Court of Criminal Appeal
Supreme Court
New South Wales

Case Name:	Nakhl v R (Cth)
Medium Neutral Citation:	[2020] NSWCCA 201
Hearing Date(s):	6 July 2020
Date of Orders:	
Date of Decision:	14 August 2020
Before:	Bathurst CJ at [1]; Hoeben CJ at CL at [2]; Adamson J at [189]
Decision:	(1) Leave to appeal granted. (2) The appeal is dismissed.
Catchwords:	CRIMINAL LAW – sentence appeal – eight counts of engaging in dishonest conduct in relation to providing financial services – further four offences of the same kind on a s 16BA schedule – money obtained from individuals – total loss to clients of $5,121,168.00 – losses incurred over a four year period – sentence of 10 years with non-parole period of 6 years imposed – whether sentencing judge erred in assessment of objective seriousness of offending – whether error in assessment of accumulation, concurrency and totality – whether sentence manifestly excessive – leave to appeal granted but appeal dismissed.
Legislation Cited:	*Corporations Act 2001* (Cth) – s 1041G(1) *Crimes Act 1914* (Cth) – s 16BA, s 21B
Cases Cited:	*AB v The Queen* (1999) 198 CLR 111; [1999] HCA 46 *Baines v R* [2016] NSWCCA 132 *Barbaro v The Queen; Zirilli v The Queen* (2014) 253 CLR 58; [2014] HCA 2 *Cahyadi v Regina* [2007] NSWCCA 1 *Hili v The Queen; Jones v The Queen* (2010) 242 CLR 520; [2010] HCA 45 *Markarian v The Queen* (2005) 228 CLR 357; [2005] HCA 25 *Mill v The Queen* (1988) 166 CLR 59; [1988] HCA 70

Mulato v Regina [2006] NSWCCA 282
Muldrock v The Queen (2011) 244 CLR 120; [2011] HCA 39
Obeid v R (2017) 96 NSWLR 155; [2017] NSWCCA 221
Pearce v The Queen (1998) 194 CLR 610; [1998] HCA 57
Ramos v R [2015] NSWCCA 313
Stoeski v Regina [2014] NSWCCA 161

Texts Cited:

Category: Principal judgment

Parties: Gabriel Nakhl – Applicant
Regina (Cth) – Respondent Crown

Representation: Counsel:
P Boulten SC – Applicant
LA Fernandez – Respondent Crown

Solicitors:
Elias Gates & Associates Pty Ltd – Applicant
Commonwealth Director of Public Prosecutions – Respondent Crown

File Number(s): 2016/259225

Publication Restriction:

Decision under appeal

Court or Tribunal: District Court of NSW

Jurisdiction: Criminal

Medium Neutral Citation:

Date of Decision: 15 March 2019

Before: Baly SC DCJ

File Number(s): 2016/259225

JUDGMENT

1 **BATHURST CJ:** I agree with the orders proposed by Hoeben CJ at CL and with his Honour's reasons.

2 **HOEBEN CJ at CL:**

Offences and sentence

The applicant seeks leave to appeal against the sentence imposed by her Honour Judge Baly SC in the Sydney District Court on 15 March 2019. The applicant was sentenced for eight counts of engaging in dishonest conduct in relation to providing financial services contrary to s 1041G(1) *Corporations Act 2001* (Cth). A further four offences of the same kind were taken into account on a schedule pursuant to s 16BA *Crimes Act 1914* (Cth) (Crimes Act). A maximum penalty of 10 years imprisonment applied to each count on the indictment. A maximum penalty of 5 years imprisonment applied to each offence on the s 16BA schedule.

3 The total effective sentence imposed on the applicant was imprisonment for 10 years with a non-parole period of 6 years. The sentence commenced on 15 March 2019. The applicant will be eligible for parole on 14 March 2025 and the total sentence will end on 14 March 2029. A reparation order totalling $4,631,918.77 was also made in accordance with s 21B *Crimes Act*.

Overview of the offending

4 Between 1 January 2009 and 31 March 2013, the applicant worked as a financial adviser and provided financial advice to clients. In this period he provided advice to 12 clients who gave him a total of approximately $6,743,707 to invest on their behalf. None of the clients had expertise in financial planning.

5 The applicant gave financial product advice in the course of carrying on a financial service business in that, between 20 February 2009 and 30 April 2011, he was an authorised representative of Australian Financial Services

Limited, now in liquidation, and he was authorised to give financial product advice.

6 In January 2010, the applicant purchased a financial adviser business, which had approximately 100 to 150 clients. On 26 August 2010, Sydney Financial Advisors Pty Ltd (SydFA) was incorporated.

7 The applicant was the sole director and ordinary shareholder. He maintained the day to day activities of the company, had about seven employees and operated from an office in Ultimo. On 2 March 2011, SydFA obtained an Australian Financial Services Licence which authorised it to give financial product advice. The 12 clients trusted the applicant to invest their funds, as he had promised.

8 The applicant used the clients' funds as he pleased, including paying some of his personal and business expenses, depositing funds into his personal share and options trading accounts, making unauthorised investments on behalf of his clients, and using the funds to reimburse his other clients.

9 The applicant made false representations to his clients about the value of their investments and how their funds had been invested. He made false representations to his clients about the availability of capital protection, or a capital guarantee, and the true risk of some of his recommended investments. Several of the applicant's clients told him that they wanted to limit their exposure to losses in their investing, and that capital protection or capital guarantee was an important consideration in their decision making.

10 As a result of the applicant's dishonest conduct, the total loss to his clients was approximately $5,121,168.

THE OFFENCES

Phillip Joy and Allan Joy

Item 2 on the s 16BA schedule

11 Between 1 March 2009 and 12 December 2010, the applicant engaged in dishonest conduct in relation to financial services provided to Phillip Joy personally and Phillip Joy and Allan David Joy as trustees for the Phillip Joy Super Fund.

12 As a result of the applicant's conduct, Mr Phillip Joy lost a total capital amount of $1,137,000 ($1,008,000 from the Joy Unit Trust Investment and $129,000 from the Joy Super Investment). The applicant has not returned any funds to Mr Joy.

13 Mr Phillip Joy became the applicant's client in around early 2009. He was 62 years old, unemployed and looking for work. Part of the funds he wanted to invest was $50,000 from his late mother which he told the applicant he wanted to invest in something very safe.

14 In mid 2009, the applicant advised Mr Joy to establish a self-managed superannuation fund which the applicant would manage on Mr Joy's behalf by purchasing shares in reputable Australian companies. The applicant also provided Mr Joy with a written document on 7 September 2009 titled "Fixed Interest Security" which detailed the terms of the investment. The applicant provided a further document on 9 October 2009 titled "Neutrally Geared, Capital Growth Managed Invest" to Mr Joy which detailed the terms of the investment and advised Mr Joy to borrow approximately $508,000, which he did.

15 In reliance on the applicant's advice, Mr Joy provided a total of $1,139,675 to the applicant. This comprised $1,008,000 to invest in the "Joy Unit Trust Investment" and $131,675 to invest in the "Joy Super Investment".

16 By 10 September 2009, Mr Joy had provided $1,008,000 of capital to the Joy Unit Trust Investment. On the same day, the applicant withdrew $350,000 and invested it in a managed fund. This was in accordance with the agreed Joy Unit Trust Terms.

17 Between 14 and 24 September 2009, the applicant withdrew a total of $668,000 from the Joy Unit Trust Investment and used the money as he pleased. This included:

(a) transferring $35,000 into his own bank account;

(b) depositing $350,000 into his CommSec account;

(c) transferring $53,000 to an account in Beirut, and

(d) paying $230,000 to an undescribed account.

18 On 18 November 2009 the applicant gave a document to Mr Joy that stated, "total capital currently included under the Phillip Joy Unit Trust totals $1,008,000" and "Capital protection will be extended ...".

19 The applicant redeemed the legitimate managed fund investment and instructed the fund manager to deposit the funds into an account controlled by the applicant. None of the $334,750 from the managed fund investment, which was the total at the time, was deposited into the Joy Unit Trust Investment, and none of it was returned to Mr Joy. As a result, all of Mr Joy's initial capital investment of $1,008,000 had been used by the applicant as he pleased by 25 November 2009.

20 During this period, the applicant sent Mr Joy three portfolio valuation reports which purported to detail the current value of the Joy Unit Trust Investment. Mr Joy was therefore not aware that the applicant had in reality used all the funds as he pleased by 25 November 2009 until about April 2013.

21 Of the $131,000 Mr Joy invested in the Joy Super Investment, the applicant withdrew a total of approximately $124,000 and provided it to another of his clients. This withdrawal occurred between 15-22 July 2010 and was made without the consent or knowledge of Mr Joy.

22 Forty six days after the funds were provided by Mr Joy, the applicant had used all of the client's money for his own purposes. Mr Joy lost a total capital amount of $1,137,000 ($1,008,000 from the Joy Unit Trust Investment and $129,000 from the Joy Super Investment). The applicant also used Mr Joy's money to move funds into his bank accounts, to pay his credit card and to pay other clients.

