SUPREME COURT OF QUEENSLAND

CITATION:	*R v Lovell* [2012] QCA 43
PARTIES:	**R** **v** **LOVELL, James Kentwell** (applicant)
FILE NO/S:	CA No 178 of 2011 DC No of 979 2010
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	9 March 2012
DELIVERED AT:	Brisbane
HEARING DATE:	31 January 2012
JUDGES:	Margaret McMurdo P, Chesterman JA and Atkinson J Separate reasons for judgment of each member of the Court, Margaret McMurdo P and Atkinson J concurring as to the orders made, Chesterman JA dissenting
ORDERS:	**1. The application to adduce further evidence is refused.** **2. The application for leave to appeal against sentence is granted.** **3. The appeal is allowed only to the extent of setting aside the term of imprisonment of 12 years imposed on count 2 and substituting a sentence of 10 years imprisonment, and setting aside the parole eligibility date of 30 November 2015 and substituting a parole eligibility date of 30 May 2015.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where applicant pleaded guilty to three charges of fraud, two charges of forgery and two of uttering – where the applicant was sentenced to 10 years' imprisonment on count one, 12 years' imprisonment on count two, three years' imprisonment on each of counts three, four, six and seven and 12 months' imprisonment on count five – where the terms of imprisonment imposed with respect to counts one, two, three, four, six and seven were to be served concurrently – where

12 months' imprisonment imposed on count five was to be served cumulatively on the others – where a parole eligibility date was fixed at 30 November 2015 which required the applicant to spend four and a half years in prison before becoming eligible for parole – whether the sentence imposed was manifestly excessive

Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth)
Corporations Act 2001 (Cth), s 184(2)
Criminal Code 1899 (Qld), s 408C
Penalties and Sentences Act 1992 (Qld), s 9(1)

Attorney-General v Tichy (1982) 30 SASR 84, cited
Johnson v The Queen (2004) 78 ALJR 616; [2004] HCA 15, cited
R v Cook and Heiser ex-parte Attorney-General [1997] QCA 14, cited
R v Cross (Unreported, Indictment 126/2006, District Court, Maroochydore, Robertson DCJ, 16 May 2006), cited
R v Daswani [2005] QCA 167, cited
R v Gadaloff [1998] QCA 458, cited
United States of America v Madoff, unreported, No 09 CR 213 (DC) (Chin J, SDNY Jun 29, 2009)

COUNSEL: The applicant appeared on his own behalf
S P Vasta for the respondent

SOLICITORS: The applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** The applicant, James Kentwell Lovell, pleaded guilty to three counts of fraud with a circumstance of aggravation (counts 1, 2 and 5), two counts of forgery (counts 3 and 6) and two counts of uttering (counts 4 and 7). He was sentenced to 10 years imprisonment on count 1; 12 years imprisonment on count 2; three years imprisonment on counts 3, 4, 6 and 7; and one year imprisonment cumulative on count 5, with a parole eligibility date set on 30 November 2015. His effective global sentence is therefore 13 years imprisonment with parole eligibility after four and a half years. He has applied to adduce further evidence and for leave to appeal against his sentence contending that it was manifestly excessive.

[2] I agree with Chesterman JA's reasons for refusing the application to adduce further evidence.

[3] Unlike Chesterman JA, however, I have concluded that the sentence was manifestly excessive so that I would grant the application for leave to appeal, and allow the appeal to the extent of setting aside the sentence of 12 years imprisonment imposed on count 2. I would substitute a sentence of 10 years imprisonment. I would also set aside the parole eligibility date of 30 November 2015 and substitute one of 30 May 2015. This would result in an effective global sentence of 11 years imprisonment with parole eligibility after serving four years.

[4] I agree generally with Chesterman JA's recitation in his reasons of the circumstances of the applicant's gargantuan fraudulent conduct over many years and its dreadful impact on the many gullible victims. I do not accept, however, that the statement of agreed facts (handed up by the prosecution without objection by defence counsel at sentence) implicitly accepted that the applicant's financial dealings were dishonest from the time he incorporated Mirtna Holdings Pty Ltd. I find no reason to conclude that Mirtna Holdings was incorporated for fraudulent purposes. It seems more probable that he initially hoped, perhaps without reasonable cause, to build a genuinely profitable business. That said, it must have quickly become obvious that his business model was unable to be legitimately sustained. There can be no doubt, as the appellant's admission on his computer[1] makes clear, that he knew by January 2003 he was defrauding his investors. His frauds continued over about six and a half years. He does not suggest that the sentencing judge was wrong in concluding that the losses caused by his fraudulent conduct totalled almost $11.5 million.

