refer specifically to the extension certificates being tabled or signed. Rather, they referred to the signing of half year accounts and a memorandum of amendments to the prospectuses for Bridgecorp and BIL. He also submitted that the amendments of the prospectuses was lodged with the Companies Office on 26 March 2007 while the extension certificate was not registered until 30 March. Mr Roest questioned why both documents were not lodged at the Companies Office together if they were both signed on the same day.

[61] At trial, Mr Roest said he could not recall whether the extension certificates were signed at the directors' meeting on 22 March 2007. We accept the Crown's submission that the weight of evidence supported the Judge's finding that the certificates were signed at that meeting. Although the Judge did not specifically state his reasons for this finding as it related to Mr Roest, he gave full reasons for the same finding when discussing Mr Steigrad's position which is materially the same as that of Mr Roest. In summary, his reasons were:[25]

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[24] Reasons judgment, above n 1, at [85].
[25] Reasons judgment, above n 1, at [494]–[504].

- The certificates were prepared by a Bridgecorp employee, Ms Wong, on the basis that they would be signed at the Board meeting on 22 March 2007.

- Ms Wong forwarded the certificates with an accompanying email to another Bridgecorp employee, Mr Martin, on 21 March 2007.

- The email was explicit as to the reasons for the certificates and Mr Martin was asked to arrange for Mr Davidson and Mr Petricevic to sign them at the Board meeting.

- Mr Martin confirmed that he had taken the extension certificates to the Board meeting.

- The memorandum of amendments to the prospectuses was also before the meeting and were signed by all directors.

- The minutes of the meeting referred to the execution of the six monthly accounts to 31 December 2006.

- The only purpose of having the six monthly accounts before the meeting for execution was to satisfy the requirement for the accounts to accompany the extension certificates.[26]

- The accounts, like the extension certificates, were signed by Mr Davidson and Mr Petricevic.

- There was no reason why the certificates would not have been signed at the same meeting.

- Mr Petricevic stated that his recollection was that he and Mr Davidson signed the certificates at the Board meeting. There was no reason to doubt the evidence of Mr Petricevic on that point.

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[26] Securities Act, s 37A(1A)(d).

[62] We conclude that there was a proper foundation in the evidence for the Judge's conclusion that Mr Roest was present at the 22 March 2007 meeting and concurred in the signing of the certificates on that occasion.

Did the Crown prove that payments were missed?

[63] As to the fact of default in making the payments of interest and principal to investors, the Crown case was that Bridgecorp and BIL commenced defaulting from 7 February 2007 and continued to do so up to the date of receivership.

[64] The Bridgecorp prospectus invited members of the public to invest in term investments secured by first ranking debenture stock issued by Bridgecorp under a trust deed dated 19 December 2003. Investors were entitled to interest on their investment and, when due, the repayment of the original investment. Investors received a copy of the investment statement with an attached application form. This gave the investor an option to invest for between three months and five years and a choice for payment of interest: compounding quarterly; payable on maturity; or having interest paid directly to a bank account. Investors were required to specify the bank account to which the funds were to be credited. Both the prospectus and the investment statement said interest payable quarterly would be paid on the last business days of March, June, September and December.

[65] Investors were issued with a secured debenture stock certificate which gave details of the amount of the stock, the date of issue, the maturity date; interest rate and dates for payment; and the principal amount. Prior to Bridgecorp repaying principal, investors were given the option to reinvest or to be repaid upon maturity.

[66] In the BIL prospectus, members of the public were invited to invest in capital notes which were described as unsecured subordinated debt securities issued by Bridgecorp under the trust deed. Investors were entitled to interest on their investment, and, when due, the repayment of that investment. Interest was payable quarterly in arrears on specified dates (31 March, 30 June, 30 September and 31 December in each year). As with Bridgecorp, investors in BIL were required to nominate a bank account for the direct crediting of interest. Upon receipt of a

completed application, BIL would issue a capital note certificate giving out details of the investment and the dates upon which interest would be paid.

[67] The Bridgecorp trust deed required a quarterly declaration by the directors that interest due on and principal monies of the securities has been paid or otherwise satisfied on the due date. The failure to make a payment of interest or principal on due date was an event of default under the trust deed.[27]

[68] The trust deed for BIL was slightly different. It required BIL to notify Covenant immediately if the company failed to meet principal and interest obligations when due.

[69] Pursuant to the respective trust deeds, Mr Roest and Mr Petricevic signed directors' certificates on behalf of the two companies certifying to Covenant that there had been no default in payments due to investors. The certificate for BIL was signed on 19 April 2007 and for Bridgecorp on 30 April 2007.

[70] As already noted, the Judge found that Bridgecorp and BIL had failed to make payments of principal and interest on due date on a number of occasions from 7 February 2007 onwards. Mr Roest challenged the finding by the Judge on this issue raising similar arguments to those the Judge had rejected in his reasons judgment.[28]

The Judge's findings

[71] In reaching his conclusion, the Judge relied on the evidence of four employees of Bridgecorp: Mrs Todd (investor services manager), Ms White (group accountant), Mr Jeffcoat (general manager) and Mr Kumar (internal auditor), as well as Mr Roest's own evidence.

[72] In summary, the reasons were:

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[27] Clause 5.1.

[28] Reasons judgment, above n 1, at [50]–[56] and [88]–[98].

- Mrs Todd prepared a daily debenture maturity schedule upon receipt of the relevant term investment certificates with instructions for the payments. The schedule recorded relevant details of the investment and of principal and interest. It also recorded whether payment was to be by way of direct credit or cheque. Mrs Todd referred to this schedule as the daily outwards cash schedule.

- Ms White was responsible for ensuring that the payments of principal and interest set out in the schedule were paid. Post-receivership, Ms White prepared schedules to identify the payments that were missed. The schedules recorded the actual payment date, the scheduled payment date (the date Bridgecorp had scheduled to make the payment as noted on the daily outwards cash schedule prepared by Mrs Todd) and the closed date (the maturity date of the investment).

- Normally all three of these dates would coincide accept that, when the maturity date fell in a weekend, it was the practice to pay on the Friday before so that the scheduled and actual payment dates would be on that day.

- Mr Kumar assisted the receivers to prepare an analysis of defaults which Mr Crichton incorporated into a schedule.[29] This disclosed that, on 7 February 2007, debenture maturities (and accrued interest) payments of $642,258.18 were due to be repaid but only $436,166.84 was actually paid that day, leaving a shortfall of $206,091.34.

- There were further shortfalls of varying amounts on 8, 14, 22 and 26 February 2007; 1, 2, 7, 9, 12–14, 27 and 30 March 2007; 2, 5, 13, 16–17, 19, 23, and 26–27 April; 2, 4, 7, 9, 15, 17, 22, 25, 29–31 May; and 8, 20–22, 25–29 June 2007.

- In evidence, Mr Petricevic accepted both companies had failed to make payments of principal and interest on due dates on a number of occasions from 7 February 2007 onwards.

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[29] The Crichton schedule and Mr Kumar's summary were based on the debenture maturity schedules prepared by Mrs Todd and the related schedules prepared by Ms White.

- On Mr Roest's own analysis, there were shortfalls in the payment of principal and interest due from 7 February 2007 onwards.

Mr Roest's submissions

[73] Mr Roest's submissions on this point may be summarised as follows:

(a) Bridgecorp could have written out cheques to investors and paid them on due date.

(b) Payments made by direct credit were not missed as they were sent to Bridgecorp's bank on due date. If they were sent after 7.00 pm, they were not processed until the next working day and paid to investors the day after that.

(c) There were errors in the schedules prepared by Mr Crichton and Mr Kumar.

(d) He was not aware of missed payments.

Conclusions

[74] We do not see any merit in the points raised by Mr Roest on this issue. The reasons given by the Judge, which we accept, may be summarised as follows:

- While the trust deed provided for payment of principal or interest either by cheque sent through the post or by direct credit, payment by cheque was very uncommon.[30] Rather, the prospectus provided that payments could be credited to the accounts specified by the investors on their application form and that is what happened.

- Even Mr Roest's reworked schedule of payments (including correction of alleged errors in Mr Kumar's schedule) showed that, on a number of occasions from 7 February 2007 onwards, payments were not made on due date. For example, on 7 February 2007 there was a shortfall in payments due that day of $206,091.34 and the following day there was

[30] Paragraph 10, Schedule 1.

a shortfall of $425,596.46. According to Mr Roest's schedule (excluding occasions when the due date fell on a weekend) there were also missed payments on 12–14, 19, 22 and 26 February, 1, 5, 7, 12–14, 19, 26–27 and 30 March, 2, 10, 11–13, 16–19, 23, 26 and 30 April, 2–4, 7, 9, 14–17, 21–22 and 28–31 May, 1, 11, 18, 20–22 and 25–29 June, and 2 July.

- According to Mr Roest's own schedule, a number of these payments were not made until more than one working day after the due date. This occurred on 12 March, 16 and 18 April, 28, 29 and 30 May and 21 June.

- The shortfall on payments due on each of the days identified was always substantial and by the date of receivership on 2 July 2007 was over $4.4 million.