Count 1

23 Between 13 December 2010 and 10 October 2012, the applicant engaged in dishonest conduct in relation to financial services provided to Phillip Joy personally and Phillip Joy and Allan Joy, as trustees for the Phillip Joy Super Fund. The total loss to the Joy clients for this count was $2,175, being the remaining capital of the Joy Super Investment.

24 During this time, the applicant sent Mr Joy nine portfolio valuation reports in relation to the Joy Unit Trust Investment and a further nine portfolio valuation reports in relation to the Joy Super Investment. These reports indicated that all of Mr Joy's capital was invested pursuant to the agreed terms. As a result, Mr Joy was not aware that the applicant had used all of his capital until about April 2013.

25 On 27 June 2012, the applicant sent Mr Joy an audio recording, which included the following statement "total portfolio is doing brilliantly". The applicant stated in cross-examination that this statement was a complete lie.

26 The applicant also sent Mr Joy emails with attached graphs claiming that his investments had outperformed the ASX 200 index.

Vincent and Joanne Belcastro

Item 4 on the s 16BA schedule

27 Between 1 January 2009 and 12 December 2010, the applicant engaged in dishonest conduct in relation to a financial product provided to Vincent Paul Belcastro and Joanne Belcastro personally and Vincent Paul Belcastro and Joanne Belcastro, as trustees for the Belcastro Super Fund.

28 As a result of the applicant's dishonest conduct, the Belcastros lost a total of $1,254,595 from both their savings investment and their super investment.

29 The Belcastros were a married couple in their late 40s. The applicant contacted the Belcastros in late 2008 or early 2009, after the Belcastro's financial adviser died. The applicant said he was taking over the deceased's financial advisory business.

30 The Belcastros wanted financial advice in relation to their retirement, as they were both looking to retire within three or four years. Their assets included $550,000 in superannuation and $1,000,000 in savings. Mrs Belcastro told the applicant she wanted very low risk investments for her half of the superannuation (approximately $225,000) and would prefer a capital guarantee. Mr Belcastro was comfortable taking higher risks with a small amount of his superannuation.

31 The applicant advised the Belcastros to put $1,000,000 of their savings into the applicant's Commonwealth Bank account to obtain better returns. He said that the Commonwealth Bank account guaranteed a return, and that their capital was guaranteed. The Belcastros asked the applicant if the funds would stay in his bank account the same way that their current savings sit in a bank account, and the applicant said "yes".

32 The Belcastros agreed to terms stated in the "Belcastro Savings Terms" and the "Belcastro Super Terms". The Belcastros then provided $1,670,759 to the

applicant. This money consisted of $1,065,000 (“the Belcastro Savings Investment”) and $605,759 (“the Belcastro Super Investment”).

33 On around 14 December 2009, the applicant requested the Belcastros to sign an authority which allowed the applicant to use up to $200,000 of the Belcastro Super Investment to trade in options on their behalf. The applicant did not explain to the Belcastros that by signing the authority they were authorising him to trade in options on their behalf. Nor did they understand the associated risks of trading in options.

34 On 21 December 2009, the applicant transferred $200,000 and used it to trade in shares and options on behalf of the Belcastros. By 29 April 2010, the applicant had lost $190,595 from trading options and shares. On 18 June 2010, the applicant transferred a further $100,000, taking the total amount of capital from the Belcastro Super Investment used to trade in shares and options to approximately $300,000.

35 By 16 October 2009, the Belcastros had provided $1,065,000 of capital to the Belcastro Savings Investment. Five days later on 21 October 2009, the applicant withdrew $1,064,000 from the account and deposited it into his personal margin loan account. This occurred without the consent or knowledge of the Belcastros.

36 The applicant sent eight false portfolio valuation reports in relation to the Belcastro Savings Investment, stating that the funds were invested, when he had in reality spent them for his own purposes. The applicant sent nine false valuation reports in relation to the Belcastro Super Investment, which did not accurately reflect how their funds were invested nor reflect the losses that the applicant had incurred trading options. The reports did not detail the amounts of capital the applicant had withdrawn to use as he pleased.

Count 2

37 Between 31 January 2011 and 26 February 2013, the applicant engaged in dishonest conduct in relation to a financial product provided to the Belcastros personally and the Belcastros as trustees for the Belcastro Super Fund.

38 The Belcastros lost all of their remaining capital, being $416,000, but were able to redeem about $62,000 from a managed fund investment. Their net loss came to $353,346.

39 The applicant redeemed one of the managed fund investments, resulting in $103,876 being deposited into the Belcastro Super Investment. The applicant did not seek authority from the Belcastros, who did not want this investment to be redeemed.

40 The applicant withdrew a total of $47,000 from the Belcastro Super Investment and deposited the funds in his own business bank account.

41 In late 2011, the applicant falsely told the Belcastros that he had been successfully trading options and he gained their permission to invest a further $69,000 in options. He did not tell the Belcastros that he had already used approximately $495,000 of their capital since 21 December 2009 to trade in options and had sustained a loss of $190,000 by April 2010.

42 During this period, the applicant used a total of $265,000 from the Belcastro Super Investment to trade in shares and options. By 21 June 2012, he had lost $272,703 from the $265,000 invested.

43 The applicant provided 14 false portfolio valuation reports in relation to the Belcastro Savings Investment and 13 false portfolio valuation reports in relation to the Belcastro Super Investment. As a result, the Belcastros did not know that most of their investment funds had been used up by the applicant and not invested in accordance with the agreed terms.

44 The applicant made a further five false representations to the Belcastros that their funds were validly invested. The applicant sent a number of emails to the Belcastros reassuring them that all was well with their money.

45 Later in 2013 Mr Belcastro requested the return of his funds. The applicant said there were no funds to return.

Marie White

Count 3

46 Between 1 July 2010 and 16 November 2010, the applicant engaged in dishonest conduct in relation to a financial product for Marie White.

47 Ms White first met the applicant in January 2010 when he made a superannuation presentation at the school where she worked as a teacher. Ms White was 41 and had sold a property in the UK. She wanted advice as to what to do with the proceeds from the property sale while she was looking to buy a property in Australia.

48 The applicant told Ms White that he could put her money in a high interest account earning 7-8 per cent per annum. He told her that he could get better rates than the average person because he was a financial advisor. The advice given by the applicant was dishonest.

49 Around 3 September 2010, Ms White transferred $230,000 into the SydFA bank account in accordance with the terms agreed upon. This account was controlled by the applicant. The closing balance of the account was $230,596.

50 On the same day as Ms White's deposit, the applicant transferred $190,000 into his personal bank account and his CommSec account. Three days later, he transferred $38,000 into his personal bank account and his credit card account. The applicant's withdrawals were made without Ms White's consent or knowledge.

51 In early November 2010, Ms White asked for the return of her funds. The applicant told her he was trying to get her money back. This was a false statement because the applicant had not invested her funds in accordance with the terms of their agreement.

52 On 11 November 2010, the applicant sourced funds from other bank accounts related to him and repaid $233,043 to Ms White.

Andrew and Annette Gadsby

Item 3 on the s 16BA schedule

53 Between 1 January 2009 and 12 December 2010, the applicant engaged in dishonest conduct in relation to a financial service provided to Andrew and Annette Gadsby as trustees for the AW Gadsby Super Fund.

54 Mr Gadsby was a company director of a small brand consultancy firm and Ms Gadsby was an art teacher. They had no financial qualifications. Ms Gadsby met the applicant when he made a superannuation presentation at the school where she worked.

55 On 29 July 2009, the Gadsbys met with the applicant and told him they wanted low risk investments. They also told the applicant they could not afford to lose any of their money because it was all they had for their retirement.

56 Between 29 July 2010 and 11 October 2010, the applicant advised the Gadsbys that their funds would be invested in a range of investments and a self managed super fund would be set up. He said most of the money should be invested in Exchange Traded Options (ETOs) which he described as quite safe, low risk, stable and could provide a reliable return on funds in the range of -2 to 11 per cent per annum. The applicant said that capital insurance could be provided that would guarantee they did not lose any capital.

57 This advice was dishonest, because the applicant was not able to provide capital insurance. Further, ETOs were not low risk and the worst return was below -2% per annum.

Count 4

58 Between 1 April 2011 and 31 March 2013, the applicant engaged in dishonest conduct in relation to financial services provided to the Gadsbys as trustees for the AW Gadsby Super Fund.

59 As a result of the applicant's conduct, the Gadsbys lost a total of $193,019.

60 This amount was the entire amount provided by the Gadsbys to the applicant. Three days after the initial funds were provided, the applicant transferred $180,000 to his own business bank account without the knowledge or consent of the clients. He then used these funds for his own purposes, which included but was not limited to transferring:

(a) $20,000 to his personal credit card;

(b) $10,000 into his personal bank account;

(c) $83,881 into bank accounts in the names of his other clients; and

(d) $1,300 into a business account controlled by his mother.

61 On 7 October 2011, the applicant told the Gadsbys that their investments were going "very well". The applicant did not tell the Gadsbys that he had already used $180,000 of their capital as he pleased and that only $7,177 remained. He suggested they invest $20,000 of the Gadsby Super Investment in accordance with his "special strategy" and the Gadsbys agreed.

