**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA543/2011**
**[2011] NZCA 542**

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| BETWEEN | MERVYN IAN DOOLAN<br>Appellant |
| AND | THE QUEEN<br>Respondent |

**CA544/2011**

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| AND BETWEEN | KENNETH ROGER MOSES<br>Appellant |
| AND | THE QUEEN<br>Respondent |

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| Hearing: | 27 September 2011 |
| Court: | O'Regan P, Randerson and Stevens JJ |
| Counsel: | C J Tennet for Appellant Doolan<br>P J Davison QC and D C S Morris for Appellant Moses<br>B H Dickey and J M Blythe for Respondent |
| Judgment: | 30 September 2011 |
| Reasons: | 28 October 2011 |

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**JUDGMENT OF THE COURT**

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**The appeals against sentence are dismissed.**

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**REASONS OF THE COURT**

(Given by Stevens J)

## Introduction

[1] The appellants, Mervyn Ian Doolan and Kenneth Roger Moses, together with Donald Menzies Young, were convicted following trial before a Judge alone in the High Court on five counts under s 58 of the Securities Act 1978 of distributing offer documents of various kinds containing untrue statements,[1] for which the maximum term of imprisonment is five years.[2] The documents had been issued by the appellants and others as directors of Nathans Finance NZ Ltd (Nathans). The appellants were sentenced to terms of imprisonment of two years and four months for Mr Doolan and two years and two months for Mr Moses.[3] Each was ordered to pay reparation in the amounts of $150,000 and $425,000 respectively. They both appeal against the sentences of imprisonment.

[2] Both appellants appeal on the basis that the sentence was manifestly excessive and that a sentence of home detention was appropriate in each case. Following the hearing of the appeal we issued a judgment dismissing both appeals with reasons to follow.[4] These are our reasons.

[3] There are two issues central to the disposal of the appeal. First, the characterisation of the offending and the degree of culpability of each appellant. Second, whether the end sentences of imprisonment ought to have been commuted to sentences of home detention.

## The background to the offending

[4] Because of their relevance to the issues we have to decide, the facts will be described in some detail. At the outset we must observe that this was a major corporate collapse involving extensive losses to large numbers of Nathans' investors. On 20 August 2007, Nathans was placed into receivership by the trustee for its investors. Nathans was a wholly owned subsidiary of VTL Group Ltd (VTL), previously Vending Technologies Ltd. As at the date of receivership, Nathans had

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1 *R v Moses* HC Auckland CRI-2009-004-1388, 8 July 2011 [reasons for verdict].
2 Securities Act 1978, s 58(5)(a)(i).
3 *R v Moses* HC Auckland CRI-2009-004-1388, 2 September 2011 [sentencing notes].
4 *Doolan v R* [2011] NZCA 511.

provided approximately $170 million in financing to VTL and parties associated with it. Such lending comprised approximately 94 per cent of Nathans' total financial receivables, Nathans having 7,082 secured debenture investors with investments totalling around $174 million. In the period between 13 December 2006 and 20 August 2007 (being the period between the prospectus containing the first of the untrue statements and the date of receivership), amounts in excess of $66 million were either invested or reinvested in Nathans. Even if an allowance of $16 million is made for funds held in accounts controlled by Nathans at the time of receivership,[5] the magnitude of the losses was major by any measure.

[5] The appellants faced charges arising from untrue statements in five separate documents. The first two counts concerned a registered prospectus and investment statement, being Nathans Finance NZ Limited Prospectus No 8 for Secured Debenture Stock (the prospectus) issued on 13 December 2006. This was when the appellants, Mr Young and a fellow director, Mr John Lawrence Hotchin, were directors of Nathans. Count 3 concerned an extension statement for the prospectus signed by two directors (Messrs Hotchin and Doolan) dated 29 March 2007, which enabled Nathans to continue to solicit funds under the prospectus. The further counts (counts 4 and 6) relate to distributing an advertisement, namely, letters to investors dated 14 May 2007 and 6 August 2007 respectively. The latter advertisement was distributed about two weeks before Nathans was put into receivership on 20 August 2007.