[5] The applicant was in his early 20s when his fraudulent behaviour began and had turned 30 by the time it was discovered. He had some concerning prior criminal history. In 1999, he was placed on two years probation and ordered to perform 100 hours community service without conviction for 15 counts of fraud and eight counts of stealing. In 2000, he was convicted and fined $400 for breaching those orders. In 2008, he was fined $1,500 without conviction for possessing dangerous drugs and property suspected of having been used in connection with the commission of a drug offence. The only matters in his favour were that he had never before been sent to prison; he gave some cooperation to investigating police officers; the committal proceedings were fully conducted by hand-up statements without cross-examination; and he pleaded guilty at an early time. The sentencing judge was not prepared to accept that he was genuinely remorseful. Letters to the judge from the applicant's sister and his girlfriend suggested that he would have their support when he was released from prison and that this would assist in his rehabilitation.

[6] As the applicant pointed out, his 13 year sentence seems to be one of the highest imposed in Queensland for offences of this kind. The respondent, in refuting the applicant's contention that the sentence is manifestly excessive, relies on *R v Cook and Heiser ex-parte Attorney-General*;[2] *R v Daswani*[3] and *R v Cross*.[4]

[7] In *Cook*, the offender was convicted, after a three week jury trial, of 39 offences of inducing money to be delivered by wilful false promises with intent to defraud, and two offences of dishonestly applying money the property of the Trustees of The Family Security Friendly Society whilst an employee. The fraudulent conduct involved $3.3 million, none of which was recovered. He was 58 years old and the chairman of the Society which collapsed following the offending. Investors, many of them retirees, lost substantial sums of money. He was originally sentenced to an effective global term of nine years imprisonment. The Attorney-General appealed against the inadequacy of the sentence. This Court determined the sentence failed to reflect the gravity of his offending and the importance of deterrence and substituted a sentence of 12 years imprisonment.

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1 Ex 5.

2 [1997] QCA 14.

3 [2005] QCA 167.

4 Unreported, Indictment 126/2006, District Court, Maroochydore, Robertson DJC, 16 May 2006.

[8] In *Daswani*, the applicant pleaded guilty to an *ex officio* indictment containing both State and Commonwealth offences: 15 counts of dishonestly using his position as a director; 11 counts of dishonestly inducing a person to deliver property of a value of more than $5,000; and one count of dishonestly obtaining a benefit of more than $5,000. He was sentenced to 10 years imprisonment in respect of some State offences and to two years cumulative imprisonment with a recognizance release order after eight months on a Commonwealth offence. The judge recommended parole eligibility after four years and three months. The judge's sentencing remarks made clear that he intended to impose an effective global sentence of 12 years imprisonment with a recommendation for parole eligibility after four years and three months. Daswani's fraudulent behaviour involved misappropriation of over $11 million with $6 million outstanding at sentence. He was aged between 45 and 47 when he offended and had no prior convictions. He was a successful businessman who expanded his businesses too quickly and committed the frauds in an attempt to stay solvent. He misused funds to flee the jurisdiction but upon his arrest in Hawaii he returned voluntarily to Australia where he was arrested and charged. He pleaded guilty at an early time to an *ex officio* indictment.

[9] This Court noted that the judge erred in ordering a sentence under the *Crimes Act* 1914 (Cth) be cumulative upon a State sentence and observed that Daswani's effective head sentence of 12 years imprisonment was within a sound exercise of the sentencing discretion. When informed that the Court intended, if leave to appeal were granted, to allow the appeal and to lawfully resentence Daswani to an effective term of 12 years imprisonment, he elected to abandon his application. He sought and received, however, a declaration from the Court that the effect of the sentence imposed at first instance was one of 10 years imprisonment with a recommendation for post prison community based release after three years and seven months.

[10] In *Cross*, the offender had a significant criminal history. In 1984, when he was aged 29, he pleaded guilty to 28 offences of dishonesty involving over $180,000 for which he was sentenced to three years imprisonment with a parole recommendation after 15 months. In 2000, he pleaded guilty to another series of fraudulent offences involving $843,000 and attempted frauds in excess of $2 million. He was sentenced to seven years imprisonment with a parole recommendation after two years and six months. He was on parole for the latter offences when he committed the subject offences. Unsurprisingly, the judge described him as "incorrigibly dishonest". His most recent offending came to light when he made a fraudulent complaint that valuable property had been stolen from his premises. Police discovered his criminal history and ultimately notified the Australian Securities and Investments Commission. His assets were frozen and a receiver appointed to the various corporations he was using to operate a fraudulent Ponzi scheme. He defrauded victims of $7.645 million of which over $3.7 million remained owing. The offending fell into the worst category of aggravated fraud. Cross was sentenced to an effective term of 10 years imprisonment to commence when he had finished serving his present term of imprisonment. No early parole eligibility date was set.