- The suggestion made in the High Court by Mr Roest that sufficient funds could have been raised to meet the payment even if delayed was simply not borne out on the evidence.[31]

[75] We also agree with the following conclusions of the Judge as to delays in bank processing:

> [95] Finally, the suggestion that, in some way the same day clearance of payments (on some limited occasions) and the processing delays by the bank excuse the default is misconceived. Neither address the fundamental point that Bridgecorp failed to meet its obligations to pay on due date. At best the same day clearance system masked the fact the payment was missed on the preceding day by showing the payment in an investor's bank statement on the same day as it would have appeared if it had been paid on due date.
>
> [96] Mr Roest's explanation that the payments were not missed but rather were only delayed, but not to a material degree, is specious. If a debenture investment matured and (with accrued interest) was due for repayment on the 7th February but was not paid until the 8th it is a missed payment, as it was not made on due date. While it could also be described as a delayed payment, (in that it was ultimately paid), it was a missed payment or a default in terms of the trust deed, which is a material event.
>
> (Footnote omitted.)

[31] Refer to the finding by the Judge at [91] of the reasons judgment, above n 1.

[76] Finally, we reject the submission that there was no proper basis for the Judge's finding that Mr Roest was aware of the missed payments. Mr Roest's submission was that amounts due which were processed by the banks after 7.00 pm were paid by the following working day. He submitted that these were not defaults and that he was not aware of any delays beyond one working day. This submission depends in part on the proposition that we have rejected that the payment made one working day after due date is not a missed payment. Importantly, Mr Roest accepted when questioned by us that there was no evidence to support his submission that clearance of payments would be delayed until the next working day if the bank did not receive instructions for payment until after 7.00 pm. In any event, Mr Roest's revised schedule shows that payments were made as much as two to four working days after due date.

[77] The Judge's reasons for finding that Mr Roest was aware of the missed payments are compelling:[32]

- Mr Roest and Mr Petricevic met regularly. Their offices adjoined each other.

- Mr Roest's evidence was that Mr Petricevic was aware of the issues of missed/delayed payments in February/March because he (Mr Roest) had discussions with him about cashflow issues.

- Since cashflow was a major issue for Bridgecorp from the middle of 2006 onwards, it was logical that Mr Roest and Mr Petricevic would discuss the company's cashflow and its commitments to investors.

- Mr Roest had nothing to gain and no reason to withhold information regarding the missed payments from Mr Petricevic, who was the managing director and had a far greater personal interest in the company than Mr Roest.

- Mr Petricevic knew, at the time he signed the extension certificate, dated 30 March 2007, that the certificate was false for failing to

[32] Reasons judgment, above n 1, at [77]–[82] (in relation to Mr Petricevic) and [88] (in respect of Mr Roest).

disclose that Bridgecorp had missed a number of payments of principal and interest to investors by that time and he could not reasonably have believed Bridgecorp was not in default.

- Mr Roest also knew the extension certificate was false in that respect. There could be no doubt that Mr Roest was aware that payments were not made on due date from time to time after 7 February 2007.

- The Judge accepted the evidence of Mr Welch that if there was insufficient money to pay investors, he would normally make sure Mr Roest was aware that Bridgecorp was not paying the full amount.

- The Judge accepted Mr Welch was responsible to Mr Roest whom he described as a "micro manager". If there was anything out of the ordinary, Mr Welch would inform Mr Roest.

[78] We add that Mr Welch sent an email to Mr Roest on 5 February 2007, warning him of "major deficit issues over the next three weeks". The cashflow attached showed negative cash balances of $667,000 on 7 February 2007 and more substantial deficits each day until 23 February 2007.

Summary on the missed payments issue

[79] To summarise, we are satisfied that the Judge was right to conclude on the evidence that:

(a) Both Bridgecorp and BIL had missed payments of principal and interest due from 7 February 2007 onwards.

(b) The extent of the defaults was substantial in scale and clearly material.

(c) The statement in the prospectus that the companies had not missed payments of principal and interest was highly material to investors or potential investors.

(d) Mr Roest knew, soon after 7 February 2007 and at the time the extension certificates were signed, that both companies had missed payments of principal and interest.

(e) Mr Roest was aware the extension certificates were being signed and concurred in their making and publication.

(f) Where it was a necessary element of the charge, Mr Roest intended to induce investors to subscribe to the securities offered.[33]

(g) There was no basis to find that Mr Roest had reasonable grounds to believe the statements about the lack of missed payments were true.

The statement that Barcroft was not a related party

Background

[80] A central feature of the charges brought under the Securities Act was that the offer document issued by Bridgecorp and BIL stated, contrary to the truth, that Barcroft was not a party related to Bridgecorp. The relevant part of the offer documents was expressed in the following terms:[34]

Loans to related parties	**2006**	**2005**
	$'000	**$'000**
CURRENT		
North Ryde Property Pty Ltd*	-	13,391
Urwin Fernandez (Fiji) Ltd*	-	3,054
Manukau City Hotel Projects*	-	4,052
		20,497

* members of UFB Pacific Limited Group

The above loans were made on normal commercial terms and conditions.

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33 The Judge's findings on this issue for Mr Petricevic and Mr Roest at [83], [97] and [98] of the reasons judgment were not seriously disputed on appeal.

34 This material appeared in notes to the financial statements for Bridgecorp for the year ended 30 June 2006 which were incorporated in the prospectus issued by both Bridgecorp and BIL.

> In December 2003, [BHL], the parent entity of the Company, established UFB Pacific Limited, a 50:50 joint venture with a company associated with the Urwin Fernandez Group. The Urwin Fernandez Group is a shareholder in Bridgecorp Holdings Limited, and Mr G.K.Urwin is a director of [BHL] and the Company. UFB Pacific Limited sources and develops hotel and resort projects. [BHL] provides funding for individual projects while the Urwin Fernandez Group provides access to the hotel operator and project management. Within the UFB joint venture are the Marriot Courtyard hotels operating at North Ryde (Sydney), Parramatta and Surfers Paradise, and the development of a Marriot-managed hotel and resort complex in Fiji scheduled for completion in stages from late 2006.
>
> **By agreement dated 30 June 2006, the Company and Bridgecorp Finance (Australia) Pty Ltd ("BFAL" – a subsidiary of the Company), sold certain loans in the ordinary course of business, including loans to members of UFB Pacific Limited Group, to Barcroft Holdings Limited ("Barcroft"), an unrelated company incorporated in New Zealand, for $76,759,081.** The purchase price for the loans was payable by the issue of certain notes by Barcroft. Barcroft's obligations to each of Bridgecorp Limited ("BL") and Bridgecorp Finance (Australia) Pty Limited ("BFAL") are secured in each case by a general security agreement in respect of Barcroft's present and after-acquired property and a specific security agreement in respect of the acquired loans and their proceeds.
>
> (Emphasis added.)

[81] As the Judge noted, despite the statement that the relevant loans were being sold to Barcroft, the transactions had been treated in Bridgecorp's accounts as a loan.

[82] The Crown's case was that although the Barcroft transaction was fully disclosed in the prospectus, Barcroft was a related party. Reliance was placed on the accounting standard NZ IAS 24 which provides for the disclosure of related party transactions. Relevantly, cl 9 defines "related party":

> *A party is related to an entity if:*
>
> *(a) directly, or indirectly through one or more intermediaries, the party:*
>
> *(i) controls, is controlled by, or is under common control with, the entity (this includes parents, subsidiaries and fellow subsidiaries);*
>
> *(ii) has an interest in the entity that gives it significant influence over the entity; or*
>
> *(iii) has joint control over the entity;*
>
> *(b) the party is an associate (as defined in NZ IAS 28* Investments in Associates *of the entity);*

> ...
>
> *(d) the party is a member of the key management personnel of the entity or its parent;*
>
> ...
>
> *(f) the party is an entity that is controlled, jointly controlled or significantly influenced by, or for which significant voting power in such entity resides with, directly or indirectly, any individual referred to in (d) …*

The following definitions also apply:

> *Control is the power to govern the financial and operating policies of an entity so as to obtain benefits from its activities.*
>
> *Key management personnel are those persons having authority and responsibility for planning, directing and controlling the activities of the entity, directly or indirectly, including any director (whether executive or otherwise) of that entity.*
>
> *Significant influence is the power to participate in the financial and operating policy decisions of an entity, but is not control over those policies. Significant influence may be gained by share ownership, statute or agreement.*

[83] Venning J also referred to paragraph 10 of the standard which provides:

> In considering each possible related party relationship, attention is directed to the substance of the relationship and not merely the legal form.

[84] The Judge found that Barcroft was an entity controlled or significantly influenced either directly or indirectly by Mr Urwin and, to an extent, by Mr Roest. Both were key members in the management of Bridgecorp.

[85] It is necessary to set out the background to the Barcroft transactions. We draw what follows from the Judge's reasons judgment.[35] A significant factor in Bridgecorp's ultimate failure was its lending for the purposes of a development at Momi Bay, Fiji and other loans related to a joint venture with Urwin Fernandez Group, a company associated with Mr Urwin.