[6] Another director, Mr Hotchin, had earlier pleaded guilty to charges concerning his involvement in the distribution of the first three offer documents, the prospectus and investment statement and the extension certificate. He was sentenced by Lang J to a sentence of 11 months home detention and 200 hours of community work, and ordered to pay reparation in the sum of $200,000.[6] Mr Young was sentenced at the same time as the appellants of the five counts on which he was found guilty at trial. His sentence involved nine months home detention and 300 hours community work, as well as an order to pay reparation in the sum of $310,000. He has not appealed.

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5 As suggested by counsel for Mr Moses.
6 *R v Hotchin* HC Auckland CRI-2009-092-20927, 4 March 2011.

[7] Nathans was incorporated in 1997, while VTL was incorporated on 23 July 2001. After the sale in 2004 of 7.5 million shares to the public, VTL was listed on the New Zealand Stock Exchange. Messrs Doolan, Hotchin and Moses owned shares in VTL, with the public shareholding in VTL amounting to 25.4% of its share capital. All of the Nathans directors had been members of the VTL board at the following times:

(a) Messrs Doolan and Hotchin were directors of both VTL and Nathans from their respective incorporations. Mr Hotchin resigned as a director of Nathans on 31 March 2007, effective from 15 April 2007.

(b) Mr Moses joined the Nathans' board on 11 August 2003 and that of VTL on 4 May 2004. Mr Moses became the chairman of the Nathans board around September 2005, after Mr Hotchin resigned from that position.

(c) Mr Young was appointed as a director of Nathans on 12 September 2005 and of VTL on 13 December 2006.

[8] The specific allegations in the indictment relating to the untrue statements in the various documents were conveniently summarised under eight headings. These included the following, drawn from the reasons for verdict of Heath J:[7]

(a) misleading statements that advances to VTL and its subsidiaries (the inter-company advances) had been made on a "commercial arm's length basis", normally for terms no longer than 12 months;

(b) omitting to disclose an expectation that each of the inter-company advances would be rolled-over on due date, with all interest being capitalised;

(c) omitting to disclose the true extent of VTL business-related indebtedness;

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7 At [24].

(d) a misleading statement that the liquidity of Nathans was supported by VTL;

(e) omitting to disclose a significant deterioration in the liquidity profile of the company between the financial statements for the year ended 30 June 2006 and the date of distribution of the prospectus, investment statement, extension certificate and advertisements respectively;

(f) a misleading statement that Nathans had no bad debts;

(g) misleading statements about the standard of corporate governance, credit assessment and credit management processes that operated within Nathans; and

(h) misleading statements relating to the growth of a commercial lending book and diversification of lending undertaken by Nathans.

[9] The trial Judge in his reasons for verdict provided a short summary of what he considered was conveyed to a potential investor by the narrative of the investment statement and the prospectus:[8]

> Nathans is seeking up to $100 million to develop its business as a finance company. The company has delivered strong profit results for a number of years, including an audited net surplus of $4.97 million for the year ended 30 June 2006, an increase of 47% on the previous year's results. A strong level of corporate governance, combined with robust credit assessment processes have enabled all loan applications to be considered and determined on the same basis. No bad debts have resulted. While a significant proportion of Nathan's lending has been to its parent company, VTL, and its subsidiaries, those loans have been made on normal commercial terms, usually for periods of no more than 12 months. VTL and its subsidiaries are actively seeking to repay their debts in the country of origin. In addition, Nathans' receivables book is both growing and expanding into diverse business sectors.