[11] The applicant's offending involved a much greater sum of money even than the huge amounts involved in *Cook*, *Daswani* and *Cross* but all those cases were, like the present case, in the worst category of aggravated frauds. Cook, Daswani and Cross were all mature offenders, whereas the applicant's offending commenced whilst he was still a comparatively young man so that rehabilitation remains a prospect. Whilst the applicant had some criminal history, it was much less

significant than that of Cross, who re-offended whilst on parole for a seven year sentence for like offending. Unlike Cook, the applicant cooperated with the authorities and pleaded guilty at an early time. Had the applicant gone to trial, it seems certain the case would have been long and complex. The effective operation of the criminal justice system, especially in cases of this kind, requires that proper recognition by way of mitigation of sentence be given to timely pleas of guilty.

[12] On analysis, the cases upon which the respondent relies to support the applicant's 13 year sentence demonstrate that it is manifestly excessive in light of the applicant's early guilty plea, modest cooperation with the authorities, comparative youth and rehabilitative prospects. This Court should now resentence the applicant.

[13] The only purposes for which sentences may be imposed on Queensland offenders are adumbrated in s 9(1) *Penalties and Sentences Act* 1992 (Qld). In this case, they relevantly include punishment of the offender in a way that is just in all the circumstances;[5] rehabilitation;[6] deterrence of the offender;[7] denunciation;[8] and protection of the community.[9] The cases I have discussed demonstrate that the appropriate sentencing range here was, as the applicant's counsel submitted at sentence, an effective global term of imprisonment of between 10 and 12 years with parole eligibility slightly earlier than the usual 50 per cent point. It was entirely appropriate, as his Honour recognised, to impose a cumulative sentence for the quite separate act of fraudulently misappropriating money donated for charity (count 5). I would substitute an effective sentence of 11 years imprisonment with parole eligibility set after four years. Such a sentence is unquestionably a severe punishment for a 31 year old man who has never before been to prison. It is unquestionably a sufficiently heavy sentence to provide an effective deterrent to the applicant and to others who might consider preying on unsophisticated investors through fraudulent Ponzi schemes. It is sufficiently severe to demonstrate that the community, through the court, strongly denounces such conduct. The sentence ensures the applicant will be subject to many years of strict supervision and appropriate support upon his release on parole, both to assist him in his rehabilitation and to protect the community from the prospect of his commission of any further offences.

[14] I would make the following orders:

1. The application to adduce further evidence is refused.

2. The application for leave to appeal against sentence is granted.

3. The appeal is allowed only to the extent of setting aside the term of imprisonment of 12 years imposed on count 2 and substituting a sentence of 10 years imprisonment, and setting aside the parole eligibility date of 30 November 2015 and substituting a parole eligibility date of 30 May 2015.

[15] **CHESTERMAN JA**: On 22 October 2010 the applicant pleaded guilty in the District Court at Brisbane to three charges of fraud, two charges of forgery and two of uttering. Particulars of the counts appearing in the indictment were:

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5 *Penalties and Sentences Act*, s 9(1)(a).
6 Above, s 9(1)(b).
7 Above, s 9(1)(c).
8 Above, s 9(1)(d).
9 Above, s 9(1)(e).

1. That between 31 August 2001 and 30 November 2008 the applicant dishonestly applied to the use of Mirtna Holdings Pty Ltd and others money and bank credits;
2. Between 1 December 2008 and 18 August 2009 the applicant dishonestly applied to the use of Mirtna Holdings Pty Ltd and others money and bank credits;
3. Between 1 April 2008 and 23 June 2009 the applicant with intent to defraud forged documents purporting to be Interactive Broker activity statements;
4. Between 1 April 2008 and 23 June 2009 the applicant with intent to defraud uttered forged documents purporting to be Interactive Broker activity statements;
5. Between 30 December 2008 and 1 February 2009 the applicant dishonestly applied to the use of Mirtna Holdings Pty Ltd and others money and bank credits;
6. Between 20 November 2008 and 13 May 2009 the applicant with intent to defraud forged a document purporting to be a letter dated 21 November 2008 issued by the Australian Taxation Office;
7. Between 20 November 2008 and 23 June 2009 the applicant with intent to defraud uttered a forged document purporting to be a letter dated 21 November 2008 issued by the Australian Taxation Office.

[16] Submissions on sentence were heard on 30 May 2011. Three days later, on 2 June 2011, the applicant was sentenced to 10 years' imprisonment on count one, 12 years' imprisonment on count two, three years' imprisonment on each of counts three, four, six and seven and 12 months' imprisonment on count five. The terms of imprisonment imposed with respect to counts one, two, three, four, six and seven were to be served concurrently. The 12 months' imprisonment imposed on count five was to be served cumulatively on the others. The effect of the sentences was therefore that the applicant serve a term of 13 years imprisonment. A parole eligibility date was fixed at 30 November 2015 which required the applicant to spend four and a half years in prison before becoming eligible for parole. Three days of presentence custody were declared as time served under the sentences.