[86] The joint venture was advanced through a company named UFB Pacific Ltd, later renamed REAL Estate Assets Ltd (REAL). UFB Pacific was owned in equal

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[35] Reasons judgment, above n 1, at [268]–[316].

shares by Bridgecorp's parent BHL and a company in the Urwin Fernandez Group. The latter was a shareholder in BHL as earlier noted. Mr Urwin was a director of BHL and Bridgecorp. UFB Pacific operated on the basis that BHL provided funding for the company's projects while the Urwin Fernandez Group provided access to hotel properties and project management.

[87] The Momi Bay project was developed by a subsidiary of UFB Pacific. By 30 June 2005, Bridgecorp had advanced over $45 million to the project for the first stage of the development. The loan was nevertheless treated as a receivable in the accounts of Bridgecorp as at 30 June 2006 on the basis of pre-sales of residential lots in stage 1 assigned or charged to Bridgecorp. The UFB Pacific subsidiary to which the loans had been made was then described in the Bridgecorp accounts as a related party.

[88] Stage 2 of the Momi Bay development was acquired towards the end of 2005 by the Pacific Trust. Muainarewa Resorts Ltd (MRL) was the corporate trustee for the Pacific Trust, the details of which we set out below. In preparation for the Barcroft transaction, Mr Urwin and Mr Roest took a number of steps involving MRL and the Pacific Trust. The Judge summarised these steps:

> [277] Effectively, in exchange for extending and consolidating the loans owing to Bridgecorp and BFAL [a member of the Bridgecorp Charging Group] by the related parties associated with Mr Urwin until December 2008, Bridgecorp obtained the further security of Momi Stage 2. It also obtained a $5 million fee which it booked in its accounts to the year of 30 June 2006 but which was to be capitalised and paid at the conclusion of the period.

[89] Venning J found that Bridgecorp obtained a real commercial benefit from this aspect of the transaction through MRL's guarantee (supported by Pacific Trust's ownership of the second stage of the development) and by obtaining the $5 million booking fee.

[90] It is significant that the subsequent sale of the loans to Barcroft and related steps all took place on 30 June 2006, the Bridgecorp balance date. Barcroft was incorporated that day and the agreement for sale and purchase of the shares was dated the same day. Barcroft's nominal shareholder was Corporate Trustee Services

Ltd (CTSL). The sole director of both CTSL and Barcroft was Mr Anthony McCullagh, who the Judge found had a long association with Mr Urwin. He regularly acted for Mr Urwin and, through CTSL, acted as a trustee for Mr Urwin's interests in various projects owned or controlled by Mr Urwin. Mr McCullagh also knew Mr Petricevic and Mr Roest, and had acted for Bridgecorp on a number of occasions since the late 1990's.

[91] Through CTSL, Barcroft was the beneficial owner of the shares in MRL, the corporate trustee of the Pacific Trust. By a declaration of trust dated 30 June 2006, CTSL held the shares in MRL as trustee of the Pacific Trust. This trust was constituted by a trust deed in 2003. Soon after, Mr Urwin became the appointer of the trust, leading ultimately to the appointment of MRL as trustee. MRL then appointed Stallman Holdings Ltd (Stallman) as a discretionary beneficiary of the trust. Stallman is an Urwin company. BHL (Bridgecorp's parent) was also a beneficiary of the trust.

[92] Through a succession of changes made in 2006, the class A appointers for the trust became Mr Urwin and a Mr Trevor Webb. The class B appointers became Mr Petricevic and Mr Roest.

[93] Venning J noted that MRL was incorporated because it was necessary to have a Fijian entity to hold the land for the second stage of the Momi Bay project. As at 28 February 2006, Mr Urwin was a director of MRL along with four others. By November 2006, Mr Temo and Mr Probert were the only directors of MRL. MRL later acquired the stage 2 land at Momi Bay as trustee of the Pacific Trust. The Judge noted that the financial statements for BHL for the year ended 30 June 2006 identified MRL as a related party.

The Judge's findings

[94] The Judge then found:

> [302] The evidence satisfies me that Mr McCullagh and Barcroft were not independent. The defence refer to the fact that different legal firms represented the parties to the transaction. But whatever legal form may have been given to the establishment of Barcroft, the practical reality was it was not independent. Mr McCullagh confirmed that throughout the relevant

> period he took his instructions in relation to Barcroft from Messrs Urwin and Roest. Mr McCullagh was told by Mr Urwin that he was to be a director of Barcroft and to hold the shares in it for a Fijian company (MRL). Despite that, Mr McCullagh never received any directions from the Fijian directors of MRL and always went straight to Mr Urwin and Mr Roest. Mr McCullagh said he believed the Fijians would have taken their directions from Mr Urwin in any event.
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> [303] Mr McCullagh also said that he was to be paid an initial fee of $50,000 together with director's fees of $1,800 per month for his role in relation to Barcroft. Although the initial fee was never paid, Mr McCullagh was paid his monthly salary by REAL [formerly USB Pacific]. Bridgecorp also agreed to pay all Mr McCullagh's legal fees.
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> [304] There were further relevant features of the relationship. Bridgecorp charged substantial administration fees (in addition to the $5 million fee) to Barcroft which Mr Roest was aware of but which Mr McCullagh said he never authorised. Bridgecorp also charged the Barcroft loan account with monthly payments to Winworth, an Urwin company. Again, Mr McCullagh did not authorise those payments.

[95] He concluded that Barcroft was a related party to Bridgecorp and there was a duty to disclose that in the accounts.[36] After referring to the accounting standard, the Judge gave his reasons for this conclusion:

> [314] The evidence confirms that Barcroft is an entity controlled or significantly influenced either directly or indirectly by Mr Urwin (and to an extent Mr Roest). Mr Urwin (and Mr Roest) was a member of the key management of Bridgecorp. The link traces through the beneficial ownership of the shares in Barcroft to MRL and from there to Pacific Trust and its discretionary beneficiaries Stallman (Urwin's interests) and BHL.
>
> [315] Through his ultimate interests in the Pacific Trust and his apparent ability to act on behalf of the Pacific Trust and direct Mr McCullagh in relation to Barcroft, Mr Urwin had control and significant influence over Barcroft. Through their ability to appoint trustees to direct the Pacific Trust Messrs Roest and Petricevic and, through them, Bridgecorp also had control or significant influence over Barcroft.
>
> (Footnotes omitted.)

Mr Roest's submissions

[96] The general thrust of Mr Roest's submissions on the Barcroft issue was that the evidence did not establish that Barcroft was a related party. He submitted that Mr Urwin was always acting in his own interests and not those of BHL or its subsidiary Bridgecorp. He said the evidence pointed to Mr Urwin's influence on

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[36] Reasons judgment, above n 1, at [305].

Barcroft and to a potential relationship between Barcroft and Stallman or possibly REAL. The only relationship between Barcroft and Bridgecorp was commercial in nature, ie lender/borrower.

[97] The Crown helpfully summarised the appellant's further submissions on this topic in these terms:

(a) He never gave instructions to Mr McCullagh in his position as director of Barcroft;

(b) He was not aware that Bridgecorp was charging fees to the Barcroft loan account;

(c) Mr Urwin gave instructions to Mr McCullagh in his position as the managing director of REAL or owner of Stallman, not in his position as a director of Bridgecorp;

(d) His Honour was not qualified to make a determination on the related party status of Barcroft, and that Bridgecorp's auditors were the only party that could reach a conclusion on that point;

(e) The appellant was entitled to rely upon the auditors to ensure that the Barcroft transaction was reported correctly.

Instructions to Mr McCullagh

[98] We accept the Crown's submission that the Judge was entitled to rely on Mr McCullagh's evidence that he never received any direction or contact from the MRL directors and so he went straight to Mr Urwin, principally, and also to Mr Roest for instructions. Mr McCullagh was aware that the ultimate beneficiaries and shareholders were the Urwin interests and BHL. That was where he saw his obligations lying. Mr McCullagh accepted that he had never sent any emails to Mr Roest but he gave evidence that he frequently attended the Bridgecorp offices and had spoken to Mr Roest on those occasions.

Mr Roest's submission that he was unaware of the fees to be paid to Mr McCullagh for his role as director of Barcroft

[99] Mr Roest's assertion that he was unaware of the fees to be paid to Mr McCullagh for his role as director of Barcroft is inconsistent with Mr McCullagh's evidence at trial. He said he agreed both the monthly and transaction fees with Mr Urwin and Mr Roest. It was agreed that the monthly director's fee of approximately $1800.00 would be paid by the joint venture, REAL and that the transaction fee of $50,000 would be paid by Bridgecorp. Mr McCullagh's evidence was that he approached both Mr Roest and Mr Urwin on a number of occasions raising with them the non-payment of the transaction fee. The Judge was entitled to accept that evidence.

[100] As to the submission that Mr Urwin gave instructions to Mr McCullagh on behalf of REAL and the Urwin Fernandez interests, we accept the Crown's submission that this misses the point. The question is not whether Mr Urwin was acting on behalf of REAL or Bridgecorp at relevant times. He was a director of Bridgecorp and BHL and was therefore in a position to exercise control and influence over Barcroft in that capacity.