[10] The Judge concluded in his sentencing notes that there were "significant differences between what was represented to investors and what the real position

[8] Set out in the reasons for verdict at [208].

was, as [the appellants] knew it to be".[9] He had, in his reasons for verdict, found that the actual position involved a situation that was materially different from that found in the investment statement and the prospectus:[10]

> The main purpose of the offer is to provide working capital to Nathans' parent company, VTL, and its subsidiaries. While loans to those companies take the form of revolving credit contracts made on usual commercial terms normally for periods of no longer than 12 months, credit management processes used for other borrowers do not apply to them. Decisions about renewals of these loans are based on VTL's needs. The inter-company advances, taken together with two major loans to companies operating as VTL's master franchisees in the United States and Australia amount to [77.48% (as at 30 June 2006) or about 84% (as at September/October 2006)] of the total amounts owing by all borrowers to Nathans. VTL, its subsidiaries and the two master franchisees (IVL and AVS) are not able to repay their debts without selling all or some of their business units. Most of the interest on the VTL, IVL and AVS loans have been capitalised to date and there is an expectation that most (if not all) of the interest payable from now on will be capitalised during the period of the loans and that the loans will be renewed if those companies are not in a position to reduce or repay them when they fall due for repayment.

[11] It was against this broad description of the offending that the Judge sentenced both appellants.

## Characterisation of the offending

[12] When imposing the sentences, the Judge gave a detailed description of what he considered to be the essence of the criminality involved. Because of their relevance to certain grounds of appeal, we set out the remarks in full as follows:

> [11] None of you acted dishonestly. There was no attempt to intentionally mislead investors. I took the view that the reason why the two summaries differed so markedly was that you had each failed to turn your mind to whether, as a matter of fact, the summary of business activities and risks truly reflected the actual position of Nathans, as you knew it to be. In that sense, your culpability rests on your complete failure to perform the statutory function cast on you as a director, namely to satisfy yourself that the offer documents did not contain any misleading statements.
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> [12] Those comments emphasise the true nature of your failings. This was always a case in which it was necessary to determine whether the information conveyed to potential investors reflected the true position, so that they could make informed decisions about investment. In contrast, your defences rested on reliance on the literal accuracy of individual components

9 Sentencing notes at [10].
10 Set out in the reasons for verdict at [225].

> of the narrative and on over-optimistic beliefs that the VTL business-related debts could be repaid from a significant sale of assets in the United States and/or Australia. You honestly believed that there was always a "big deal" around the corner that would salvage the position and, indeed, create wealth for VTL's shareholders; even though all the objective evidence pointed in the opposite direction. You displayed a lack of appreciation of the fact that phrases that are literally correct can, when read together, create a misleading impression. That is why it was so important for you to read and understand what was conveyed and to compare it with the position as you knew it to be.
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> [13] There were aspects of your performance as directors that troubled me significantly:
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> (a) One was the failure to consider, in any meaningful way, whether the prospectus and investment statements conveyed materially accurate information to investors that was required for the investor to make a proper decision about investment risks.
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> (b) Another was the undue reliance on professionals and senior management personnel, to the extent that your functions and responsibilities of directors in determining whether the prospectus and investment statement conveyed accurate information was seemingly abdicated. In effect, your position was that you did not have to satisfy yourselves of the accuracy of the information imparted in the prospectus and investment statement because you had been advised by various professionals and management that various components were "compliant".
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> (c) A third, which did not form part of the charges which came to light during evidence, was your apparent belief that there was nothing wrong in using moneys solicited from members of the public for the purpose of Nathans business being diverted to the parent company to allow it to honour a guarantee given to another VTL finance company, Chancery. That was done so that Chancery could repay maturing investors that could not otherwise be achieved. Like me, when I heard that evidence, I am sure that an investor in Nathans would have been horrified to learn that you considered it was acceptable or appropriate to use funds from the public in that way.

[13] The Judge next considered the nature of the "spectrum of offending" under s 58 of the Securities Act. The Judge stated:[11]

> At the most serious end would be offending involving dishonesty, for example, an intention to mislead potential investors in order to secure funds for a particular venture or to obtain a personal financial gain. Immediately below that would be conduct that could be characterised as either reckless or grossly negligent. By gross negligence, I refer to conduct that involves a

[11] Sentencing notes at [15].