[17] The applicant's fraudulent activity, the subject of counts one and two, was the operation of a "Ponzi" scheme, and occurred continuously throughout the periods alleged in those counts (although the applicant disputes the commencement date of the frauds, an argument to be addressed later). The offending was made the subject of two separate counts distinguishable by dates because on 1 December 2008 the maximum penalty for the offence was increased from 10 years' imprisonment to 12. The sentencing judge imposed the maximum penalty allowable for both offences.

[18] The applicant who was aged between 22 and 30 years over the course of the offending has applied for leave to appeal against the sentences on the grounds that:

(a) The sentence imposed on count two was manifestly excessive given the short timeframe during which the offending occurred and the relatively small amount of money involved;
(b) To make the sentence of 12 months' imprisonment on count five cumulative on the other sentences was manifestly excessive having regard to the overall criminality of the applicant's conduct;
(c) The Crown Prosecutor gave the sentencing judge erroneous and misleading information distorting the judge's opinion of the applicant's overall criminality;

(d) The applicant's counsel did not comply with the applicant's instructions with respect to the facts propounded by the prosecutor in support of the charges, and did not inform the court of the errors in the Crown address.

New Evidence

[19] The applicant also applied for leave to adduce further evidence in the form of an affidavit sworn by him. The basis for the application to adduce further evidence was that:

> "(a) This affidavit contains information that the Applicant gave strict instructions to [his] legal representatives to submit … at [the] sentencing hearing;
>
> (b) The information is relevant … and contains mitigating circumstances and evidence in favour of the Applicant;
>
> (c) The Affidavit … is a rebuttal of erroneous and misleading information presented by the Crown at the … sentencing hearing;
>
> (d) The Applicant's legal representatives, although instructed to do so, did not submit or make known to the Court the information during the sentencing hearing."

[20] The applicant's affidavit repeats the assertion that his lawyers did not accept his instructions to challenge the prosecutor's schedule of facts and contains a brief history of his business dealings by which he seeks to exonerate himself of any fraudulent intention. It also claims that he endeavoured to change his business practices so as to invest successfully on behalf of those who gave him their money. To that end, he says he sought to change "the structure of the investment" because it was "unsustainable". There are also quibbles about some of the detail of the prosecutor's address and some irrelevant claims of harassment by those whose fortunes he stole.

[21] The applicant was represented at the sentence hearing by solicitor and counsel. For the hearing of the appeal his solicitor, Ms Locke, provided an affidavit in which she described the process of taking instructions from the applicant in preparation for his plea. On 30 May 2011 the prosecutor tendered an agreed statement of facts, a lengthy and comprehensive document. It had been the subject of negotiation between the prosecutor and the applicant's counsel and solicitor. A draft of the agreed statement was provided to the applicant and his comments on it were obtained. There were discussions between Mr Godbolt, the applicant's counsel, and the prosecutor. Ms Locke deposed to a conference attended by her, Mr Godbolt and the applicant at which the applicant's written comments on the draft were discussed. Ms Locke stated:

> "Mr Godbolt informed Mr Lovell of the reality in negotiating with the Crown. He advised him that … if the Crown did not agree to the changes to the schedule of facts, the only option was to speak to the schedule or to withdraw the plea. Mr Lovell reiterated strongly that he wished to go ahead with the guilty plea. …
>
> At 11.27am on 29 May 2011 I received an email from Mr Godbolt to Mr Lovell with the statement of facts that had been forwarded by [the prosecutor]. That email indicated that the Crown had agreed to make all but two of the changes discussed in Conference … ."

[22] There was another conference between the applicant, his counsel and solicitor on 30 May 2011. Ms Locke deposed that at that conference:

> "Mr Godbolt and Mr Lovell discussed the agreed schedule of facts and Mr Godbolt indicated what facts he would be speaking to in the schedule. Mr Lovell indicated he was happy with Mr Godbolt's approach. … [a]t the end of the conference, Mr Lovell indicated that he was satisfied with Mr Godbolt's advocacy. I took a note of this because Mr Lovell had been a difficult client."

[23] On the same day, 30 May 2011, the applicant signed a document entitled "plea of guilty instructions" in which he confirmed his instructions to plead guilty and recited the explicit advice he had been given about the likely course of proceedings, the penalty sought by the Crown and the likelihood that a lengthy term of imprisonment would be imposed. The document included this passage:

> "I understand that the prosecution will tender a schedule of facts to the Judge which outlines there (sic) allegations against me. I understand that Mr Godbolt has negotiated these facts with the prosecution on my instructions to the best of his ability. I understand that it would be contrary to my interest to dispute them any further. Accordingly, I do not wish to dispute them."