62 The applicant transferred a further $35,000 from the Gadsby Super Investment account to his own business bank account and used the funds as he pleased.

63 In November 2011, the applicant provided a false portfolio valuation report to the Gadsbys stating that all their funds were invested. The Gadsbys relied on the report and remained ignorant of the fact that the applicant had used their funds as he pleased and not invested it in accordance with the agreed terms.

64 In March 2013, the Gadsbys asked for the return of their funds from the super account. The applicant did not return any of their funds.

Mr Bharucha and Ms Maharaj

Item 1 on the s 16BA schedule

65 Between 1 June 2010 and 12 December 2010, the applicant engaged in dishonest conduct in relation to a financial service provided to Mr Bharucha and Ms Maharaj as trustees of the P Bharucha Super Fund.

66 Mr Bharucha was an engineer and employed as a senior power consultant. He had no financial qualifications and relied on the advice of the applicant. He was 63 and told the applicant that he planned to retire in a few years' time. He wanted secure, low risk and conservative investments. Security was his primary concern and he wanted to avoid losing any money.

67 During a telephone conversation in mid 2010, the applicant told Mr Bharucha that he agreed security was very important given Mr Bharucha's age and intention to retire soon, that he had a low risk, low return strategy and that capital would be guaranteed. He said that a self managed super fund should be established and that his funds would be invested in term deposits and Australian shares and property. Although disputed by the applicant, the Crown case was that the applicant guaranteed a return of about 10 per cent per annum, even with low risk investments.

68 The sentencing judge found that the oral representations by the applicant in mid-2010 that he could guarantee a return of about 10 per cent with low risk investments and that Mr Bharucha's capital would be guaranteed, were dishonest.

Count 5

69 Between 1 January 2011 and 23 October 2012, the applicant engaged in dishonest conduct in relation to a financial product provided to Mr Bharucha and Ms Maharaj as trustees of the P Bharucha Super Fund.

70 The total loss suffered as a result of the applicant's conduct was approximately $509,000.

71 Mr Bharucha's self managed super fund provided a total of $688,000 to the applicant between 24 January 2011 and 20 December 2012 ("the Bharucha Super Investment").

72 Between 24 February 2011 and 30 May 2011, the applicant withdrew a total of $545,000 from the Bharucha Super Investment for unauthorised trading. He bought options and sold uncovered call options, which were much riskier than the investment strategy authorised by the clients.

73 In mid March 2011, Mr Bharucha told the applicant "I want to play it down the safer side. I want to take the capital protection, with lesser profits". The applicant replied "Yes, I think that is the way to go".

74 On 8 or 9 May 2011, Mr Bharucha told the applicant "I want a lower risk investment with this money … This is quite a large amount. I want it to be safe and I don't want to lose any money". The applicant replied "I will make low risk investments for you".

75 On 27 June 2011, the applicant transferred $30,000 from the Bharucha Super Investment into his business bank account and used the funds as he pleased.

76 On 25 May 2012 the applicant sent Mr Bharucha an email that stated "We've protected every single client … in terms of your capital".

77 On 25 May 2012, the applicant withdrew a further $100,000 from the Bharucha Super Investment and deposited the funds into other clients' accounts. On 5 June 2012, the applicant emailed Mr Bharucha and said "The important thing is that the capital is preserved". By 21 June 2012, the applicant had lost $221,726 of the super funds capital by trading shares and options.

78 On 21 September 2012, Mr Bharucha contacted the applicant and said he had further funds to invest. Mr Bharucha said that capital protection was his prime concern. The applicant recommended that the funds be invested in options. He told Mr Bharucha that his capital would be protected and that his trading had been going very well.

79 In total, approximately $544,000 of the clients' funds were used for trading shares and options and $130,000 was spent by the applicant as he pleased.

80 The applicant sent five false portfolio valuation reports to the clients. The reports were relied upon by the clients, who believed that the funds were invested as agreed and that the capital was secure. The reports did not detail the amounts of capital the applicant had withdrawn to use as he pleased. Further, the amounts did not reflect the substantial losses the applicant had made trading in shares and options.

81 Between February and April 2013, the applicant met with Mr Bharucha. Mr Bharucha became aware that his funds had not been invested in accordance with the agreed terms and that the applicant had accrued large losses trading shares and options. The applicant did not return any of the funds. Mr Bharucha was able to recover around $179,000 from his investments.

Phillip and Merlene Dudman

Count 6

82 Between 1 January 2011 and 26 February 2013, the applicant engaged in dishonest conduct in relation to a financial service purportedly provided to Phillip and Merlene Dudman as trustees for the PJ and MM Dudman Super Fund.

83 The applicant used $270,000 of the $280,000 which the Dudmans provided to him, as he pleased and without the consent or knowledge of the clients. The applicant did not return any funds to the Dudmans. However, they were able to recover about $48,000, bringing their total capital loss to $232,000.

84 The Dudmans were clients of the financial advisory business bought by the applicant. The Dudmans were in their 60's and Mr Dudman told the applicant he was about to retire when the applicant contacted them in late 2010 or early 2011.

85 The applicant advised the Dudmans that a self-managed super fund should be established and that investments should be made in blue chip shares. The applicant said the return would be around 10 per cent per annum. He said their capital would be secure and protected from the fluctuations of the share market. The applicant provided written advice to the Dudmans specifying that $240,000 would be invested in shares that have ETOs held over them. He said the total expected return from the ETOs per annum was 11 per cent and that the worst return would be -2 per cent.

86 The investment advice from the applicant was dishonest as he could not provide capital protection or 10 per cent return per annum. The Dudman's capital was not safely invested in shares and options, and the lowest return was worse than -2 per cent.

87 The applicant also sent a false portfolio report indicating that the $280,000 was invested in accordance with the agreed terms. The Dudmans relied upon the false report.

Dhun and Cyrus Madon

Count 7

88 Between 5 May 2011 and 31 July 2012, the applicant engaged in dishonest conduct in relation to a financial product provided to Dhun Madon and Cyrus Madon as trustees for the Madon Super Fund.

89 The Madons were both in their 60's when they met the applicant. They told the applicant that they did not want any risky investments and that their capital was to be completely safe so that they could provide for their retirement.

90 The Madons provided a total of $1,411,238 in funds. This included $861,238 invested in the Madon Super Investment and $550,000 invested in the Madon CBA Trust Investment.

91 Between 7 and 9 July 2010, the applicant invested $810,900 of the Madon Super Investment funds in accordance with the agreed terms.

92 About a year later, the applicant transferred $70,000 and then $220,000 from the Madon Super Investment funds into his business bank account and used the funds as he pleased. This included depositing the funds into the accounts of his other clients and transferring funds onto his credit card and into his personal margin loan account.

93 In October 2011, the applicant told Mr Madon that options were very safe and a good way to save money. The applicant told the Madons that as long as he was alive they would never lose their money. This was dishonest because options are inherently risky and the applicant could not ensure the Madons would not lose more if they invested in them.

94 On 27 October 2011, the applicant provided written advice to the Madons as to the value of their investments. He stated that the Madon Super Investment was currently valued at $911,252. This information was dishonest because by this stage the applicant had used $290,000 of the funds as he pleased.

95 On 15 November 2011, the applicant withdrew a further $200,000 from the Madon Super Investment and put it into broking accounts in his own name. Later, he withdrew a further $29,452 and then $80,000 from their funds and again put these funds into broking accounts in his own name.

96 By April 2012, the applicant had used approximately $600,000 of the funds as he pleased, including paying some of his personal expenses.

97 Around 14 November 2011, Ms Madon provided a further $300,000 to the applicant to invest. The applicant provided dishonest advice to Ms Madon, especially with regard to capital protection. He could not guarantee that Ms Madon would get her capital back. Nine days after these funds were received, the applicant deposited $170,000 into broking accounts in his name and $130,000 into other clients' accounts.

98 On 3 May 2012, Ms Madon provided a further $250,000 to invest. The applicant used all $250,000 as margin to trade options on behalf of the Madons. This was unauthorised.

99 The applicant provided the Madons with 13 false portfolio valuation reports. The reports did not detail the amount of capital the applicant withdrew and used as he pleased. Furthermore, in reliance on the false valuation reports, the Madons provided the applicant with additional funds for him to invest, which totalled $550,000.

100 In July 2012, the Madons instructed the applicant to return all of their funds. He falsely told them the funds were in cash. In August 2012 the applicant provided the Madons with $762,773, which he obtained from selling personal assets and assets from other businesses.

101 The Madons were able to redeem approximately $95,000 from a managed fund and a further $131,000 from SydFA's insurer. They also withdrew $80,000 of capital during the course of the investments. Therefore, the total loss to the Madons was $428,017.

102 In total, the applicant used almost $900,000 of the Madons' money for his own purposes.

Kayleen Crotti and Lindsey Jones

Count 8

103 Between 1 December 2011 and 26 February 2013, the applicant engaged in dishonest conduct in relation to a financial product provided to Kayleen Crotti personally and Kayleen Crotti and Lindsey Jones as trustees for the Kay Crotti Super Fund.

104 In total, the applicant spent $634,000 of Ms Crotti's money for his own purposes. No funds have been returned to Ms Crotti but she was able to recover $44,000 from her investments. Ms Crotti's net loss was $1,012,016.