Lack of relevant evidence and expertise

[101] The submission by Mr Roest that the Judge did not have the expertise or evidence to make the related party findings is misconceived. We have already referred to the expertise of Mr Crichton and Mr Graham in this respect and to the Judge's general observations about expert evidence.[37] The Judge found that the issue was for the Court to determine.[38] We agree. The issue was not unusually complicated and was essentially a question of fact. In the end, as the Judge said, the Court must make the decision based on the evidence placed before it.

Reliance on the auditors

[102] Mr Roest submitted that Bridgecorp's auditors (who were Sydney-based) were the only persons properly qualified to express a view on the related party issue.

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37 See [44]–[50] above.

38 Reasons judgment, above n 1, at [313].

They had raised no concerns about the issue and were not called to give evidence. There are several responses to this issue. First, we accept the Crown's submission that it was open for the appellant and his co-accused to call the auditors if they could have offered any useful evidence on this subject. Second, the Judge was in a position to make the decision. Third, the Judge found that Mr Roest had not produced any evidence (other than the Bridgecorp accounts themselves) to support his defence that the auditors had all the relevant information to determine whether Barcroft was a related party. The Judge found there was no formal advice on the issue and that, if there had been, he was satisfied Mr Roest would have produced it. Mr Roest referred us to an organisational structure diagram that Mr Dawson provided to him on 6 November 2006. This contained details of all the relevant companies and the Pacific Trust. Mr Roest's evidence at trial was that he provided this to the solicitors' firm Buddle Findlay and believed it was also given to the auditors about that time. But he admitted he could not recall precisely and did not produce any documentary evidence that this occurred.[39]

[103] We add that, in cross-examination, Mr Roest acknowledged that a question about the status of Barcroft was raised much later on 16 April 2007 by the Securities Commission. He had drafted a letter sent to the auditors on this subject but accepted it did not provide full information. For example, the letter did not explain that both BHL and Stallman were discretionary beneficiaries under the Pacific Trust and that Bridgecorp's directors (including Mr Petricevic, himself and Mr Urwin) had powers of appointment in terms of the trust deed.[40]

Conclusions on the Barcroft related party issue

[104] The features of the Barcroft transaction that stand out are:

- Immediately prior to 30 June 2006, the very substantial loans made by members of the Bridgecorp Group to UFB Pacific/REAL were treated as related party lending.

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[39] Notes of evidence at 2948–2949.
[40] Notes of evidence at 2827–2830.

- That was because it was accepted that UFB Pacific was a 50:50 joint venture between BHL and the Urwin Fernandez Group. Mr Urwin was a director of both entities. The Urwin Fernandez Group was a substantial shareholder in both Bridgecorp and BHL.

- On the 30 June 2006 balance date for Bridgecorp, the loans owed to the Bridgecorp Group were sold to Barcroft for a sum in excess of $76 million. No cash was paid. Payment of the purchase price was achieved by the issue by Barcroft of certain notes.

- The effect of the transaction was to dramatically reduce the related party lending shown in Bridgecorp's accounts which were incorporated in the 21 December 2006 prospectus for both Bridgecorp and BIL.

- Bridgecorp and BHL retained control and significant influence over Barcroft primarily through Mr Urwin. That is because he was in a position to, and did, influence Mr McCullagh as the sole director of Barcroft and its sole shareholder, CTSL.

- In turn, CTSL held the shares in MRL as trustee of the Pacific Trust on behalf of the ultimate beneficiaries, Stallman (Mr Urwin's interest) and BHL.

- Mr Petricevic and Mr Roest were also in a position to control and influence Barcroft through their powers to appoint trustees of the Pacific Trust. Together with Mr Urwin, they were three of the five directors of Bridgecorp and BHL.

- As Mr Graham put it in his evidence, ownership of Barcroft ultimately lay with BHL and Stallman through their beneficial interests in the Pacific Trust while day-to-day control was exercised by Mr Urwin and Mr Roest.[41]

[105] Given the Judge's factual findings, particularly the nature and extent of Mr Urwin's influence over Mr McCullagh; the identity of the parties responsible for

[41] Notes of evidence at 1919–1920.

his fees; and the other undisputed facts, the conclusion that Barcroft was a related party to Bridgecorp was inevitable. This was contrary to the plain implication from the offer documents. The transaction may be seen as a transparent attempt to improve the Bridgecorp financial statements by the apparent major reduction of related party lending but without any material change to the control and influence the Bridgecorp Group and Mr Urwin enjoyed prior to the transaction being entered into.

Materiality

[106] There can be no doubt that if Barcroft was indeed a related party, this fact would be highly material to any new potential investor and to a decision by any existing investor as to whether to reinvest. Mr Roest did not attempt to argue otherwise.

Did Mr Roest have reasonable grounds to believe that Barcroft was an unrelated company?

[107] At trial, Mr Roest raised the defence under s 58(4) of the Securities Act. This was on the basis that no external party had suggested that Barcroft may have been a related party or raised any concerns on that issue. The Judge was satisfied that Mr Roest could not honestly have held a reasonable belief that Barcroft was not a related party.[42] His reasons for that finding are summarised:[43]

- Mr Roest was involved with Mr Urwin in developing the Barcroft transaction from the outset.

- A Bridgecorp legal adviser (Mr Dawson) had raised the issue whether Barcroft was a related party transaction for accounting purposes in an email to Mr Roest on 29 June 2006. Mr Dawson raised the matter again in a letter of 30 August 2006. It is common ground that Mr Dawson did not provide any advice as to whether Barcroft was a related party.

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42 Reasons for verdict at [394].

43 Reasons judgment, above n 1, at [394]–[399].

- The Judge accepted Mr Kumar's evidence that he raised the issue with Mr Roest shortly before the December 2006 prospectus was issued. The response from Mr Roest was that it was not a related party and that he had obtained a professional opinion to that effect. No such opinion was produced.

- Mr Roest's evidence that he had relied on the auditors, Covenant and MED was not supported by any evidence that those parties had all the relevant information.

- Mr Roest and Mr Urwin had full knowledge of the Barcroft transaction.

- Concerns were raised about the lending to Barcroft at a meeting of Bridgecorp's Property Investment Research Committee chaired by Mr Urwin. These concerns were reported in the minutes of the executive committee meeting of 17 November 2006 attended by Mr Roest and Mr Petricevic.

[108] Mr Roest's essential submission on this point was that he was entitled to rely on the absence of any concerns being raised by the auditors and other external parties. However, there can be no doubt that Mr Roest was fully aware there was a potential issue about the accounting treatment of the Barcroft transaction. In the absence of evidence that Bridgecorp had received formal advice from the auditors or other advisors that Barcroft could be treated as an unrelated party, Mr Roest had no reasonable grounds to believe that the prospectus on this issue was true. We uphold the Judge's findings on this point.

The statement that, in the period 30 June 2006 to 21 December 2006, no circumstance had arisen to affect the trading or profitability of the Charging Group; the value of its assets; or its ability to pay its liabilities due in the next 12 months

[109] The Crown provided a number of sub-particulars under this heading. The Judge accepted that some but not all of these had been proved.[44] We deal with these in order.

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[44] The Judge's findings are at [317]–[344] of the reasons judgment, above n 1.

Decline in investments and issues affecting loan recoveries

[110] The Judge found there was a decline in the monthly new investment rate from $13.4 million in July 2006 to $6.3 million in November 2006. The decline should have been a cause of concern, particularly to the executive directors. The Judge was satisfied this reflected circumstances that would adversely affect the Charging Group's trading profitability or its ability to pay its liabilities within the next 12 months.

[111] The general thrust of Mr Roest's submission under this heading is that it was not shown beyond reasonable doubt that a reduction of investments would have a material impact on the company's financial position or performance. It was, he submitted, only one of many factors that might impact on the company's performance and its ability to pay its debts as they fell due. It was simplistic to select one factor alone. It was necessary to review the company's budgets, and the financial and cashflow forecasts. While new investments and reinvestment rates were factors relevant to cashflow, the overall picture had to be considered.

[112] The Crown accepted Mr Roest's proposition that it was necessary to take into account Bridgecorp's overall financial position between June and December 2006. The Judge appears to have accepted this as well since he grouped together three other associated particulars relied upon by the Crown:

- Loans were not being repaid on time and were being rolled over on due date.
- There was an increase in impaired loans and non-performing assets.
- The actual recovery of loans was lower than forecast.

[113] The Judge found that total impaired and non-performing assets (which included both non-accrual and past due loans) for the Charging Group had increased from $48.3 million at June 2006 to $118.9 million at November 2006.[45]

[45] Reasons judgment, above n 1, at [329].

[114] He noted that a defence witness, Mr Lazelle, suggested this was not an isolated event and that there had been very large increases in non-accrual assets and impaired loan provision for the financial year to 30 June 2006. However, the Judge saw the increase in the June to December 2006 period as the continuation of an existing negative trend which should have been an issue of concern for the Bridgecorp directors.