[24] Mr Godbolt provided a brief affidavit. He confirmed negotiating the contents of the schedule of facts with the prosecutor who was prepared to make all but two of the "considerable number" of changes requested by the applicant.

[25] The applicant did not seek to cross examine his former lawyers; nor was he cross examined. In this state of affairs the applicant's assertions that his solicitors and counsel did not execute his instructions to contest the factual base of the sentence advanced by the Crown must be rejected. The contest is between a self serving affidavit from the applicant who has been convicted on his own confession of serial dishonesty of psychopathic proportions, and an affidavit by a solicitor against whose character nothing was said and whose statement was corroborated by the instructions signed by the applicant.

[26] If one did not choose between the deponents on this basis but approached the dispute on the basis of moral relativism one is left with competing assertions, one no more plausible than the other. There is an onus on the applicant to persuade the court that his affidavit should be accepted because his case was not put before the sentencing judge. If there is no basis for preferring one version over the other, the onus has not been discharged.

[27] The applicant should not have leave to adduce further evidence.

[28] When pressed in his oral presentation as to what errors he wished his affidavit to correct the applicant identified six:

(1) That at the time of his arrest he was trying to establish an investment fund which complied with all relevant statutory provisions;

(2) At the time of his arrest he was working on computer software which would have enabled him to trade successfully on behalf of investors;

(3) His dishonesty did not commence on 31 August 2001 as alleged in the indictment but later, in 2003;

(4) The detail of how he met one of the investors was wrong;

(5) The sentencing judge was not clearly told that the applicant had never represented to investors that he had a license to act as a financial advisor;

(6) The detail of the closeness of his relationship with one of the women whose money he stole was misstated.

[29] This recital reveals another reason why the applicant should not have leave to adduce his affidavit. None of the errors he wishes to correct are relevant, except perhaps the third, which can be addressed without reference to the affidavit.

Facts

[30] The applicant operated a Ponzi scheme, a fraudulent investment operation that pays returns to investors from their own money or money paid into the scheme by subsequent investors rather than from any actual profit earned from money invested. The scheme entices new investors by offering returns legitimate investments cannot, returns that were both abnormally high and consistent. The perpetuation of the returns that a Ponzi scheme advertises and pays requires an ever increasing flow of money from subsequent investors to keep the scheme going.

[31] The applicant incorporated Mirtna Holdings Pty Ltd ("Holdings") on 28 August 2001, after he had completed some courses in securities trading. Initially he introduced some friends and acquaintances to his scheme which was trading in securities, shares, options, futures etc. He claimed that he had skill and knowledge, and a software program, and that he had traded successfully for some years. He gave his close circle of investors regular statements which purported to show that he was trading successfully and that their investments were appreciating. These friends advised other friends and acquaintances who in turn approached the applicant to invest. The applicant informed investors that their funds were pooled and were invested by him through brokers in Australia and overseas. Each month the applicant provided investors with a statement indicating the value of their investment. The figures were fanciful. The applicant himself described one set of figures he produced as "fake".

[32] In August 2002, the scheme was expanded to receive and invest superannuation funds. In 2004 the applicant incorporated a company, Life Super Pty Ltd ("Super"), into which investors could rollover their superannuation monies held in other funds. The applicant prepared a brochure extolling the benefits of investing in Super. It set out in graphical form monthly returns on investments between July 2002 and June 2006. These were said to average between six and eight per cent *per month*. The applicant continued to offer investments through Holdings and produced a brochure, less elaborate than the one for Super, which also claimed inflated monthly returns. For the period July 2006 to June 2007 the brochure proclaimed that the growth in investments was 88.84 per cent. It also claimed that the applicant's "group of companies" had "in excess of $20 million in assets under management for investors based all over the world." The statements were untrue.

[33] Investors who wished to withdraw funds had to give notice ostensibly so that investments could be redeemed and funds made available. Redemptions were in fact made from funds invested subsequently. Many investors were induced by the

sums they were told they had in their account to contract financial obligations they were, in the end, unable to meet.

[34] On 28 August 2007 the applicant incorporated Mirtna Capital Pty Ltd ("Capital") which was intended to operate as a licensed investment company and to solicit investment from the public at large. Before that could be done lawfully the applicant had to obtain a financial services license. The applicant did make attempts, the details of which do not matter, to qualify for a license. He spent considerable sums of money, obtained from investors, in the endeavour. He also employed traders and analysts who would make the investments once the licence was granted and investments flowed in from the public. As many as 14 employees were engaged. The considerable debts associated with the issue of the license and the attempt to produce a template for trading were paid from the monies given to the applicant and his companies to invest.