105 Ms Crotti was recently divorced and had a dependent child. She made it clear to the applicant that she wanted her funds to be protected. She was very inexperienced with handling money, having left school at 15 and never having held a bank account in her own name. Her former husband had given her a cash allowance.

106 The applicant advised her to invest $835,000 in shares and options and $93,000 in cash. He advised Ms Crotti that her capital would be protected and that this strategy would generate income of 1.5 per cent per month. He also advised her to set up a self-managed super fund that he would manage. Ms Crotti provided funds totalling $1,056,016.

107 Of the $1,056,016 provided by Ms Crotti to the applicant, $926,294 was to be invested in the Crotti Non-Super Investment and $129,722 was to be invested in the Crotti Super Investment.

108 Between 5 April and 8 May 2012, the applicant traded $288,000 of the Crotti Non-Super Investment in shares and options. On 8 May 2012, the applicant withdrew a total of $320,000 from the Non-Super Investment and transferred $85,000 into accounts in his own name and $235,000 into other clients' accounts.

109 He charged Ms Crotti $30,000 for a "capital protection expense" that was not actually in place.

110 On 25 May 2012, the applicant emailed Ms Crotti with a voice recording of him attached. He said "We've protected every single client that is getting this voice recording in terms of your capital". The applicant did not inform Ms Crotti that he had already spent $350,000 of her capital as he pleased.

111 On 28 May 2012, the applicant withdrew a further $194,000 from the Crotti Non-Super Investment and transferred $31,327 into his business bank account and the remaining $162,673 into his own bank and broking accounts.

112 By 28 May 2012, approximately four months after Ms Crotti gave the applicant $926,294 to invest, the applicant had used $544,000 as he pleased.

113 The applicant sent three false portfolio valuation reports relating to the Crotti Non-Super Investment to Ms Crotti, stating that the full amount was invested. The reports did not detail the amounts of capital the applicant had withdrawn to use as he pleased or lost trading shares and options.

Sentence proceedings

114 The sentencing judge noted that although the applicant had pleaded guilty, he did not do so at the first available opportunity in that the plea came on the fifth day after the date set for trial. Accordingly, her Honour gave a reduction in sentence of 12 per cent for the utilitarian value of the plea.

115 The sentencing judge summarised the background to the offending as follows.

> "Between around 1 January 2009 and 31 March 2013, the offender worked as a financial adviser and provided financial advice to clients. During the above period, he provided advice to 12 clients. The clients provided him with a total of $6,743,707 to invest on their behalf. None of the clients held any expertise in financial planning themselves.
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> ...
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> The twelve clients trusted the offender to invest their funds, as he had promised.
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> Instead, the offender used their money as he "pleased", including paying some of his personal and business expenses, depositing funds into his personal share and options trading accounts, making unauthorised investments on behalf of his clients, and using the funds to reimburse his other clients.
>
> He made false representations to his clients about the value of their investments and how their funds had been invested, concealing (in some cases for several years) how he had really used their money. He also made false representations to his clients about the availability of capital protection, or a capital guarantee, and the true risk of some of his recommended investments. As a result of the offender's dishonest conduct, the total loss by all clients was approximately $5,121,168." (Sentence judgment 2.1-3.2)

116 The sentencing judge noted that on 31 January 2012, the Australian Securities and Investment Commission (ASIC) obtained orders freezing the applicant's assets. On 2 September 2012, the applicant placed his companies into voluntary liquidation and on 4 September 2013, he was made bankrupt.

117 Her Honour further noted that although the Belcastros, Mr Joy and Mr Bharucha had received partial compensation from a third party, there was no evidence that the applicant had repaid or entered into any arrangement to repay, any of his victims.

118 Tendered before her Honour were three video clips which were sent to clients. Her Honour described the content of the video clips as follows. Each clip showed the applicant confidently communicating with his clients and reassuring them that their investments were in good hands. In one of the clips, dated 12 April 2013, the applicant confidently discussed volatility in the share market and his strategy for dealing with volatility as a substitute for lack of growth. The other video clips had similar content.

119 Her Honour had before her a number of victim impact statements, three of which were read to the court. In relation to those statements, her Honour said:

> "It is trite to observe that the impact of the offender's crimes on each and every victim has been substantial. In every case, the victims placed their trust and their hard earned and precious money in his hands. Their loss has been, in a very real sense, devastating and ruinous. It has meant that victims could not retire as they hoped and planned. It has meant that they could not provide for their dependents. There have been health implications on account of the stress and strain involved in pursuing legal action. Relationships have suffered. Plans for the future have been destroyed. And some victims have had to stay working, when they should have been able to retire comfortably." (Sentence judgment 15.5)

120 There was also before the sentencing judge a 24 page affidavit sworn by the applicant. The applicant was extensively cross-examined on the contents of that document.

121 When dealing with the applicant's subjective case, her Honour recorded the following which was not controversial. The applicant was born in February 1981. His parents were of Lebanese heritage. His father was retired and his mother is an accountant. At school he was bullied and ostracised. The applicant attributed this to being ethnically different and because he suffered from various health conditions, including Tourette syndrome. He obtained a job as a mortgage consultant in mid 2006 and was taught on the job. He was naturally good with figures. In 2007, he did a four day certificate course in mortgage broking and became employed in a mortgage broking business. In about 2006, he commenced trading as a sole trader. In 2008, he qualified as a financial adviser by completing a compliance course which included a written examination. He commenced working as a financial adviser in June 2008. In due course he purchased client books which allowed him to set up his own business at the age of 28.

122 Her Honour reviewed the contents of the affidavit as follows:

> "... he says that he regarded funds received from clients as his, for the period of the contract, to deal with as he saw fit, and to be returned at the end of the term, together with interest payments. He claims that he did not take legal

advice, and was unaware of compliance and licensing requirements. He claims that his conduct was negligent and naive. He claims that he did not consider that he needed to keep investors' funds separate from his own funds, or from each other's funds, and was totally unaware of the requirement to do so. It must be said that, in cross-examination, he seemed to contradict this assertion ...

I cannot accept that the offender did not know that he could not co-mingle funds. That, in my view, is a most extraordinary assertion to make, and I cannot accept it.

The affidavit proceeds to go through what the offender did while conducting his business. There is a heading ... "Borrowing from Clients", and then ... the offender states, "My view was that once raised, the clients' funds became simply my funds". Again, it must be observed that this is an extraordinary claim to make. It is, in my view, plainly false. Over and above the falsity, I do not accept, even on balance, that the offender truly did believe the investments were loans, and his to do what he pleased with. That claim is contradicted by what is in the agreed facts, including that he sent false reports to the victims. It is contradicted by what he said in the video clips, and it is simply unbelievable, even accepting that the offender does suffer from some mental conditions ... and even accepting that his qualifications and level of experience could be described as woefully inadequate. Further, as the Crown Prosecutor has pointed out, it does not fit with the way that the offender dealt with the funds belonging to Robin Glover ...

Next, in the affidavit, the offender goes on to detail his personal expenses, wherein he accepts that some of the victims' moneys were used to pay his credit card, other personal expenses, expenses associated with his business, but he goes on to claim that the vast bulk of the money was used to finance further investments, or to meet obligations to other clients. He failed, here, to refer to the fact that he bought four or five, perhaps more, properties in his name ...

In seeking to explain the false portfolio reports, the offender states ... that he reported to his clients about the position of their investments, as per their entitlements rather than as per where the money was actually invested. This is another claim that I reject. It is simply contrary to what is stated in the reports and, in my view, is patently false.

The offender then goes on to seek to explain what went wrong. ... he accepts that he has been dishonest in dealings with the victims. He goes on, in his affidavit, to claim that his intentions were good, and he claims that he was seeking to make more money for his clients.

The offender gives an account of his mental conditions, as he perceives them to be. He claims to be suffering from depression, anxiety, Tourette syndrome, attention deficit hyperactivity disorder and autism. These, he says, have significant impacts on his daily life. He says these conditions significantly contributed to the position that his clients are in. He says he is unable to assess risk, does not understand oral and written communication in the same way normal people do, and has overconfidence in what he does.

It immediately strikes me that some of these claims appear contrary to the facts, the video clips and, as the Crown Prosecutor again points out, the

> content of Robin Glover's affidavit. In all of that material, there is not even a hint that the offender does not understand communications in the same way that normal people do.
>
> ...
>
> I do note, however, that a number of concessions, in this regard, were made under cross examination. I do accept the claim, made by the offender, that he was not motivated by malice." (Sentence judgment 17.7-20.1)

123 Her Honour noted that in the rest of the affidavit, the applicant set out the contributions he had made in recent times to charities and voluntary work which he had performed for the community. He had been working casually and had also attended university where he obtained a degree in Applied Mathematics. He had provided assistance to others who suffer from autism. He deposed to being medicated for depression.