> major departure from the standard of care expected when a director performs a statutory duty. Below that are cases involving innocent misrepresentation arising out of greater or lesser degrees of carelessness.

[14] The Judge was satisfied that the appellants' offending fell "within the gross negligence category".[12]

## The sentences imposed

*Mr Moses*

[15] In describing Mr Moses' involvement with Nathans, the Judge emphasised that, although Mr Moses played no executive role, he had an intimate knowledge of Nathans' financial position, in particular the state of the accounts as between Nathans and the VTL business-related entities. In other words, Mr Moses had knowledge from both sides of the transaction and was aware of the escalation of debts on the VTL side and the decreasing ability for VTL to pay such debts without sale of some or all of the relevant business units.

[16] The Judge referred to the role of Mr Moses as a director of Nathans from August 2003. He became chairman of the board in September 2005 after Mr Hotchin resigned. In terms of the chairman's role the Judge stated:

> [71] … one of your duties was to ensure the agenda for a meeting was properly formulated. Another was to guide discussion and to ensure the meeting was conducted efficiently and effectively. It was part of the chairman's function to ensure that the board set policy to be implemented by management and to ensure that all directors received sufficient and timely information for them to perform their duties as board members.
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> [72] Despite your continuing expressions of concern about the level of VTL business-related indebtedness, nothing was done to achieve the goal of reduction that you articulated on so many occasions over the years. At the end, actions speak louder than words. Your words, by the end of the day, represented no more than a whisper. Indeed, it was my impression that a degree of lip-service was paid to the issue. There is no evidence of any concerted effort to repay or reduce the debts.
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> [73] You were held out to members of the public as having "significant and wide-ranging experience, especially in financial planning". Potential investors were told that you had been "instrumental in the foundation and

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12 At [16].

> development of New Zealand's financial planning industry". For investors placing retirement funds in Nathans, I am sure those qualities would have been reassuring. Although not disclosed in the prospectus or other offer documents, the fact that you had previously written books on topics such as retirement savings suggests to me that you regarded yourself as something of an expert in this area. Nevertheless, I had the impression that you were tending to downplay that aspect of your experience when giving evidence.
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> [74] Of particular concern is the way in which you, as chairman, failed to deal with the exchanges of emails that occurred not long before the December 2006 prospectus was issued. In an email you sent on 30 November 2006, you expressed the view, on the topic of risk disclosure, that: "We need to tread the fine line between being open and up front, but not overly obvious". You sought a modification to the draft "to convey a true and realistic view of the risks without sticking it too far up the investors' noses ... so to speak".

[17] As the appropriate starting point the Judge settled on three years and three months imprisonment. This was greater than that chosen for Mr Hotchin because of the longer duration of Mr Moses' offending and the additional loss that the 2007 advertisement letters would have caused. The Judge noted that reparation in the sum of $425,000 had been offered, before concluding as follows:

> [79] You are entitled to credit for the offer of reparation, supporting your expressed remorse. Despite what has been said, I do accept that you have remorse for your offending and sorrow for the position in which the investors find themselves. You are also entitled to credit for your prior good character. You have done considerable good for the community throughout your life. I make an allowance for the fact that you have already made arrangements for reparation moneys to be held by your solicitors and paid immediately in terms of the Court order. In my view, those factors justify a credit of 13 months, which would leave an end sentence of 2 years 2 months imprisonment.
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> [80] I have considered whether home detention is a viable option. It is not. The extent of your knowledge of the financial affairs of Nathans and VTL, your failure to do anything about reducing the debt over a period when it climbed astronomically and your inability to turn your mind to the accuracy of the description of business activities and risk in the prospectus and investment statement mean that the sentencing goals of denunciation, deterrence and accountability, in the senses I have described previously, cannot be met with a sentence short of imprisonment.