[115] The Judge accepted evidence from the receiver, Mr McCloy, that impaired and past due loans increased from 10.2 per cent at June 2006 to 27.5 per cent by November 2006 and that non-performing assets increased from 16.2 per cent at June 2006 to 28.2 per cent by November of that year. The Judge was satisfied this marked increase was a circumstance that would adversely affect the trading or profitability of Bridgecorp and its ability to pay its liabilities due within the next 12 months.

[116] As to the actual recovery of loans as against forecast, the Judge recorded the Crown allegation that the recovery predicted in the financial statements for 30 June 2006 in the period July to December 2006 was $482 million against actual collections of only $95 million. The Judge accepted that the amount of collections forecast reflected contractual obligations and needed to be considered in the context of the disclosure in the prospectus that loans were rolled over from time to time and that interest was capitalised. However, even taking those factors into account, the Judge considered it to be significant that less than one-fifth of what was contracted to be repaid in that six month period was actually repaid. He considered this to be very relevant to liquidity. The variance was so significant that it would impact on the ability of the Charging Group to pay its liabilities over the next 12 months.

[117] Venning J found that cash was so tight that Bridgecorp ceased new lending by May 2006 and that, from mid-2006, cashflow was a major focus of the company.[46] It was wholly reliant on reinvestments to continue funding its business during that period.

[118] The Crown also pointed to substantial short term borrowing by Bridgecorp from the St Laurence Group. A sum of $8 million was borrowed, initially for a three

[46] Reasons judgment, above n 1, at [341].

month period. The initial interest rate was 13 per cent per annum plus a fee of $200,000. Bridgecorp provided security in the form of shares it owned in Dorchester Pacific Ltd. While accepting that a finance company might borrow short term from time to time, the Judge observed that the borrowing of this sum from a second tier finance company in Bridgecorp's situation should have been a matter of concern to the directors. However he concluded that, given the size of Bridgecorp's loan book, this borrowing was unlikely to adversely affect Bridgecorp's profitability or its ability to meet its liabilities.[47]

[119] We consider the St Laurence borrowing is best viewed as reflective of the very tight liquidity issues Bridgecorp was facing in the second half of 2006. Taken with the other facts found by the Judge, it supports the overall finding that the deterioration in Bridgecorp's financial position affected its trading in profitability, the value of its assets, and its ability to pay its liabilities due over the next 12 months.

[120] We are satisfied that the Judge was correct to conclude that the decline in investments along with the associated issues discussed under this topic were significant factors he was entitled to take into account in his findings on the topic of circumstances affecting Bridgecorp's trading or profitability, the value of its assets and its ability to pay its liabilities in the ensuing 12 months.

Reduction in available cash

[121] The final particular relied upon by the Crown under this heading related to the shortage in cashflow from mid-2006. We have already referred to this in part. The Judge noted that, even on Mr Lazelle's figures, there was a marked reduction in cash available between 30 June 2006 and November 2006. The available cash for the Bridgecorp Charging Group expressed in New Zealand dollars had reduced from $13.3 million in June 2006 to $3.4 million by November 2006. In the same period, the consolidated cash available expressed in Australian dollars had reduced from $21.3 million to $3 million. The Judge found that, particularly at a time when new lending was not being undertaken in order to build up cash reserves, the significant

[47] Reasons judgment, above n 1, at [339].

reduction in cash available was another circumstance that would have adversely affected the company's ability to meet its liabilities over the following 12 months.

Mr Roest's submissions

[122] Mr Roest made many points disputing aspects of the Judge's finding under this heading. He submitted, for example, that the Securities Act did not require the prospectus to cover forecast or historic investment or reinvestment rates. He pointed out that the Judge had not been prepared to find that the percentage of term investments renewals over the period June to December 2006 demonstrated any undue deterioration; cashflows available to the directors demonstrated that the company could meet its liabilities as they fell due; there was no deterioration in Bridgecorp's "financial position" which he defined as the difference between assets and liabilities; the increase in past due loans was resolved by the rolling over of the loans in December; and investors were alerted in the prospectus to the coup in Fiji in late 2006 (which affected the Momi Bay development) and to the general liquidity risks in the prevailing climate.

[123] The Crown disputed all the propositions raised by Mr Roest in careful and detailed submissions. It was submitted that the essential issue under this heading was whether circumstances had arisen in the last half of 2006 to affect the trading or profitability of the Charging Group, the value of its assets or its ability to pay its liabilities due in the next 12 months. The particulars accepted by the Judge on this issue were supported by the evidence. Variances between budgeted and actual cashflows had no direct bearing on these issues. In any event, they had to be considered in the light of the other indicators of Bridgecorp's deteriorating financial state during that period.

[124] The Crown produced evidence demonstrating that over the period May to October 2006, the receipt each month of new monies deteriorated significantly from $14.9 million to $4.6 million. This was also an indicator of the deterioration in Bridgecorp's liquidity. We also accept the Crown's submission that receipt of new money for investment or the reinvestment of existing debenture stock did not improve the net asset position of the company since Bridgecorp assumed a

corresponding liability to repay the funds invested as well as an ongoing interest commitment. Given the freeze on new lending, the fall-off in loan recoveries, and the capitalisation of interest on most loans Bridgecorp made, the reduction in new investment was significant.

[125] The Crown relied on Mr Graham's evidence that delayed loan repayments became a very serious issue in relation to Bridgecorp's solvency and liquidity. As at 20 October 2006, there were non-accrual loans of $72.4 million, past due loans of $53 million making a total of $125.4 million in impaired assets. The company's cashflow arose almost wholly from loan repayments, the issue of debenture stock and the sale of loans. We accept the Crown's submission that loans in the impaired or past due category were not available to meet the liquidity requirements of the company. That position was not altered by the rolling over of the past due loans which simply postponed Bridgecorp's obligation to repay. Mr McCloy's evidence about the increase in loan impairments and non-performing assets over the period June to November 2006 was not challenged in cross-examination.

[126] Finally, the Crown referred to a schedule produced at trial showing the decline in the company bank balance over the period July 2006 to December 2006 (as drawn from the Bridgecorp board papers). This showed that, at the end of July 2006, the company had $15.8 million in cash at the bank, declining to $3.2 million and $3.3 million dollars at November 2006, then increasing to $6.5 million at the end of December 2006. We agree that this too ought to have been a matter of concern to the directors at a time when the company was endeavouring to build up its cash reserves by declining to make any fresh advances.

Conclusion on the deterioration in Bridgecorp's financial position between 30 June 2006 and December 2006

[127] We are satisfied there was a proper basis in the evidence for the Judge to conclude that the Crown had proved beyond reasonable doubt that circumstances had arisen in the period 30 June 2006 to 21 December 2006 that would adversely affect the Charging Group in the ways identified. We agree with Venning J's approach of considering the factors relied upon by the Crown in combination. The directors were well aware that Bridgecorp was operating in conditions of very tight liquidity. As

the finance director, Mr Roest ought to have been alert to any signs of deterioration in liquidity, particularly when the difficulties over Momi Bay arose.

[128] In combination, the Judge's findings were appropriate in the light of:

- The sharp decline in new investments in Bridgecorp debenture stock;
- The marked deterioration in impaired, non-accrual and past due loans;
- The major discrepancy in the forecast of actual loan recoveries over the period; and
- The reduction in cash at bank and the absence of cash reserves.

Materiality

[129] We have no doubt that the Judge was right to conclude that the statement in the offer documents on this topic was both untrue and material in the circumstances just outlined. The matters identified all had obvious relevance to the decisions of new and existing investors.

The s 58(4) defence

[130] We are also satisfied that the Judge's conclusion that Mr Roest did not have an honestly held belief that the statement was true was a proper finding on the evidence.[48] As the finance director, Mr Roest had full knowledge of the relevant circumstances and did not assert he was relying on the views of others on this topic. Given the facts found by the Judge, he could not have had reasonable grounds to believe that no circumstances had arisen that affected Bridgecorp's position in the respects identified.

Untrue statements in relation to liquidity risk

[131] As noted, the Crown relied on two matters relating to liquidity risk in relation to the offer documents of 21 December 2006. The first was the omission to state the actual deterioration in Bridgecorp's liquidity since the year ended 30 June 2006. Our

[48] Reasons judgment, above n 1, at [400] and [401].

conclusions in relation to the last issue apply equally to this matter and we need not refer to them further. The second matter the Crown relied upon under this heading was the statement that Bridgecorp had a policy of maintaining a minimum cash reserve on bank deposit. We can also deal briefly with this issue. The offer documents for Bridgecorp contained a statement to the following effect:

> Liquidity risk is managed by:
>
> …
>
> - Having a policy of maintaining a minimum cash reserve held on bank deposit.

[132] BIL's prospectus contained a similar statement except it did not refer to a "policy". Rather, it stated positively that liquidity was managed (inter alia) "by maintaining a minimum cash reserve held on bank deposit."