124 Apart from her own comments in relation to the applicant's affidavit, her Honour also had regard to the results of the cross-examination by the Crown Prosecutor. Her Honour set out those matters as follows:

(1) the applicant did understand and appreciate that the victims had directed him to invest their money in certain specified ways, including managed funds and superannuation;

(2) he understood that almost all his victims wanted low risk investments;

(3) he understood that capital protection was important to his clients;

(4) he knew at the time he sent false reports that they were incorrect;

(5) he disobeyed the victims' instructions;

(6) he did buy a number of properties with the victims' funds. He paid off his credit card with their funds, he covered his own trading losses with their funds, he ran a number of companies, including a sports car hire business and motorbike hire company, using the victims' funds; and

(7) he had not repaid the victims.

125 Her Honour next had regard to a report from a forensic accountant, Alex Bell, obtained on behalf of the applicant. Her Honour did not see a need to go into his evidence in any particular detail because of the limitations which affected his report. The most significant limitation was that the report was based solely on what Mr Bell had been told by the applicant and his mother. Mr Bell had not been provided with full documentation, but only some bank statements. As a result, her Honour made the following observations and findings concerning the evidence of Mr Bell:

(1) one of the things he was told was that the funds were "loans". Her Honour regarded that as fundamentally incorrect in that the money provided was not by way of loan but was to be invested on behalf of the clients;

(2) Mr Bell's findings were significantly limited by a lack of information;

(3) much of Mr Bell's information was provided by the applicant's mother who was an accountant and also a director of GN Finance, his principal company;

(4) there was a real question mark over the accuracy of some of the documents and information provided to Mr Bell;

(5) GN Finance did incur losses as a result of trading; and

(6) it was no part of Mr Bell's brief to consider the source of the funds traded by GN Finance.

126 In summary, her Honour said:

> "Frankly, where all that takes me, in terms of my role in passing appropriate sentences upon the offender, is not terribly far. I accept that this is not a simple Ponzi type case of "robbing Peter to pay Paul". I accept that some legitimate investments were made, and I accept that losses were incurred.

> This is not a case where the offender was gambling on poker machines or at the races, but he was taking risks with the victims' money that he was not authorised to take. In that sense, he exhibited a dishonest disregard for his clients' money. I accept that there is simply no evidence that the offender significantly enriched himself, or lived a lavish lifestyle, although it must be noted that what amounts to a lavish lifestyle, or significant enrichment, will no doubt vary subjectively from person to person. Perhaps minds might differ but, for my part, I think being able to purchase properties in the Sydney market is not an insignificant benefit. It does seem to me to be a form of enrichment.
>
> This leads me to make some conclusions on the important issue of the offender's motive. I find, on all of the evidence, that the offender was not malicious when he committed the crimes. I think he certainly hoped he would succeed for his clients and for himself, but the fact is he failed, and his victims bore his loss. He acted dishonestly, and to his own personal benefit. While he did not achieve great riches, he, as the facts repeatedly state, used the victims' money as he pleased, and for his own purposes. The greed here is not seen as ostensible or obviously lavish, but there was an element of greed involved. I do not accept that he acted only in his clients' best interest, as he claims. The evidence suggests otherwise." (Sentence judgment 23.9-24.8)

127 Her Honour considered and assessed the psychiatric evidence which was before her. This evidence comprised reports from a psychologist, Dr Julie Peterson and two psychiatrists, Dr Olav Nielssen and Dr Yvonne Skinner. As well as providing reports, Dr Peterson gave evidence and was cross-examined.

128 Her Honour noted that it was uncontroversial that where it is established that an offender suffers from a mental condition, that may be taken into account in four ways:

(1) where it is causally related or operative to the offending, it may reduce the offender's moral culpability for the offending;

(2) it may mean that an offender is an inappropriate vehicle for the application of general deterrence or that general deterrence should be given less weight;

(3) it may sound in a greater or lesser need for specific deterrence as a sentencing purpose; and

(4) it may mean that an offender will experience greater hardship if incarcerated on account of that mental condition. This may lead to a shorter sentence.

129 Her Honour noted that a person's mental condition can also be taken into account as a factor that goes into the subjective mix, along with other relevant subjective factors (s 16A(m) *Crimes Act*).

130 Her Honour further noted that there was a measure of agreement between the parties in relation to the medical evidence. It was agreed that the applicant did not suffer from a mental illness such that he did not appreciate the nature and quality of his actions or the moral wrongness of them. Dr Peterson, as a psychologist, was not qualified to give a medical diagnosis. The parties also agreed that the applicant did suffer from some mental condition, or conditions, although the relationship of those conditions to the offending remained in issue.

131 There was no issue that in January 2006, the applicant had issues that led to him having suicidal thoughts for some years. In the course of him receiving treatment, Professor Sachdev, a neuropsychiatrist, opined that the applicant's primary disorder was possibly Tourette syndrome, with significant obsessive compulsive symptoms. Professor Sachdev thought his depression was secondary and that he did not suffer from bipolar disorder or schizophrenia.

132 Dr Skinner was retained by the prosecution. She interviewed the applicant twice and assessed his intelligence as in the superior range. She noted a degree of grandiosity when the applicant described his achievements. Dr Skinner found this to be consistent with a narcissistic personality type. Dr Skinner also watched videos of him. In her report, she said:

> "I have viewed the video material and listened to audio clips. In the videos Mr Nakhl presents as appropriately dressed in business attire. His manner is warm and friendly, he maintains eye contact with the camera and displays appropriate emotional expression. In the audio and video clips he speaks in a well-modulated voice, sounding confident and well prepared. He frequently uses words such as 'protecting capital' and phrases such as 'important to keep the capital you have worked for'. He provides explanations for the

> client's financial situation and talks of strategies for increasing the investment amount. I am not able to find anything in this DVD to suggest that he is suffering from a mood disorder, psychotic symptoms or other mental disorder. The material demonstrates narcissistic features of his personality. Mr Nakhl refers to the hard work and long hours he is putting in for the benefit of his clients; he is confident that the clients will appreciate what he has done; he speaks in an unrealistic, positive manner of the success of the investments."

133 Dr Skinner reviewed his medical records from 2006 and also reviewed other reports, including those of Dr Nielssen in 2014. She noted the diagnosis of Dr Nielssen of autism spectrum disorder, obsessive compulsion disorder, Tourette syndrome and possible bipolar disorder. Dr Skinner also reviewed a number of witness statements, the applicant's school records and the report of Dr Peterson.

134 Her Honour noted that Dr Skinner disagreed with Dr Peterson. Dr Skinner set out her findings under the heading "Summary and Conclusions" in her report of 20 April 2018:

> "Mr Nakhl has features of autism spectrum disorder, with a gift for retaining learned information, social difficulties from early school years and having to learn appropriate social behaviour. He has associated obsessive compulsive disorder. The disorders are mild in severity. Mr Nakhl has functioned well in his academic achievements; he maintains good relationships with his parents; he has developed and maintained a relationship with partners and he has been enthusiastically commended as a teacher. He holds the responsible position of driving a public transport bus.
>
> I do not consider that Mr Nakhl suffers, or has suffered from a mood disorder, depression or mania. In 2006 he took an overdose of medication in the context of a relationship breakdown, but was not diagnosed with depression by doctors who saw him at that time. There is no history of mania. Mr Nakhl was diagnosed with Tourette's Disorder in 2008, but there are presently no signs of that disorder. He was taking a stimulant appetite suppressant around the time of that diagnosis, and it is probable that the medication caused or precipitated the movement disorder.
>
> At the time of the alleged offences, between 1 January 2009 and 31 March 2013, Mr Nakhl was suffering from mild autism spectrum disorder. He was suffering from mild obsessive- compulsive disorder. These disorders persisted for the entire period. Mr Nakhl was not suffering from mental illness, as defined under the *NSW Mental Health Act 2007*.
>
> In my opinion, Mr Nakhl did know the nature and quality of his conduct. The conduct occurred over a prolonged period, was purposeful and co-ordinated, and was consistent, in that he had devised a strategy by which he hoped to increase the assets of his clients, and to provide income for himself, and he worked consistently towards that strategy. I consider that he knew that the

> conduct was wrong. Mr Nakhl's behaviour was co-ordinated and deliberate. He was aware of differences between the statements made to clients by emails and videos and the actual figures in statements provided by his bookkeeper. Mr Nakhl was able to control his conduct. There is no record of uncontrolled behaviour over the period of the alleged offences.
>
> In relation to the report of Dr Peterson, I have commented above. Points of agreement are the diagnoses of autism, obsessive-compulsive disorder. Both are mild in severity. I do not consider that these disorders impacted on Mr Nakhl's performance as a financial advisor to cause the conduct involved in the alleged offences. I agree with Dr Peterson that Mr Nakhl has narcissistic personality traits. These traits are evident in the video and audio recordings and impacted on his judgment and reasoning, leading to over-confidence in his ability to manage stock trading and unrealistic plans to increase wealth for his clients and himself."

135 Having carefully examined the contents of the reports and the cross-examination of Dr Peterson, the sentencing judge set out her conclusions as follows:

> "It is accepted that the offender suffers from a number of mental conditions, including autism, Tourette's and narcissism. The severity of those conditions is in issue, as is the causal relationship to the offending behaviour.
>
> [Counsel for the offender] concedes that the offender's mental conditions cannot be said to have caused the offending. He submits that his conditions contributed to the commission of the offences in a material way."