*Mr Doolan*

[18] The Judge described Mr Doolan's executive director role noting that in the prospectus and investment statement Mr Doolan was held out to members of the public as:[13]

> … a chartered accountant "with extensive international experience in corporate finance issues, international and domestic tax planning, mergers and acquisitions, corporate restructuring, and structured finance projects". Reference was made to your work on "substantial structured finance projects" in New Zealand, the United Kingdom, Australia, Japan and the Netherlands. Your involvement as a partner in the well-known accounting firm of Ernst & Young was identified, with your role being described as a "tax principal".

[19] More particularly, Mr Doolan was responsible for financial planning, structural development, systems implementation and overseeing the accounting and finance functions, these being responsibilities referable to Nathans at the time the prospectus was issued in December 2006. The Judge pointed to Mr Doolan's knowledge of the increasing indebtedness of VTL business-related entities and the staggering realisation that the extent of that debt, only a few weeks after the prospectus and investment statement were issued, exceeded the amount sought from the public under the offer of debt securities. Thus Mr Doolan had full knowledge of the relevant financial information and the nature of the business conducted by VTL.

[20] In terms of offending, the Judge concluded that Mr Doolan's culpability was "greater than Mr Moses" but the difference was marginal. Accordingly the Judge chose as a starting point for sentence a term of three years and four months imprisonment. The Judge noted the offer of $150,000 by way of reparation. The Judge concluded:

> [96] … [reparation] is, as you recognise, of no significance to investors. It is, however, recognition of an acceptance of responsibility on your behalf. I am satisfied that it does make a difference as far as you personally are concerned. I am satisfied that the offer is the most that can be made, either from personal resources or those to which you have access to live and borrowings from family and friends. I adjust the end sentence of imprisonment downwards to reflect that offer, taking account of the nature of it.

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[13] At [86].

> [97] I allow for remorse, the difficulties inherent in you serving a prison sentence in New Zealand away from your family, and your prior good character. I allow a credit of one year. That leaves an end sentence of 2 years 4 months imprisonment, together with a reparation order of $150,000.

## Submissions

*Mr Moses*

[21] First, Mr Davison QC challenged the approach of the Judge when dealing with the "spectrum of offending" encompassed within s 58 of the Securities Act. In particular, counsel criticised the Judge's statement following the reference to offending involving dishonesty as being "at the most serious end".[14] The Judge commented: "Immediately below that would be conduct that could be characterised as either reckless or grossly negligent."[15] By equating recklessness and gross negligence, it is said the Judge erred, with the result that offending involving gross negligence is seen as only one step below deliberate and dishonest offending.

[22] Mr Davison emphasised that Mr Moses was honest throughout his dealings at Nathans and any failings were not intentionally misleading. Mr Davison challenged at the Judge's reference to reckless conduct in the spectrum of offending covered by s 58 of the Securities Act.[16] But counsel accepted that the Judge's description of the offending itself, as summarised at [11] of the sentencing notes,[17] is accurate.

[23] Counsel submitted that Mr Moses, when he was the chairman of Nathans, was focussed on the viability of the VTL loans and the VTL business generally. However, Mr Moses was reliant, in part at least, on the quality of information given to him by Mr Hotchin and others. Mr Moses took appropriate steps to bring these issues to the Nathans board table. Mr Davison was critical of the Judge's finding that "nothing was done to achieve the goal of reduction that you articulated on so many occasions over the years".[18] He did not accept the Judge's finding that

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14 At [15].
15 At [15].
16 At [15].
17 Quoted at [12] of this judgment.
18 Sentencing notes at [72].

Mr Moses only paid "lip-service" to the issue. However, he accepted that the characterisation of his offending was within the gross negligence category.

[24] Mr Davison submitted that the starting point of three years and three months imprisonment was too high. Counsel sought to draw comparisons with other cases of breach of s 58 of the Securities Act. However he accepted that the criminality in this case involved five charges relating to a prospectus and other documents and it covered, in the case of Mr Moses, a period between mid-December 2006 and 6 August 2007, just prior to Nathans being placed in receivership.