[35] A brochure prepared for Holdings claimed that the average annual return on investments placed with the company between the years 2003 and 2008 was 111.43 per cent. Although the applicant claimed to have invested $1 million of his own monies into Capital the only sums in fact deposited to the company's account were $100,000 transferred from Holdings on 27 May 2008, and the further sum of $75,000 on 9 May 2009 and $50,000 transferred from Interactive Brokers on 19 May 2009.

[36] In all $8,874,206.76 was paid by investors to Holdings and $6,677,160.49 to Super, a total of $15,551,367.25. Of that sum $4,426,917.87 was redeemed i.e. paid back to investors from Holdings and Capital, and $2,207,160.49 from Super, making a total of $6,632,078.36. Of that sum, however, $2,536,765.18 was over paid to a few investors who redeemed investments early and ostensibly received the phenomenal "profits" promised. The amount lost to investors was therefore $11,456,054.07.

[37] Despite receiving more than $15 million the applicant invested a mere fraction, $2,823,286.17, of the money. Most of that was lost. The money recovered amounted only to $907,883.43. The loss on investments was $1,915,405.74.

[38] It is apparent that the applicant obtained money from friends and acquaintances, and their friends and acquaintances, on a false pretence that he would invest the monies and that he had made, and was making, enormous returns on the sums invested. Less than a fifth of what he was paid was invested and he managed to lose two thirds of that. He never traded successfully, never made a profit, invested a fraction of the monies given to him for investment and he lied elaborately, persistently and flagrantly about the fate of the monies entrusted to him.

[39] An example of the applicant's duplicity can be seen from his dealings with Ms Colleen Kent who sought an assurance that her investment was secure. The applicant wrote her a letter dated 14 April 2008 which attached financial statements which he said were prepared by his accountant and which he claimed demonstrated his capacity to honour the guarantee he gave investors. The documents indicated he had made a trading profit of more than $100,000 for the month of March 2008 and that his personal profit from trading in the previous nine months was more than $2,600,000. He attached what was said to be a statement of account from Interactive Brokers, a broking firm he did use, showing that he personally had funds on deposit with the brokers in excess of $2.3 million. Every piece of information in

the letter and accompanying documents was false. The statement of account from the brokers was a forgery.

[40] The global financial crisis of 2008-2009 had an immediate and obvious impact upon the applicant's scheme. It would have failed inevitably, as all Ponzi schemes do, but its demise was hastened by the credit crisis. Despite that the applicant continued to issue statements to investors indicating monthly returns of between two and three per cent, at a time when the funds held by Interactive Brokers on behalf of the applicant's companies declined from $1.65 million to $38,000. Despite the reassuring but fraudulent misstatement some investors were alarmed and sought redemptions of their investments which the applicant did not have the funds to meet. As well the lessor of the premises which his companies leased locked them out because of non-payment of rent.

[41] The applicant deflected his co-directors' concerns about the companies' finances by producing a letter, apparently from the Australian Taxation Office, dated 21 November 2008, addressed to Holdings. The letter said:

> "The ATO has been notified of the transaction detailed on the accompanying page which has breeched (sic) international Anti-Money Laundering security levels. We have requested that the bank freeze the transfer and the accompanying account pending further investigation.
>
> Under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* the ATO can request a temporary freeze of international and domestic transactions if the transaction is deemed to be potentially related to illegal activity or tax evasion. An investigation of the transaction ... will be conducted, …
>
> As the authorised representative for the related entity you will be contacted by the case officer for more information if required. Co-operation with this matter will ensure that all investigations are conducted in a timely manner.
>
> **Release of related accounts and funds**
>
> The results and a recommendation of the related investigation will be forwarded to the ATO's relevant committee for approval. … [t]he release of related accounts and funds is at the discretion of the committee … . The results of the investigation will be forwarded to you …"

[42] The applicant told his co-directors that the amount frozen by the ATO was $2.6 million which was to have been transferred from Vanuatu to Holdings (or Capital) and that he was taking steps to have the money released. The letter was a forgery. There were no funds which had been frozen and no funds to be transferred. In reliance upon the applicant's fraudulent misrepresentations the directors obtained a short term loan to pay the outstanding rent and regain possession of their office. To continue operations money was retrieved from Interactive Brokers and investors' funds held by Super were transferred to Capital. The applicant approached a woman, Lucia Wright, (about whom more will be said later) and asked her to invest $100,000 which she did on 8 May 2009. $75,000 of that sum was transferred to Capital as operating cash.

[43] The amount of money obtained from investors after 1 December 2008, the commencing date for the offence alleged in count two, was $1,480,000. The rest of

the money was received earlier; in the period covered by count one. Although the amount the subject of count two is comparatively small (though still very large) the circumstances in which these monies were obtained for investors makes the offending callous, and, indeed despicable. The monies were solicited at a time when the applicant knew his trading had been unsuccessful and that he could not offer any return, let alone the substantial ones he promised. In fact by December 2008 the applicant had ceased trading altogether.