136 The Crown conceded that the applicant would find imprisonment more difficult.

137 Having examined all of the evidence, the sentencing judge accepted the Crown's submission, which was based on the opinion of Dr Skinner:

> "I find that the offender's conditions, perhaps most particularly his narcissism, has led, at least in part, to greater risk-taking on his part. Having read the affidavit of Robin Glover, the agreed facts, having watched the video clips and seen the offender give evidence, I cannot accept all of Dr Peterson's evidence. It is my view that she, as well as the offender himself, have exaggerated both the severity of his mental disorders and the effect, or impact, of the offender's conditions upon the offending here. In making that finding, one of the factors I note is that the offender's past breakdowns are most related to relationship difficulties, as set out in the notes of Dr Chee. In my view, Dr Skinner has conducted a very thorough assessment of all of the evidence, and it is her opinion that I find is most helpful to the Court. It is most consistent with the agreed facts and the other evidence, and I accept it.

> Accordingly, I do think that the offender, because of his conditions, was more inclined to engage in risky behaviour. I do find some small diminution in moral culpability. It will sound in a slight reduction in the length of sentences that will be imposed. I accept that specific deterrence should be given slightly more weight and general deterrence slightly less. General deterrence is still relevant in this case. This is not a case where the offender should be regarded as an inappropriate vehicle for the application of general deterrence. I do, however, accept that the offender will find imprisonment more onerous, on account of his mental conditions." (Sentence judgment 31.9-32.9)

138 On the basis of the foregoing material, her Honour set out her findings as to the facts and circumstances of the offences and their objective seriousness:

> "The Crown says that the offending falls into the high range, in terms of seriousness for this type of offending. I accept that categorisation, or characterisation, of the offending conduct. In making that finding, I have found the case of *Finnigan v R* [2013] NSWCCA 177 helpful, in terms of the approach that I should take to objective seriousness. Of course, I must assess the seriousness of each offence, but in Finnigan Campbell J, with whom Macfarlan JA and Barr AJ agreed, cited from *Hoy v R* [2012] VSCA 49, a judgment of Redlich JA, wherein it was recognised that offences such as the ones here, where a judge is required to impose terms of imprisonment on a large number of counts, it is, within limits, acceptable to adopt a "broad brush" approach to the fixing of sentences. In terms of objective seriousness, Nettle JA said, at [25]:
>
> > "Punctilious identification of distinguishing features between offences doubtless has a role to play in some sentencing exercises. But in cases like this, involving multiple counts of systematic and serious fraud, its utility tends to be limited."
>
> Turning now to the relevant factors affecting criminality, overall.
>
> Firstly, the period of offending here was one of four years and three months. A reasonably long period, and there was a course of misconduct during that period.
>
> Secondly, the total loss was approximately just over five million dollars, on any view, a large amount of money.
>
> Thirdly, there were twelve separate victims.
>
> Fourthly, the offender's conduct, I find, was deliberate, premeditated, planned and systematic. The level of planning was high, as is evident from, for example, the fact that, in many cases, the offender swiftly removed the victim's money into his own account, in some cases in a matter of days. I find that there was a high degree of sophistication in what the offender did. He was persuasive and manipulative, as is evident from the fabricated portfolio documents and the false representations, including by video. He led the victims into investing with him, and misled them into believing that all was well with their money, when it was not. He was, in fact, losing their money, but telling them that they were making money. This was done, in some cases,

continuously over time. He repeatedly told them that their capital was safe, when he was using it for his own purposes.

Next, each victim was vulnerable, and each looked to the offender for guidance and, of course, trusted the offender with their savings. He was told by the victims that they sought safe investment. He ignored that instruction. The victims trusted him. He was qualified, they were not. Ms Crotti had never held a bank account. The offender built this trust and then he betrayed it. The breach of trust was gross and egregious.

Many of the victims do remain unpaid, meaning that they have lost the means by which they were going to support themselves and their families later in their lives. Borrowing from what Campbell J said in *Finnigan* at [32]:

> "… the consideration that the effect on each victim was ruinous, in the circumstances of this case was a more compelling consideration, among many, than the precise calculation of the amount involved."

Having said that, it must be noted that the victim the subject of Count 3 did not make a loss, but a slight gain. That, however, as the Crown submits, does not mean the offence is less serious, because the funds paid to that victim were taken from others.

Next, I find that there was no malice on the part of the offender, but there was greed. I accept that he did not intend to lose money, but he used the victims' money as he pleased for his own purposes and his own benefit. He was dishonest in his dealings with the victims and, in my view, arrogant. His conduct is more serious than simply, as Mr Green submits, a matter of dishonesty, regarding the "means" by which the offender did what he did. ...

As to specific offences, the Crown submits, and I accept, that four specific offences are more serious. They are the offences involving the Joys, the Belcastros, the Madons and Ms Crotti. Based upon the losses, they are regarded, and I accept, as more serious. They are Counts 1, 2, 7 and 8. While I accept that this is correct, the loss is one factor out of a number, and will not result in markedly different sentences.

In the result, I find that each offence does fall into the high range of seriousness for these types of offences. Contrary to what is submitted by Mr Green, I do not think that there are unusual circumstances surrounding the offences. Having said that, however, I must say I find it surprising, perhaps staggering, that someone with so little in terms of qualifications and experience, could practise as he did, with seemingly little or no supervision. That is not, however, a mitigating factor." (Sentence judgment 33.1-35.10)

139 In relation to the applicant's subjective case, her Honour took into account the absence of any prior convictions. That was qualified to some extent by the fact that the applicant could not have committed these offences without being of good character.

140 Her Honour found the issue of contrition to be a difficult one. On the one hand, there was the fact of the belated pleas of guilty as well as expressions of regret in the affidavit. On the other hand, it was put by the Crown that the applicant had still not accepted responsibility for his offending and that the pleas of guilty were made in the face of a very strong Crown case. Taking all of those matters together, her Honour concluded that the applicant was remorseful and contrite and that he was truly sorry for the losses incurred by the victims. Nevertheless, her Honour noted that the remorse was somewhat limited in that there was a lot of self pity in the affidavit and also an attempt to justify and excuse his conduct.

141 Her Honour found that expressions of contrition and remorse fed into the consideration of the applicant's prospects of rehabilitation and the likelihood of him reoffending. Her Honour found that the assessment of those matters to some extent depended upon the applicant's level of insight and the extent to which that might develop positively with time. Her Honour accepted the applicant's submission that although his insight into the offending was once deficient, it was improving with the passage of time.

142 The findings made by her Honour were:

> "Firstly, the offender is still a relatively young man. He committed these offences when he was young, perhaps cavalier, but also immature and over confident.
>
> Secondly, he has the support of his family.
>
> Thirdly, he has received some treatment and, contrary to what the Crown said, he has engaged with Dr Christian Balanza, and taken concrete steps toward his rehabilitation.
>
> Fourthly, he has made some very considerable contributions in recent times to charity and to others who suffer from autism. ...
>
> Fifthly, he is more than capable of contributing, in future, to the community. He is a highly intelligent man, and has a lot to offer.
>
> ...
>
> Seventhly, the offender has cooperated with ASIC." (Sentence judgment 37.5-38.1)

143 Her Honour also took into account testimonials provided for the applicant and the fact that the applicant had tutored and mentored through Mission Australia and had mentored young people who suffer autism.

144 For those reasons, her Honour found that the applicant did have good prospects of rehabilitation and was unlikely to reoffend. Her Honour found that the applicant was a very intelligent young person whom the videos showed to be charismatic.

145 Her Honour rejected the propositions that there should be a further discount applied to the applicant's sentence because of his assistance to authorities in that while the applicant did not obstruct the investigation, he provided little assistance to it. Similarly, her Honour rejected the proposition that delay should be taken into account as a discounting factor. This was because of the complexity of the investigation that was required to set out fully the extent of the applicant's offending.

146 Her Honour noted that when sentencing she had to take into account the four offences on the s 16BA schedule in that these offences represented additional criminality which must be reflected in the sentences ultimately imposed for the principal offences in respect of counts 1, 2, 4 and 5. Her Honour noted that each offence on the schedule carried a maximum penalty of 5 years and was a serious offence of a like nature to those for which the applicant was being sentenced.

147 Her Honour had regard to *Pearce v The Queen* (1998) 194 CLR 610; [1998] HCA 57 and noted its requirement that the court impose a sentence for each offence and then determine how the sentences were to be served. Her Honour had regard to the principle of totality in that there were eight separate counts on the indictment for which sentence was to be imposed. Her Honour noted that each offence was discrete in terms of its criminality and that no single offence fully comprehended the criminality of any other. It was therefore necessary for there to be a degree of accumulation.