[25] The real burden of counsel's submission was to challenge the Judge's decision to impose a sentence of imprisonment rather than one of home detention. Mr Davison referred to the reasons given by the Judge, namely the extent of Mr Moses' knowledge of the financial affairs of Nathans and VTL, his failure to do anything about reducing the debt over the period when it climbed astronomically and the failure to address the accuracy of the description of business activities and risk in the prospectus and investment statements. Counsel submitted that these factors were applicable to all directors. Given that Mr Young was sentenced to home detention, a similar sentence ought to have been applied to Mr Moses.

[26] Mr Davison also drew comparisons with Mr Hotchin, although he accepts that there are differences in his case given the early guilty pleas and the co-operation with the prosecution. Finally, Mr Davison emphasised that Mr Moses had less information and had less personal borrowings than others involved in Nathans. Accordingly it was open to the Judge to have imposed a sentence of home detention (itself a condign sentence) rather than imprisonment.

*Mr Doolan*

[27] Mr Tennet also emphasised the lack of dishonesty on Mr Doolan's part. Having regard to Mr Doolan's role at Nathans and the Judge's characterisation of the offending as "gross negligence", Mr Tennet accepted that the chosen starting point of three years and four months imprisonment was within range and cannot be shown to be manifestly excessive.

[28] But again, the real focus of counsel's submissions was the imposition of a sentence of imprisonment, as opposed to home detention. Here such a sentence was available to the Judge, even though the final sentence was imprisonment of two years and four months. Mr Tennet submitted that a sentence of imprisonment for Mr Doolan places too much weight on deterrence, denunciation and accountability, whereas a sentence of home detention would be the least restrictive outcome.

[29] Mr Tennet submitted that, taking into account the purposes and principles of sentencing as the Court must do when considering home detention, such a sentence was appropriate. This was particularly so, given that one of the directors, Mr Young, (as well as Mr Hotchin), received a sentence of home detention.

*The Crown reply*

[30] For the respondent, Mr Dickey submitted that the appellants have shown no identifiable error that warrants appellate intervention. Mr Dickey submitted that, given the nature of the offending, the starting points chosen were low. The Crown had advocated for a four year starting point.

[31] Mr Dickey submitted that there is no disparity with the sentences of home detention imposed on both Mr Hotchin and Mr Young. In Mr Hotchin's case, he pleaded guilty at an early stage and provided co-operation and assistance to the prosecution. With Mr Young, the Judge was entitled to differentiate his situation from that of the appellants. He joined Nathans later than the appellants and was not involved in rolling over certain of the VTL loans. Moreover, at trial, he alone accepted that some of the statements referred to in the indictment were untrue: the appellants contested all allegations throughout the trial.

[32] Whilst as a matter of jurisdiction home detention was available, this is not a case where either appellant had demonstrated any error on the part of the Judge. The relevant sentencing factors had all been properly weighed as part of the Judge's fettered sentencing discretion. Thus the appeals should in each case be dismissed.

## Discussion

*Degree of culpability*

[33] The first general point concerns the challenge by counsel for Mr Moses to the characterisation of the offending. We do not consider that the Judge fell into error. He was rightly identifying the range of offending included within s 58 of the Securities Act. He properly emphasised that such offending must be carefully analysed to determine the level of seriousness and the degree of culpability that a particular offender bears. Such offending will fit along the continuum from the most serious (dishonesty) to the least (which would include cases of innocent misrepresentation or lesser degrees of carelessness). We are satisfied it is not appropriate to draw bright lines between types of offending along the continuum. As the Judge remarked later,[19] offending falling towards the top end of the gross negligence category will be akin to recklessness. Thus the different categories will tend to shade into one another.

[34] The Judge was clear that this was a case within the gross negligence category.[20] He did not find the conduct was reckless, which would involve an appreciation of the risk but a determination to proceed in any event. But more importantly, the Judge was careful to describe the gravamen of the offending by spelling out precisely how the real position of Nathans' financial position was materially different from that found in the prospectus.[21] We are satisfied that the true nature of the failings of both appellants were accurately characterised in the sentencing notes.[22]

*Imprisonment or home detention*

[35] Section 15A of the Sentencing Act 2002 gives the Court power to impose a sentence of home detention as follows:

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19 At [94].
20 At [16].
21 Quoted at [8] and [9] of this judgment.
22 At [11]–[13], quoted at [12] above.