[133] Mr Roest's submission on this point was limited in the end to questioning whether the statements about maintaining cash reserves were material. The Judge found that, at no time, was any money held on bank deposit by way of cash reserve.[49] He referred to some general evidence that a figure of $50 million was to be held in reserve but found there was no evidence that a cash reserve to that level was ever met. He added:

> [348] Even if the rather general evidence about Bridgecorp's intention could be elevated to the status of a policy to maintain a cash reserve, the statement was untrue in that it was misleading in the form and context in which it was included in the prospectus. A notional investor would take from reading that statement that Bridgecorp had a structured policy of holding funds on bank deposit to manage the risk of difficulty in raising funds at short notice to meet its financial commitments as they fell due. The notional investor would take comfort from that. That was not, however, the true position. The true position, if outlined, would have been that Bridgecorp had stopped new lending, that it intended to set aside a fund to manage liquidity issues and build the fund to approximately $50 million before recommencing lending, but that figure had not been achieved. The statement in particular (e)(i) was untrue.

[134] We are satisfied that the Judge's conclusion on this issue was amply justified on the evidence and that it was material. We note that Mr Welch accepted that the

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[49] Reasons judgment, above n 1, at [347].

minimum reserve was never reached.[50] There was no basis upon which Mr Roest could assert a defence under s 58(4) of the Securities Act since he had full knowledge of the facts and knew the statement was untrue.

The extension certificates dated 30 March 2007

[135] The final allegations under the Securities Act charges related to the extension certificates issued for the purposes of s 37A(1A) of the Act. The certificates were required to state (and did so state) that:

> (c) ... in the opinion of all directors of the issuer after due enquiry by them,—
>
> (i) the financial position shown in the statement of financial position [contained in the Registered Prospectus] has not materially and adversely changed during the period from the date of that statement of financial position [being 30 June 2006] to the date of the certificate; and
>
> (ii) the registered prospectus is not, at the date of the certificate, false or misleading in a material particular by reason of failing to refer, or give proper emphasis, to adverse circumstances …

[136] The Judge accepted that the Crown had proved beyond reasonable doubt that these statements were untrue. Venning J found that the statements in the extension certificates were untrue in a number of respects.[51] By that date, there had been a deterioration in Bridgecorp's position since 30 June 2006 sufficient to adversely affect the trading or profitability of the Charging Group and its ability to pay its liabilities within the next 12 months. There had also been a further deterioration in Bridgecorp's overall liquidity. In addition, as we have already noted, there had been a number of principal and interest payments missed in the period between 7 February 2007 and 30 March 2007. Those defaults, as the Judge found, continued during the period post-30 March up to the date of receivership.

[137] Other factors relied upon by the Judge were:

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50 Notes of evidence at 870.

51 Reasons judgment, above n 1, at [460].

- The inflow of new investments remained at critically low levels from March onwards.[52]

- As a consequence of the coup in Fiji, the Momi Bay receivable of $48 million (which had been due for settlement by 31 December 2006) was not achieved and, by January 2007, had been removed from cashflow predictions.[53]

- The summary of the consolidated group's cash position in Australian dollars prepared for the purpose of a board meeting on 22 March 2007 reported an actual position of negative $3.1 million as against a budgeted forecast of $33.5 million in credit.

- On 29 March 2007, Mr Roest sent an email to the non-executive directors attaching a cashflow forecast that predicted a negative cash balance of a little over $2 million for the Bridgecorp Group for the week ended 30 March.[54] It also recorded that the week had started with negative cash of $61,000.

- The defence witness, Mr Lazelle, accepted that the forecast deficiency in cashflow ought to have been a matter for concern by the directors.[55]

- Mr Roest was aware of the negative cashflow position and the ongoing defaults in payment of principal and interest.[56]

[138] Mr Roest endeavoured to dispute the Judge's findings but we are not persuaded by the points he raised. In our view, the evidence of an ongoing and deteriorating financial position for Bridgecorp post-December 2006 and up to the date the extension certificates were issued is overwhelming. We have already found that there were a significant number of missed payments of principal and interest from 7 February 2007 onwards and that Mr Roest knew about this. That matter alone is sufficient to prove the Crown case in relation to untrue statements in the

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52 Reasons judgment, above n 1, at [462].
53 Reasons judgment, above n 1, at [439].
54 Reasons judgment, above n 1, at [446] and [447].
55 Reasons judgment, above n 1, at [451]–[453].
56 Reasons judgment, above n 1, at [472] and [473].

extension certificates. As well, the allegation is proved beyond reasonable doubt by Mr Roest's own email of 29 March 2007 and the concessions made by the defence witness, Mr Lazelle.

[139] We add that the Crown produced evidence of a continuing reduction in available cash at bank over the period December 2006 to March 2007 and beyond. The Crown evidence also established a pattern of major variations between budgeted bank balance and the actual balance. The budgeted bank balance as at the end of November 2006 had a negative variance of $40 million. That increased to a negative variance of $94.2 million at the end of March 2007 and remained around that level over the following months.

[140] The materiality of the truth of the statements made in the extension certificates cannot be questioned. Nor was there any possible foundation for a defence by Mr Roest under s 58(4) of the Securities Act.

Conclusions on conviction appeal

[141] We are satisfied that the verdicts reached by Venning J on each of the charges were not only open to him on the evidence but were also the correct verdicts on the evidence. It follows that the appeal against conviction must be dismissed.

Sentence appeal

Introduction

[142] Mr Roest was sentenced along with Mr Steigrad on 18 May 2012.[57] As noted above, Mr Roest was sentenced to an effective term of six and a half years imprisonment, the same sentence the Judge had earlier imposed on Mr Petricevic.[58]

[143] Mr Roest appeals against his sentence principally on the ground that it was excessive and unfair when compared to the sentences imposed on his co-accused and sentences given to directors of other finance companies with similar offending. He also raises matters he contends ought to have been taken into account in mitigation.

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57 *R v Roest*, above n 2.
58 *R v Petricevic*, above n 3.

The Judge's approach to sentencing

[144] Venning J set out the following matters he considered relevant to the offending:

- The offer documents were distributed over a six month period from 21 December 2006 until 29 June 2007 when the Securities Commission suspended their distribution.

- From 7 February 2007 Bridgecorp and BIL began to regularly miss payments of interests and principal due to investors yet, on 30 March 2007, both companies registered extension certificates which had the effect of extending the time period during which securities could be allotted for a further nine months.

- During the period the relevant offer documents were before the public, 991 investors invested in excess of $25 million of new money and 3,461 existing investors reinvested almost $86 million with Bridgecorp.

- During the same period, 67 investors invested just under $2.4 million of new money and existing investors reinvested over $5.2 million with BIL.

- In total, $91 million of reinvested funds and $28 million of new money was invested during the currency of the false statements.

- When Bridgecorp was placed into receivership on 2 July 2007, it had approximately $459 million of secured debenture stock outstanding to approximately 14,500 debenture holders. It was likely those investors would recover less than 10 cents in the dollar.

- BIL was placed in liquidation on 6 July 2007. At that date, BIL had approximately $28.8 million of capital notes outstanding and 30 million redeemable preference shares. It was unlikely the capital note holders of BIL would recover anything of the amounts due to them.

- There were numerous victims of the offending, some of whom had lost much, if not all, of their life savings and had sustained enormous emotional and psychological costs. In some cases victims would inevitably suffer from medical conditions brought on by the stress of events.[59]

[145] Addressing Mr Roest's role in the offending, the Judge noted:[60]

- He, along with Mr Petricevic, had been an executive director of Bridgecorp. He was its finance director from 17 July 2006 but had been with Bridgecorp in a number of roles since 1996.

- He was heavily involved in the day-to-day operation of the business and had responsibility for all financial information including cashflows and other detailed financial information about the company. He and Mr Petricevic kept in close contact and regularly discussed the company's business and financial state.

- He knew from 7 February 2007 onwards that both companies had missed principal and interest repayments due to investors on a number of occasions. In finding the charges under the Crimes Act proved, the Court had found he knew the statement in the offer documents that Bridgecorp had never missed interest and principal repayments was false and that he intended to induce people to invest in the companies despite that knowledge.

- In finding the Companies Act charges proved the Court had found that Mr Roest had furnished statements to Covenant that were false in a misleading particular, namely that they failed to disclose that the company had missed interest and principal repayments.

- Mr Roest was closely involved with Mr Urwin in the Barcroft transaction. Mr Dawson had raised with Mr Roest directly the issue of whether Barcroft was a related party. The lending to entities underlying

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59 At [9]–[13].
60 At [21].

the Barcroft transaction and the effect of the transaction itself was one of the principal reasons for the failure of Bridgecorp.

- He had acted dishonestly and with intent to deceive the investing public from 7 February 2007 onwards.

[146] The Judge accepted that Mr Roest had not set out to cause harm to any of the investors but he had deliberately made false statements with the intention of inducing people to invest in Bridgecorp when he knew the company was in serious financial trouble. It had ceased its principal activity of new lending. The new money was effectively used to keep the company going and to repay investors who wished to withdraw their funds.

[147] The Judge did not accept a submission made by counsel that Mr Roest's culpability was less than that of Mr Petricevic. While it was accepted that Mr Roest had been a director for a shorter time, he was deeply involved in the day-to-day operations of the business and, as finance director, had responsibility for the company's financial affairs. While Mr Roest's shareholding was significantly less than that of Mr Petricevic, the Judge did not regard this as a material factor, noting that there was no particular focus on the relative extent of shareholding during the trial.