148 On that issue, her Honour said:

> "Application of the principle of totality, in this case, means that the degree of accumulation will not be great. All of the offences were committed during the one period of offending.
>
> I have decided to set a single non-parole period. I will set it at 60% of the total effective term. That is because the offender is new to prison, he has some mental health needs, and he will require assistance and guidance, including, in my view, professional assistance, when he is released into the community.
>
> Condign punishment in the form of stern sentences is required. I do not intend by these sentences to crush the offender. The offender's rehabilitation has commenced, and it is hoped that the sentence will facilitate it, rather than serve to crush him. I also accept that imprisonment will be more onerous for this offender, and the sentences have been reduced on account of that fact. Simply put, the offender must be punished for these offences, which have had such a devastating impact on the victims, and a message must be sent that anyone tempted to dishonestly use their clients' funds will face condign punishment." (Sentence judgment 39.9-40.6)

149 The sentences ultimately imposed by her Honour were as follows:

Count 3 – 3 years to date from15 March 2019.

Count 6 – 3 years and 3 months to date from 15 September 2019.

Count 7 – 3 years and 3 months to commence 15 June 2020.

Count 8 – 3 years and 9 months to commence 15 March 2021.

Count 1 – Taking into account item 2 on the s 16BA schedule, 4 years and 4 months to date from 15 March 2022.

Count 2 – Taking into account item 4 on the s 16BA schedule, 4 years and 4 months to date from 15 March 2023.

Count 4 – Taking into account item 3 on the s 16BA schedule, 4 years to date from 15 March 2024.

Count 5 – Taking into account item 1 on the s 16BA schedule, 4 years to date from 15 March 2025.

150 It can be seen from those sentences that the sentence for count 3 sets a start point of imprisonment for 3 years. Count 6 is accumulated by 6 months on count 3. Count 7 is accumulated by 9 months on count 6. Count 8 is accumulated by 9 months on count 7. Count 1 is accumulated by 12 months on count 8. Count 2 is accumulated by 12 months on count 1. Count 4 is accumulated by 12 months on count 2. Count 5 is accumulated by 12 months on count 4.

THE APPEAL

Ground 1 – Her Honour erred in her assessment that the offences were in the high range of objective seriousness

151 The applicant submitted that her Honour's finding that the offences were in the high range of objective seriousness was substantially influenced by her conclusion that there were no "unusual circumstances surrounding the offences". The applicant submitted that that conclusion was contrary to established facts which her Honour found.

152 These were:

(1) it was staggering and surprising that the applicant had very little in terms of qualifications and experience and could practise with seemingly little or no supervision;

(2) the applicant's conduct did not constitute a "simple Ponzi" type case of "robbing Peter to pay Paul";

(3) legitimate investments were made with the intention of achieving profits for his clients;

(4) the applicant was not malicious when he committed the crimes but rather he hoped that he would succeed for his clients as well as for himself; and

(5) there was no evidence that the applicant had significantly enriched himself or lived a lavish lifestyle.

153 The applicant submitted that these factors were all very unusual for offences of this type. He submitted that the existence of these factors suggested that the seriousness or moral culpability of the offending was significantly lower than as categorised by her Honour.

154 The applicant further noted that her Honour found that the applicant's mental conditions created, at least in part, a greater risk of him engaging in risky investments. This was so even though her Honour found that his narcissistic condition provided just "a small diminution in moral culpability". The applicant submitted that despite that qualification, the effect of her Honour's finding was that his mental condition provided a significant insight into why it was that he took so many risks with his client's funds.

155 The applicant accepted that this Court could only reach a different conclusion to that of her Honour concerning the objective seriousness of the offending if her Honour's finding was outside the range that was properly available to her to conclude and was therefore plainly unreasonable. The applicant further acknowledged that the Court of Criminal Appeal should be slow to determine such matters for itself differently – *Mulato v Regina* [2006] NSWCCA 282 (*Mulato)*; *Stoeski v Regina* [2014] NSWCCA 161 at [46] (*Stoeski*) and *Ramos v R* [2015] NSWCCA 313 (*Ramos)*.

156 The applicant submitted that despite those discretionary considerations, her Honour did overlook the significance of the very facts that she found which in turn lead to an erroneous assessment of the seriousness of the offending. The applicant submitted that properly characterised, each offence was marked by a desire by him to maximise profits for his clients in circumstances

where he took too many risks to do so contrary to his express instructions. The applicant submitted that while his conduct was exceedingly reckless and was dishonest, he was not motivated merely by the type of greed which motivates scams to steal clients' money through a "Ponzi style" scheme. The applicant submitted that at all times he intended that the victims received not just their money back but increased profits.

157 The applicant submitted that in those circumstances, it ought not to have been concluded that the offending was high range offending. He submitted that serious though the conduct was, it was not high in the range.

Consideration

158 The applicant's submissions on this ground focused on a limited number of factors relevant to the nature and circumstances of the offending rather than the whole of the applicant's offending which the sentencing judge considered in determining the nature and circumstances of the offending. For example, the corollary to the applicant's statement that he sought to maximise profits for his clients is that he deliberately disregarded the explicit instructions of his victims who were seeking safe, rather than risky and profitable investments.

159 It should also be noted that the applicant gave evidence that he believed that his clients' funds were his own. It is difficult to reconcile that evidence (in chief) with the assertion that he was seeking to maximise profits for the benefit of his clients. It also sits uneasily with the unchallenged evidence that the applicant deposited clients' funds into his own personal account and used those funds for personal expenses.

160 The applicant's conduct was intentionally dishonest. There was no aspect of recklessness involved in what he did. What was important in formulating an appropriate sentence was the type of scheme the applicant had devised, not how it was different to other schemes. The applicant's scheme was to dishonestly use his client's money for his own purposes out of greed and to benefit himself financially. As part of that scheme, he systematically sought to deceive his clients by not only giving false assurances concerning where their

money had gone, but in using technology to create a false impression that the funds deposited with him were safe. At no time did he attempt to provide security for the moneys made available to him.

161 An important element of the applicant's scheme, and therefore his offending, was the concerted and continuing effort to deceive his clients into believing that the moneys given to him were secure. In some cases, this fraudulent façade was maintained for years as a result of false portfolio valuation reports and misleading videos. The applicant knew and intended his clients to rely upon those reports and videos as providing an accurate reflection of the value of their investments. This conduct prevented his victims from taking any timely action to rescue their investments.

162 Although on one occasion in her Honour's lengthy judgment she did refer to each individual offence being in the high range, it is clear from the whole of the judgment that her Honour's finding in that regard was directed towards the totality of the offending. This is clear from the fact that the individual sentences were not such as would be appropriate for an assessment of offences in the high range. What her Honour clearly had in mind was the total effect of the offending and the substantial moral culpability which it gave rise to. This can be seen at **[138]** hereof where her Honour referred to the authorities which endorsed a "broad brush" approach when sentencing for a number of offences.

163 In finding an absence of malice, I understand her Honour to mean that unlike more conventional offending, there was no intention on the part of the applicant to steal from the victims the funds which they had made available to him. Nevertheless, the effect for the victims was the same. This is particularly so when regard is had to the systematic efforts on the part of the applicant to deceive his victims as to what had happened to their money. The money was placed at risk and lost, regardless of the applicant's intentions.

164 In any event, having lost over $5 million of his victims' money over a period of four years, the applicant must have realised that the way he was applying

moneys advanced to him by them was not only risky, it was almost certain to fail rather than produce positive results.

165 The findings made by her Honour as to his understanding of what he was doing, which involved a deliberate and consistent disregard of his clients' instructions, well justify her Honour's characterisation of the offending as being in the high range. Those findings were:

(1) the applicant did understand and appreciate that his victims had directed him to invest their money in certain specified ways, in particular, managed funds and superannuation;

(2) he understood that almost all his victims wanted low risk investments;

(3) he understood that capital protection was important to his clients;

(4) not only did he know that the reports which he gave to his clients were false, but they were prepared with the intention of deliberately deceiving them;

(5) he disobeyed his clients' instructions; and

(6) he made no effort to repay the them, other than manoeuvring funds if one of his clients became too insistent on being repaid.

166 While buying a number of properties with his clients' money, paying his credit card with their funds and covering his own trading losses with their funds might not involve deliberate malice as was found by her Honour, the effect was the same. This is so though his intention at the time may not have been to permanently deprive his victims of their money.

167 Importantly, none of her Honour's factual findings have been challenged on appeal. Accordingly, each of those facts and the inferences which her Honour drew from them were available to be properly taken into account by her Honour when assessing the objective seriousness of the offending. Included

in those factual findings was that the victims were vulnerable and dependent on the applicant for financial advice and that he was well aware of their vulnerability. Despite the applicant's protestations that his overall intention was to maximise their profits, none of his victims made that request.

168 Finally, as the applicant acknowledged, a finding of objective seriousness is a matter classically within the discretion of the sentencing judge in performing the task of finding facts and drawing inferences from those facts. This is the effect of the judgments of Spigelman CJ and Simpson J in *Mulato*: see also *Stoeski* at [46] and *Ramos*. As Basten JA (with whom Rothman and Fagan JJ agreed) stated in *Baines v R* [2016] NSWCCA 132 at [15], consideration of the objective seriousness of an offence is an evaluative exercise that requires assessment of a range of factors which may be susceptible of significant differing views. His Honour said that the difficulties in intervening in such a determination were at their height in circumstances where there has been a trial in which the sentencing judge has been able to assess the evidence of the witnesses.

169 Here there was no trial but the sentencing judge heard two days of evidence, including evidence from the applicant. The sentencing judge was in a significantly more favourable position than this Court to assess the evidence of those witnesses.