**15A Sentence of home detention**

(1) If a court is lawfully entitled under this or any other enactment to impose a sentence of home detention, it may impose a sentence of home detention only if—

(a) the court is satisfied that the purpose or purposes for which sentence is being imposed cannot be achieved by any less restrictive sentence or combination of sentences; and

(b) the court would otherwise sentence the offender to a short-term sentence of imprisonment.

(2) This section is subject to any provision in this or any other enactment that—

(a) provides a presumption in favour of or against imposing a sentence of home detention in relation to a particular offence; or

(b) requires a court to impose a sentence of imprisonment in relation to a particular offence.

A short-term sentence of imprisonment is defined as being of two years or less.[23]

[36] The jurisdictional requirements for a sentence of home detention are spelled out in s 80A of the Sentencing Act. These include the offender being convicted of an offence punishable by imprisonment,[24] the court being satisfied that the proposed home detention residence is suitable,[25] the offender agreeing to comply with the conditions that will apply during home detention,[26] and the sentence of home detention being for not less than 14 days or more than 12 months.[27] The legislation is not specific on the approach that a sentencing judge should take when deciding between a short-term sentence of imprisonment or home detention.

[37] This issue was the subject of observations by William Young P in his dissenting judgment in *R v Vhavha* as follows:[28]

> [29] Eligibility for home detention depends upon the sentencing judge deciding that, but for the availability of home detention, the offender would otherwise be sentenced to a short-term sentence of imprisonment (ie of two

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23 See definition of "short-term sentence" in s 4(1) of the Sentencing Act 2002 and in s 4(1) of the Parole Act 2002.

24 Section 80A(1)(a).

25 Section 80A(2)(a)(i).

26 Section 80A(2)(a)(iii).

27 Section 80A(3).

28 *R v Vhavha* [2009] NZCA 588 (emphasis added).

> years or less): s 15A of the Sentencing Act 2002. In effect, the Court is given a discretion to commute to home detention what would otherwise be a short-term sentence of imprisonment. *There is nothing in the Sentencing Act to suggest a presumption for or against such commutation, either generally or in respect of particular types of offence.* So what is called for is an exercise of sentencing discretion in a way which gives effect to the purposes and principles of sentencing recorded in ss 7 and 8 of the Sentencing Act.

[38] These comments were endorsed by this Court in *Osman v R*.[29] In our view the critical point is that the sentencing decision as between imprisonment or home detention involves a discretionary exercise that necessarily engages all of the principles and purposes in ss 7 and 8 in the Sentencing Act. Those provisions of the Sentencing Act do not accord greater weight to factors such as denunciation or deterrence than the personal circumstances of the offender.[30] The relative weight to be given to the principles and purposes of the Act is left to be determined by the sentencing judge in all the circumstances of the case.

[39] In terms of appellate review of such sentencing decisions, the court on appeal must focus, as with other appeals against sentence, on the identification of error, having regard to the discretionary nature of the decision.

*Was there any error?*

[40] Bearing these principles in mind, we now consider whether the Judge erred when sentencing both appellants to terms of imprisonment for this offending.

[41] Dealing first with Mr Moses, we are not persuaded that any error of approach by the Judge has been shown. First, we are satisfied that the Judge accurately assessed the true scope of Mr Moses' culpability. Despite his non-executive role, Mr Moses was chairman of the board of Nathans from September 2005. This role carried with it the responsibility to lead the other directors, a role which the Judge found he performed inadequately when faced with approving the final form of the prospectus and the investment statement. Moreover, he was the signatory to the advertisement letters in May and August 2007 by which further funds were solicited from the public.

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29 *Osman v R* [2010] NZCA 199 at [20].