[148] The Judge treated the Crimes Act charges as the lead offending. He was most assisted by two earlier decisions made under similar provisions of the Crimes Act: *R v Farquhar*[61] and *R v Thompson*.[62] He adopted a starting point of seven and a half years imprisonment on a totality basis to reflect Mr Roest's culpability and overall offending on all charges. A discount of 10 per cent was allowed on the footing that, at the age of 55, Mr Roest had no previous relevant criminal offending. The Judge was not prepared to allow any further reduction for remorse, noting that Mr Roest did not accept the verdicts and still regarded himself as innocent. He had no insight into his offending and did not accept responsibility for the harm he had caused. There was no prospect of reparation since Mr Roest was bankrupt.

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61 *R v Farquhar* CA455/94, 5 October 1995.

62 *R v Thompson* HC Christchurch T113/95, 8 March 1996; *R v Thompson* CA75/96, 14 August 1996.

[149] The deduction of 10 per cent from the starting point would have resulted in a sentence of six years and nine months imprisonment but the Judge considered it appropriate to reduce this by a further three months to six and a half years to bring the sentence into parity with that imposed on Mr Petricevic. The end result was that Mr Roest was sentenced to six and a half years imprisonment on the charges under the Crimes Act with concurrent sentences of four years imprisonment for the offending under the Companies Act and four and a half years for the Securities Act offences.

Mr Roest's submissions on the sentence appeal

[150] Mr Roest's submissions in support of his sentence appeal may be summarised in these terms:

- His blameworthiness was significantly less than that of Mr Petricevic who was a major shareholder and managing director of BHL and its subsidiaries for some 14 years from 1993. In effect, Bridgecorp was Mr Petricevic's company and Mr Roest reported to him as an employee.

- Mr Petricevic had effectively committed perjury by trying to mislead the Court and this should have been taken into account as a distinguishing factor.

- Significantly lower sentences had been imposed on directors of other finance companies, including community-based sentences in some cases.

- The figure of $25 million of new monies invested post-21 December 2006 was misleading since much of that money was invested for only short periods and matured prior to receivership.

- Of the investors on hand at 21 December 2006, some $95 million was repaid to over 3,000 investors between that date and the date of receivership.

- The losses sustained by the investors would have been much higher if the companies had gone into receivership in December 2006.

- The companies' auditors had given an unqualified opinion in November 2006 in relation to the companies' financial statements for the year ended 30 June 2006.

- Much of the losses sustained were attributable to the conduct of the receivership and post-receivership factors such as the global financial crisis, the property market downturn and the general collapse of the finance industry.

- The directors had believed that substantial funds of $40 to $50 million would be received from the Momi Bay project. This sum was originally expected in November 2006 but was delayed after advice from Mr Urwin that it would not be paid until May or June 2007. This would have ensured all investors were repaid.

- He had no motive of personal gain or interest and had worked to ensure all investors were repaid even putting his own funds into the company at times.

- There had been a lack of prudent financial advice taken by investors for which he and the other directors should not be held to account.

Discussion

Starting point

[151] We start our assessment by a consideration of the starting point of seven and a half years imprisonment. An immediate point of distinction from many of the sentences imposed on finance company directors following the string of collapses in the finance industry in the 2006/2007 period is that the present case involved convictions under the Crimes Act and findings of dishonesty.

[152] The Crimes Act charges on which Mr Roest was convicted carry a maximum penalty of 10 years imprisonment. This is to be compared with the maximum of five

years for the offending under the Companies Act and the Securities Act charges. As we later note, significantly lower sentences have been imposed in cases involving charges laid only under the Securities Act with no element of dishonesty. Notable amongst those cases are the sentences imposed on the directors of Nathans Finance Ltd, and Lombard Finance and Investments Ltd which we discuss below.

[153] In sentencing both Mr Petricevic and Mr Roest, the Judge was entitled to take into account the sentences imposed in *Farquhar* and *Thompson*. Mr Farquhar was convicted after trial on three charges arising from the failure of Landbase Securities Ltd. Two of the charges were laid under the former s 250(c) of the Crimes Act which is in materially similar terms to the present s 242. The third was a charge of fraudulent failure to account for some $800,000 contrary to s 222 of the Crimes Act. He was sentenced to five years imprisonment.

[154] A total of nearly $37 million had been received from investors during the period covered by the first two charges with a loss to investors in excess of $14 million in respect of investments made during that period. Mr Farquhar was a first offender with a distinguished record in finance and banking. The Judge accepted that he had not set out to defraud, rather it was a case of dishonest regard of the interest of third parties when his own interest became subject to commercial stresses.

[155] This Court upheld the Farquhar sentence of five years as being "well within the range of penalties available to him".[63] No reference was made by this Court to a starting point but it must be assumed to have been in excess of five years given the mitigating factors the sentencing Judge took into account.

[156] In *Thompson*, the appellant was convicted after trial on 12 charges of fraudulent conduct as a director of Fortex Group Ltd. He was sentenced to six and a half years imprisonment. The charges involved the fraudulent omission to record loan drawdowns in the company's financial statement for the years ended 1991 to 1993 which had the effect of understating the company's liabilities. The charges were laid under the then s 252 of the Crimes Act which carried a maximum penalty

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63 *R v Farquhar*, above n 61, at 13.

of seven years imprisonment. The losses sustained by creditors exceeded $40 million and some 1,800 employees lost their jobs. The Judge accepted that Mr Thompson's criminal dishonesty had not caused all the losses but he was satisfied that it had played a major part in those losses.

[157] In upholding the sentences as appropriate, this Court noted:[64]

> We are satisfied that it was open and appropriate for the Judge to take into account that there were secured and unsecured creditors who lost large sums upon the collapse who would not have dealt with the company had the true position been known. Sentencing for commercial fraud necessarily must proceed on a broad assessment of culpability in all the circumstances. It is not a mathematical exercise by reference to millions of dollars lost or misappropriated. There was however evidence from financiers that they would not have dealt with the company had they known its true position. Further, as the Judge recognised the difficulty of detection, the abuse of the reliance by the commercial community upon the accuracy of financial reporting and the temptation to conceal all call for deterrent sentences.

[158] This Court in *Thompson* also referred to factors relevant to the assessment of culpability in commercial fraud cases in these terms:[65]

> The assessment of an appropriate sentence for commercial fraud is not without difficulty — particularly where the offending is by a person of standing in the commercial community. Some of the relevant principles were mentioned in *R v Gunthorp* but, as said there, the circumstances will vary and there can be no set tariff. As mentioned, there are to be borne in mind the difficulty of detection and the reliance upon the accuracy of financial reporting which is vital to a credible securities market. The amount of direct and indirect losses flowing from the offending is relevant though quantum is not necessarily a true measure of criminality. Recourse to dishonesty because of inability of persons of standing to confront failure has been at the heart of much commercial fraud. We agree with the sentencing Judge that it is an arguable point whether such motivation is any less culpable than greed.

[159] We agree with the observations made in *Thompson* which have a direct bearing on the present case. In assessing culpability, the Court is entitled to take into account the reliance the community places on the accuracy of financial reporting and its importance to a credible securities market. We also agree with the observations about the difficulty of detecting commercial fraud. The directors and management personnel of a company such as Bridgecorp are those who have access to and

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64 *R v Thompson*, above n 62, at 244.
65 *R v Thompson*, above n 62, at 246.

detailed knowledge of the company's financial affairs. Members of the investing public are entitled to rely upon the accuracy of the company's financial statements and to expect honest conduct by the directors. This Court's observation in *Thompson* that recourse to dishonesty arising from the inability of persons of standing to confront failure resonates in the present case. The failure by Mr Petricevic and Mr Roest in particular to face up to the imminent failure of the company, particularly after the missed payments to repay investors from 7 February 2007 onwards was dishonest and reprehensible.

[160] The Crown submitted that the offending in the present case was more serious than that disclosed in *Farquhar* and *Thompson*. Reference was made to the greater number of victims; the more extensive losses; and the nature and extent of the dishonesty involved. We accept the Crown's submissions in this respect. The losses were much higher in the present case, even taking into account inflation since those cases were decided. So too, the greater number of victims in the present case. However, we bear in mind that sentencing in cases of this kind is not a mathematical exercise and the amount of the losses flowing from the offending, though relevant, is not necessarily a true measure of criminality.

[161] We note that in more recent cases, starting points for offences involving dishonesty or theft under the Crimes Act have attracted starting points in the range of five to eight years imprisonment. In *R v Douglas*,[66] Mr Tallentire was convicted of two charges of theft by a person in a special relationship under s 220 of the Companies Act. The charges involved breaches of the provisions of a debenture trust deed. Mr Tallentire was convicted of the theft of $12.1 million although the amount he received personally was described as minimal. The sentencing Judge, Wylie J, adopted a starting point of six years imprisonment and imposed an end sentence of five years. The sentence was upheld by this Court in *Tallentire v R*.[67] The Court found the factors adopted by this Court in *R v Varjan*[68] to be a useful basis for assessment of culpability in cases such as this.[69]

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66 *R v Douglas* [2012] NZHC 2271.
67 *Tallentire v R* [2012] NZCA 610, [2013] 1 NZLR 548.
68 *R v Varjan* CA97/03, 26 June 2003 at [22].
69 At [179].