170 This ground has not been made out.

Ground 2 – Her Honour erred in determining questions of accumulation, concurrency and totality

171 The applicant accepted that the existence of eight different charges involving different victims required some degree of accumulation. He submitted, however, that there was a significant overlap in both the objective and subjective features of each offence. He submitted that the offences were all committed in the course of his business. The manner in which he conducted his business was central to an assessment of the seriousness of each charge. In each instance his motivations were similar or the same. His methodology

of offending was the same or similar and the subjective features were the same in each instance. The applicant submitted that in those circumstances, a total effective sentence of 10 years was inappropriate having regard to all of the overlapping characteristics of the offences. The applicant submitted that the result "looks wrong" (*Mill v The Queen* (1988) 166 CLR 59; [1988] HCA 70 at [63] per Wilson, Deane, Dawson, Toohey and Gaudron JJ). This was because when the specific sentence for each offence were added together, the total effective sentence was disproportionately high, i.e. approximately 29.5 years. The sentence exaggerated the total criminality involved in all the offences.

Consideration

172 As a start point, the applicant accepted that some degree of accumulation was necessary even though there were similarities between the counts. It is also trite to observe that the assessment of concurrency and accumulation involves a discretionary assessment by the sentencing judge. The only question here is whether her Honour's exercise of discretion was so unbalanced that it required reduction in the amount of accumulation in order to observe the principle of totality.

173 There is no doubt that her Honour was well aware of the relevant principles. This was clear when her Honour said:

> "Condign punishment in the form of stern sentences is required. I do not intend by these sentences to crush the offender. The offender's rehabilitation has commenced, and it is hoped that the sentence will facilitate it, rather than serve to crush him. I also accept that imprisonment will be more onerous for this offender, and the sentences have been reduced on account of that fact. Simply put, the offender must be punished for these offences, which have had such a devastating impact on the victims, and a message must be sent that anyone tempted to dishonestly use their clients' funds will face condign punishment." (Sentence judgment 40.3)

174 The relevant principles were set out and applied by Howie J (with whom Adams and Price JJ agreed) in *Cahyadi v Regina* (*Cahyadi*) [2007] NSWCCA 1. On this issue, Howie J said:

> "27 In any event there is no general rule that determines whether sentences ought to be imposed concurrently or consecutively. The issue is determined by the application of the principle of totality of criminality: can the sentence for one offence comprehend and reflect the criminality for the other offence? If it can, the sentences ought to be concurrent otherwise there is a risk that the combined sentences will exceed that which is warranted to reflect the total criminality of the two offences. If not, the sentences should be at least partly cumulative otherwise there is a risk that the total sentence will fail to reflect the total criminality of the two offences. This is so regardless of whether the two offences represent two discrete acts of criminality or can be regarded as part of a single episode of criminality. Of course it is more likely that, where the offences are discrete and independent criminal acts, the sentence for one offence cannot comprehend the criminality of the other. Similarly, where they are part of a single episode of criminality with common factors, it is more likely that the sentence for one of the offences will reflect the criminality of both."

175 Her Honour determined that counts 1, 2, 7 and 8 were more serious because of the amounts involved. There was also the fact that counts 1, 2, 4 and 5 had to take into account the four matters on the s 16BA schedule. The effect of the four schedule matters was to increase the criminality involved in counts 1, 2, 4 and 5. Her Honour reflected that increased seriousness in the length of sentences and the start dates which indicated the extent of the accumulation (see **[149]** hereof).

176 Applying *Cahyadi,* it is clear that although there were similarities between the offences in that the applicant applied the same techniques to deceive his victims, the criminality in each offence was quite different. The amounts involved were different and the identity of the victim was different. It could not be said that the criminality in one of the offences encompassed the criminality in all.

177 Nevertheless, her Honour noted that although there was accumulation the extent of it would not be great. When one has regard to the total length of the sentences imposed, i.e. 29.5 years, but also has regard to the single non-parole period of 6 years with a head sentence of 10 years, it can be seen that the extent of the concurrency was considerable or put another way as her Honour did "the degree of accumulation [is] not great".

178 This ground of appeal has not been made out.

Ground 3 – The total effective sentence and the single non-parole period are both manifestly excessive

179 The applicant submitted that this ground of appeal was interrelated with Grounds 1 and 2. He submitted that the total effective sentence was manifestly excessive when proper consideration was given to it and there should have been a finding that the objective seriousness was not as high as her Honour had assessed. The applicant submitted that in addition his subjective circumstances were by and large entirely favourable. He had pleaded guilty and shown some degree of remorse for his offending, he had no previous criminal record, he was unlikely to reoffend and his time in custody was likely to be more onerous for him than for most other offenders because of his complex mental condition.

180 The applicant submitted that the total sentence imposed was unreasonable or plainly unjust. This was either because of the discrete errors identified in Grounds 1 and 2 or otherwise because of the misapplication of some principle that was not overtly demonstrated in her Honour's judgment. The applicant submitted that imprisonment for 10 years, which was the total effective sentence, was a very harsh sentence for an offender who committed the offences in the circumstances identified by the sentencing court.

181 The applicant submitted that this Court should impose a lesser sentence and that the independent exercise of the sentencing discretion ought lead to a different and less severe total effective sentence and non-parole period.

Consideration

182 In *Obeid v R* (2017) 96 NSWLR 155; [2017] NSWCCA 221, R A Hulme J conveniently summarised the principles relevant to this ground of appeal. His Honour stated:

> "443 When it is contended that a sentence is manifestly excessive it is necessary to have regard to the following principles derived from *House v The King* (1936) 55 CLR 499; [1936] HCA 40 at 505; *Lowndes v The Queen* (1999) 195 CLR 665; [1999] HCA 29 at [15]; *Dinsdale v The Queen* (2000) 202 CLR 321; [2000] HCA 54 at [6]; *Wong v The Queen* (2001)

207 CLR 584; [2001] HCA 64 at [58]; *Markarian v The Queen* (2005) 228 CLR 357; [2005] HCA 25 at [25], [27]; and *Hili v The Queen; Jones v The Queen* (2010) 242 CLR 520; [2010] HCA 45 at [59].

- Appellate intervention is not justified simply because the result arrived at in the court below is markedly different from sentences imposed in other cases.

- Intervention is only warranted where the difference is such that it may be concluded that there must have been some misapplication of principle, even though where and how is not apparent from the reasons of the sentencing judge, or where the sentence imposed is so far outside the range of sentences available that there must have been error.

- It is not to the point that this Court might have exercised the sentencing discretion differently.

- There is no single correct sentence and judges at first instance are allowed as much flexibility in sentencing as is consonant with consistency of approach and application of principle.

- It is for the applicant to establish that the sentence was unreasonable or plainly unjust."

183 The difficulty confronting the applicant in making out this ground of appeal is as set out in the above quotation. There is no single correct sentence and sentencing is not a mathematical exercise. Sentencing judges are required to reach a sentence for each offence by balancing many different and conflicting features (*Markarian v The Queen* (2005) 228 CLR 357; [2005] HCA 25 at [27]; *Barbaro v The Queen; Zirilli v The Queen* (2014) 253 CLR 58; [2014] HCA 2 at [34].) As Hayne J stated in *AB v The Queen* (1999) 198 CLR 111; [1999] HCA 46 at [128]:

> " ... there will be a range of possible sentences that could be imposed without error."

184 There is no issue that a non-parole period is one that must be imposed because justice requires that the offender serve that period in custody (*Muldrock v The Queen* (2011) 244 CLR 120; [2011] HCA 39 at [57]). The non-parole period represents the minimum period of actual incarceration that the offender must spend in fulltime custody having regard to all the elements of punishment. This includes rehabilitation, the objective seriousness of the

offending and the offender's subjective circumstances (*Hili v The Queen; Jones v The Queen* (2010) 242 CLR 520; [2010] HCA 45 at [40]).

185 The applicant's grounds of appeal, including Ground 3, challenge discretionary findings which are quintessentially those of a sentencing judge. For the reasons set out above, the applicant has failed to make out the matters raised in Grounds of Appeal 1 and 2. The applicant's real challenge is to the sentencing judge's determination of the extent of the objective seriousness involved, the extent of the partial accumulation of sentences and the extent to which the sentence is said to be outside the appropriate sentence range.

186 The applicant has failed in relation to those first two grounds and in effect depends upon those grounds, either taken individually or collectively, as establishing the ground of appeal raising manifest excess. The applicant's failure to make out Grounds 1 and 2 and his failure to raise any further matters in relation to Ground 3 mean that the applicant has failed to discharge the onus which he carries to establish that the sentence imposed by her Honour is unreasonable or plainly unjust.

187 This ground of appeal has not been made out.

188 It follows that the orders I propose are:

(1) Leave to appeal is granted.

(2) The appeal is dismissed.

189 **ADAMSON J:** I agree with Hoeben CJ at CL.

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I certify that this and the 46 preceding pages are a true copy of the reasons for judgment herein of the Honourable Justice Hoeben, Chief Judge at Common Law and of the Court.

Morna Lynch
Associate
Date: 14 August 2020