30 See *Manikpersadh v R* [2011] NZCA 452 at [14]–[19].

[42] We are also satisfied that the matters that "troubled" the Judge[31] were appropriately identified. The evidence was presented over 13 weeks and so the Judge was well placed to assess the significance of the material before him relative to the crucial task of determining the level of seriousness and degree of criminal culpability of the directors. In this context we consider that the Judge rightly emphasised the position of conflict between Mr Moses' role as chairman of Nathans and his role as a director of VTL. While participating in the distribution of offer documents of various kinds containing untrue statements, Mr Moses was well aware of the escalation of debts by VTL and the decreasing ability to meet them without the sale of some or all of VTL assets. It was not enough for him, as chairman of Nathans, to note that the level of VTL business-related indebtedness was a matter of concern. Active steps to repay or reduce the debt were required. Mr Moses did nothing to ensure that this was achieved.

[43] Second, we consider that the starting point of three years and three months imprisonment chosen by the Judge was appropriate. If anything, it was on the light side. The end point sentence of two years and two months imprisonment was appropriate after having taken into account all relevant mitigating factors including the offer of reparation, the expression of genuine remorse, and credit for prior good character and good work in the community.

[44] Although the end sentence of two years and two months imprisonment was longer than a short-term sentence of imprisonment, the Judge had jurisdiction on account of the timing of the offending to impose a sentence of home detention,[32] but the Judge did not consider that home detention was a viable option.

[45] In considering whether to commute the sentence of imprisonment to home detention, the Judge correctly assessed the extent of Mr Moses' knowledge of the financial affairs of both Nathans and VTL, and his failure to do anything about reducing the VTL debt during the period when it climbed astronomically. The Judge noted in particular the failure of Mr Moses as chairman to turn his mind to the accuracy of the description of business activities and the level of risk to investors in

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31 At [13].
32 See *R v Hill* [2008] 2 NZLR 381 (CA).

the prospectus and investment statements. As we have noted earlier, this was a major corporate collapse that led to large numbers of investors sustaining extensive losses. In the light of these factors, the Judge considered that the goals of denunciation, deterrence and accountability could only be met with a sentence of imprisonment.

[46] We are satisfied that this decision was correct. Given the level of culpability found by the Judge, a prison sentence was clearly appropriate. Despite his careful and comprehensive submissions, Mr Davison has not shown that the Judge made any error that would warrant appellate intervention.

*Mr Doolan*

[47] Turning now to Mr Doolan, again we are not persuaded that any error of approach was made by the Judge. The fact that, in the prospectus and investment statements, Mr Doolan was held out to members of the public as a chartered accountant with extensive experience in all relevant financial areas was relevant to the level of culpability. The Judge assessed Mr Doolan's culpability as being slightly greater than that of Mr Moses, given the executive role he had, with oversight of the management committee, the finances of Nathans and his "more direct involvement in the day-to-day management and operations of VTL and Nathans".[33]

[48] In light of such involvement, we are not satisfied that the starting point chosen of three years and four months was out of line. Neither was the end sentence of two years, four months imprisonment shown to be manifestly excessive. Like Mr Moses, Mr Doolan benefitted from a significant reduction for applicable mitigating factors. We agree with the Judge's assessment that, although Mr Doolan's culpability was greater than that of Mr Moses, the difference could reasonably be characterised as "marginal".

[49] So far as home detention is concerned, we are not persuaded by Mr Tennet's submissions that the Judge erred in the evaluative task of deciding between a sentence of imprisonment and home detention. The Judge found that for Mr Doolan

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[33] At [84].

"home detention is out of the question and a sentence of imprisonment is inevitable".[34] The Judge relied, when making that assessment, on the same factors as had been considered in relation to Mr Moses, which we have already traversed. It follows that we are not persuaded that any error was made that would warrant intervention by this Court.

## Result

[50] It was for these reasons that we dismissed the appeals by both appellants.

Solicitors:
Dominion Law, Auckland for Appellant Doolan
Cook Morris Quinn, Auckland for Appellant Moses
Crown Law Office, Wellington for Respondent

34 At [95].