[162] As a further example, Mr Nicholas Kirk and Mr Marcus MacDonald pleaded guilty to two charges of theft by a person in a special relationship after the collapse of the Five Star Consumer Finance Group of Companies in mid-2007. In sentencing them, Judge Joyce QC adopted starting points of six years for Mr Kirk and five years for Mr MacDonald.[70] Neither had diverted funds directly for their own use. The charges arose from intentional breaches of the trust deed's requirements concerning related party lending and prudent lending in respect of loans totalling approximately $50 million. A third offender (Mr Neill Williams) was found to be the driving force behind the offending and was regarded as the most culpable. The starting points took into account the totality of the offending including additional charges under the Securities Act and financial reporting charges.

[163] Finally, we note this Court's decision in *Watson v R* in which an appeal against Mr Watson's sentence of six and a half years imprisonment was dismissed.[71] Mr Watson was convicted after pleading guilty to one count of theft by a person in a special relationship (s 220 of the Crimes Act) and another count of theft under s 219 of the Crimes Act. Mr Watson was the general manager and finance controller of the Ross Group of Companies. He stole close to $5.5 million from the Group. Most of the money received by the appellant was gambled away. In sentencing Mr Watson, Judge Blackie adopted a starting point of eight years imprisonment.

[164] We now deal with sentencing levels in cases where the charges were laid under the Securities Act alone with no element of dishonesty. The sentences of four directors of Nathans Finance Ltd purely for offending under the Securities Act, attracted starting points ranging from two years nine months imprisonment to three years four months imprisonment. A summary of the charges and the sentences was set out by this Court in *Jeffries v R*.[72] This Court later dismissed appeals by two of the offenders (Messrs Doolan and Moses).[73] In *R v Ryan*,[74] Venning J sentenced three directors of Capital + Merchant Finance Ltd on three charges under s 58 of the Securities Act. Starting points ranging from two years nine months to three years six

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70 *R v Kirk* DC Auckland CRI-2009-004-24026, 21 December 2010.
71 *Watson v R* [2012] NZCA 17.
72 *Jeffries v R*, above n **Error! Bookmark not defined.**, at [233].
73 *Doolan v R* [2011] NZCA 542.
74 *R v Ryan* [2013] NZHC 501.

months were adopted. Starting points of two and a half years imprisonment were adopted on Securities Act charges in *R v Banbrook*[75] and *Ministry of Economic Development v Clegg.*[76] In *Jeffries*, four directors of Lombard Finance and Investments Ltd were convicted on Securities Act charges. On a Solicitor-General's appeal, this Court adopted starting points of two years for the executive director and eighteen months imprisonment for the non-executive directors.[77]

[165] While the starting point of seven and a half years adopted in the present case might be considered a little high for the offending under the Crimes Act alone, we consider it was within the available range taking into account the additional offending under the Companies Act and the Securities Act. Although there was some overlapping between the Crimes Act and other charges, those laid under the Securities Act in particular were not confined to the missed payments issue but extended well beyond that to include the untrue statements made in the offer documents about the status of Barcroft. The Judge regarded this as a serious aggravating factor, given the scale of the lending and the likely impact on investors who relied on the truth of the statement that Barcroft was not a related party. As well, the Securities Act charges embraced the failure to disclose the deteriorating financial position of the Bridgecorp Group post-30 June 2006.

[166] The charges laid under the Crimes Act in relation to the extension certificates at 30 March 2007 were also an important factor in the assessment of culpability given the finding that both Mr Petricevic and Mr Roest knew of the missed payments from 7 February 2007 onwards, a critical factor which would have plainly influenced decisions by potential new investors or existing investors.

Disparity with the sentence imposed on Mr Petricevic?

[167] This Court in *Macfarlane v R*, commented on the circumstances in which disparity with the sentence of a co-offender will justify a reduction in sentence:[78]

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75 *R v Banbrook* [2013] NZHC 462.

76 *Ministry of Economic Development v Clegg* DC Auckland CRI-2009-004-25176, 15 December 2009.

77 The Supreme Court has granted leave to appeal against the sentences in this case: *Graham v R* [2013] NZSC 104.

78 *Macfarlane v R* [2012] NZCA 317 (footnotes omitted).

> [24] Disparity between the sentences of co-offenders will lead to a reduction in the sentence under appeal only if the difference is so marked as to lead a "reasonably minded independent observer aware of all the circumstances of the offence and of the offenders" to "think that something had gone wrong with the administration of justice". The difference must be "unjustifiable" or "gross". A lenient or unusually merciful sentence extended to one offender cannot create an expectation that other offenders will receive the same indulgence.

[168] We are not willing to interfere with the assessment by Venning J of the relative culpability of Mr Petricevic and Mr Roest. As the trial judge, he was in an ideal position to assess their culpability relative to each other. They were each executive directors who had full and detailed knowledge of Bridgecorp's financial affairs. We do not see any material distinction between Mr Petricevic as managing director and Mr Roest as finance director. Both were heavily involved in the day-to-day management of Bridgecorp's business. Although, given his larger shareholding, Mr Petricevic may have had more to lose from Bridgecorp's collapse than Mr Roest, we do not view that difference as a factor in their relative culpability. The real question is what each of them knew and did on matters relevant to the offending. There is no discernible distinction between them on those issues.

[169] Similarly, the fact that Mr Roest may have been a director for a shorter period is not material. He was a director throughout the relevant period of the offending and had been involved in various other capacities with Bridgecorp at earlier times. We also note that the Judge found that Mr Roest and Mr Urwin were the directors most heavily involved in the crucial Barcroft transaction. As the Judge observed, Mr Dawson had raised the proper accounting treatment of Barcroft with Mr Roest, yet no formal advice was ever obtained on the issue.

[170] We reject the submission made by Mr Roest that the Judge ought to have taken into account the perjury by Mr Petricevic. Although Venning J did not accept the evidence given by Mr Petricevic on some topics, he made no finding of perjury. Mr Roest's submission overlooks the fact that the Judge did not accept his evidence on a variety of topics either. Most notably, that he was not aware of any missed payments being made from 7 February 2007 onwards.

[171] Mr Roest also raised the issue of disparity in relation to the lesser sentences imposed on Mr Steigrad and Mr Davidson. However, their cases are readily distinguished on a variety of grounds. Most obviously, both were non-executive directors and their convictions arose on charges under s 58 of the Securities Act alone. No element of dishonesty was involved in either case. As noted above, Mr Steigrad was convicted after trial on six charges under that Act and sentenced to nine months home detention and 200 hours community work. He was also ordered to pay reparation of $350,000. Mr Davidson pleaded guilty to 10 charges under s 58 and was sentenced to nine months home detention and 200 hours community work. He was also ordered to pay reparation of $500,000.[79]

Mitigating factors relied upon by Mr Roest

[172] Mr Roest submitted that there were a number of mitigating factors which the Judge ought to have allowed for in addition to the discount for his lack of prior convictions. First, in relation to the quantum of losses by investors, no analysis was provided of the extent to which the $25 million of new monies invested post-21 December 2006 was repaid. Nor does this take into account the much greater sums reinvested in the period charged. In any event, as earlier noted, the sentencing in cases of this kind is not a mathematical exercise and the extent of funds invested in reliance on the untrue statements in the offer documents is only one of a range of considerations. On any view, the amounts invested in the charged period were substantial. A substantial sum was repaid to investors on hand at 21 December 2006 and some who invested after that date may have been repaid but there remained very significant losses sustained during the charged period thereafter.

[173] In his submissions, Mr Roest again attempted to transfer blame to other parties. He reiterated his earlier submissions that, if the company had gone into receivership at or before 21 December 2006, the value of the company would have been decimated and the losses much greater. He also submitted that the receivers should be held to account for failing to realise more from the assets of the company. He attempted once again to deflect blame onto investors for failing to take prudent advice before investing.

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[79] *R v Davidson* HC Auckland CRI-2008-004-29179, 7 October 2011.

[174] All of these matters are beside the point. Mr Roest and Mr Petricevic are not being held criminally responsible for the collapse of the Bridgecorp Group, which we accept was affected by a variety of factors. Rather, their culpability lies in their failure to provide accurate information to investors and, more seriously, their dishonesty in continuing to seek money from the public on false assumptions when they well knew that the company was in serious financial difficulty in the period post-7 February 2007.

[175] The attempt to shift blame onto the investors is entirely misplaced and demonstrates that Mr Roest continues to regard himself as an innocent party. The Judge was right not to allow any discount for remorse since Mr Roest has not accepted responsibility for his offending.

[176] None of the other factors warrant a discount beyond that given by the Judge. It follows that the sentence appeal must also be dismissed.

Result

[177] The appeal against conviction and sentence is dismissed.

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