[44] In about April 2009 the applicant wrote a "confession" on his computer. It was in these terms:

> "As I write this I am in complete disarray. Lost, without notion or idea as to the way forward.
>
> My world has finally closed in around me and I am unsure as to the path to righteousness. I have been doing this since January 2003. I have been given in excess of $12 Million over six years and currently have approximately $100,000 at a stretch.
>
> I do not want to reveal the extent of the deception, regardless of how close I have been to doing it in recent weeks, but I also need an immediate solution. Unless we receive a substantial investment, I believe the deception will be discovered by the end of April, 2009.
>
> Mirtena and Life Super currently require $2.95 Million to honour redemption requests, $820,000 to cover outstanding invoices and another $1.15 Million to remain in business through the end of the financial year. That is just under $5 Million in new investments before we put any funds in a trading account.
>
> I can think of approximately $4.2 Million that we have spoken to investors about, however a large percentage of those funds are either predictions or rely on Enterprise(NZ). If you got every prediction and Fred/Kevin we will have money to the end of the year."

[45] At a time when the applicant had lost or spent all the money entrusted to him, and when he acknowledged that he had obtained it by deception, the applicant was contemplating enticing other innocents to pay him $5 million to extend the concealment of his peculation and keep his businesses going for another few months.

[46] One of the persons the applicant approached was Lucia Wright, described as the widow of one of his friends. He attended the friend's funeral, spoke to Mrs Wright and then later approached her to solicit money which he promised to invest and obtain substantial returns. She paid him $100,000 which he applied to keep his companies operating. The applicant complains that Mrs Wright's husband was not a friend but only a slight acquaintance. The distinction is immaterial. What matters is the applicant's cynical manipulation and callousness in approaching a widow at a time of mourning to entice her to pay over her late husband's estate on the basis of a lie, knowing that he never could, and did not intend to, invest the money for her benefit. She has been predictably devastated and has entertained thoughts of suicide.

[47] The third count of fraud concerns a sum of $36,023. The applicant had been in the habit of hosting lavish parties on New Year's Eve as a means of promoting his

business and evincing the indicia of financial and social success. On New Years' Eve 2008 the party was held at the Hilton Hotel. A feature of the party was fundraising for two charities, the National Breast Cancer Foundation and Prostate Cancer Foundation of Australia. Guests were invited to be generous. The monies were paid to the applicant or one of his companies for on payment to the charities. He pilfered them.

[48] Counts three and four were forging and uttering the Interactive Broker's statement shown to Ms Kent and other investors who sought assurances of the financial worth of the applicant's companies before investing. Ms Kent invested $89,000 on the basis of the forged representations. Another investor put $500,000 into the applicant's hands on the faith of the forgery.

[49] Counts six and seven concern the forgery of the Australian Taxation Office letter which convinced the applicant's co-directors to borrow money to pay the rent and were shown by the directors to a number of investors to encourage them to invest in the applicant's scheme.

[50] The monies dishonestly applied by the applicant went to maintain a comfortable though not overly lavish lifestyle, and to provide the trappings of wealth necessary to persuade investors that he could obtain the returns he promised, and to fund the operation of his company. It would seem the bulk of the monies went to this latter endeavour. The applicant appeared genuinely to attempt to establish a licensed investment business and to undertake successful trading in financial derivatives. He never achieved that goal, as I have mentioned.

[51] The applicant has prior convictions. When 19 he was convicted of 15 charges of fraud and eight of stealing. The applicant stole items of property from his flatmates and pawned them. He was sentenced to two years' probation and 100 hours community service. There was, as well, a charge of possessing drugs for which he was fined.

[52] In passing sentence the learned judge said:

> "You initially relied on friends and acquaintances but, over time, extended this to others. In all, over the period from August 2001 to June 2009, you had over 200 investors … . Initially, you paid handsome rewards to those who were lucky enough to invest early or who, over time, were able to induce you to repay their investments or part of them. The scheme … involved you using the money paid to by you by subsequent investors to pay, either as dividends or redemption of capital, earlier [invested]. … Such payments were made of course to ensure there were persons who were successful with their investments – indeed, spectacularly successful to all appearances – to ensure that they unwittingly encouraged others to invest in the scheme … . During the period of your fraud, at least up to February 2009, each investor was provided with a statement indicating the sum owing at the beginning of the month, any contributions or withdrawals, the income said to have been received from the … investments, and the amount owing … at the end of the month. You represented the investments were achieving fantastically high returns. For example, one investor who had invested $5,771.87 in November 2002 was said to have had an account balance of $494,510.33 by February 2009. Another who

> invested [$]100,000 in October 2004 withdrew some [$]445,000 in the period from August 2006 to February 2009 and was still said to have almost $815,000 in his account in February. … A brochure was prepared on behalf of Life Super … . It's an impressive looking document that contains a graph of supposed monthly returns … from July 2003 to June 2006. It showed phenomenal performance, averaging a return of about seven per cent per month. That would mean funds doubled about every 10 months, … . The brochure was apparently credible but wholly fictitious."

[53] His Honour then turned to the effect the frauds had had on the applicant's victims:

> "Clearly the loss of almost $11.5 million by investors has had catastrophic effects for them. Individual losses in excess of half a million dollars have been suffered. Many investors, some of whom have received handsome returns encouraged members of their families and friends to invest. As those persons have lost their investments, the persons who encouraged them have suffered feelings of guilt, shame and embarrassment. Many of those who invested have lost their own life savings. Many are by reason of age or illness now unable to work and have a much poorer future than they'd hoped for, or deserve. For some, the loss has significantly [and] adversely compounded health problems. For others, the stress associated with your deception has caused the development of such health problems and significant marital and personal discord. For some, the money had been invested to pay for their children's future education, and is now entirely lost. Another, who invested the proceeds of a personal injury payout has, because of the injuries … been unable to work, but his receipt of the payout precludes his receipt of social security. Some have borrowed to invest and now must, … repay the borrowed sum and any interest … . All are understandably devastated. Some may themselves face bankruptcy."

[54] The judge referred to the applicant's "confession" and the fictitious investment summaries he had prepared showing the extravagant returns on investments, and expressed the opinion that the applicant's conduct did not:

> "… readily lend itself to the assertion of remorse maintained on your behalf, especially when the deception continued for eight years and continued after you yourself … had recognised that you believed the whole business would collapse by April 2009."

[55] The judge concluded:

> "In this case, I believe that your offending is so serious that a sentence in excess of 12 years is justified, particularly having regard to the duration and extent of your fraud, the very large loss of about [$]11.5 million, the fact that many, if not all, of the investors can be seen to be relatively unsophisticated … who invested sums, the loss of which, through your callous conduct, has caused untold financial and emotional stress. Additionally, the manner of your defrauding charities of … some $36,000 … is reflective of your contempt for others."

[56] Although the judge accurately summarised the effects of the fraud upon the investors some of the detail is worth noting. One invested $255,000 with the

applicant and lost everything. She had two young children and lost her home. Her husband was said to be "on the verge of a nervous breakdown". Another investor entrusted the applicant with $450,000 jeopardising his capacity to support and educate his family and even to maintain them in the family home. He complains that the applicant knew "he was supporting a young family and struggling to maintain a new businesses" when he solicited the investment. Another gave the applicant his retirement savings and has had to return to the workforce. Another investor also gave the applicant $450,000 and was obliged to sell her house, in which her aged mother lived, to repay the money which she had borrowed to invest with the applicant. One investor's loss was relatively modest, $14,000, but it was his entire wealth. He described himself as a "minimum wage earner" who had taken 20 years to save "this meagre sum." Another investor lost $585,619.77, his entire life's savings which he had put into superannuation for his retirement.

Applicant's arguments

[57] In the end the applicant pressed three points. The first was that his course of offending did not run over eight years as the sentencing judge described on several occasions but only over six, or six and a half years, commencing in 2003. The second point was that the offending subject to count two involved substantially less money than the offending the subject of count one and occurred over a much shorter period, (nine months, rather than seven years and three months) but was punished by a heavier penalty than for count one. The third point was that the sentences were excessive overall, particularly the accumulation of the sentence for count five.

[58] The only complaint of substance is the third, that the sentence is manifestly excessive. The first complaint involves a quarrel about a fact which the applicant raised for the first time on appeal, and the second a misunderstanding of the sentencing process.

[59] I will deal with the points in turn.

[60] The applicant should not be allowed to contend that his offending did not occur over the time alleged in the indictments. He pleaded guilty to the dishonest application of monies between 31 August 2001 and 18 August 2009. The statement of agreed facts, a draft of which he had prior to the sentence and parts of which he had changed by negotiation, implicitly accepted that the scheme was dishonest from the start and that Holdings was incorporated for peculation.

[61] There is nothing in the material put forward at sentence, or in support of his application, to indicate that he ever traded successfully, or ever made a profit, or ever had any basis for telling friends or acquaintances that he could trade profitably for them. From the beginning his soliciting and receipt of money was deceitful.

[62] In any event the difference in duration is immaterial. The applicant's "confession" accepts that he had been defrauding people since January 2003. He deprived 200 investors of over $15 million by an elaborate, contrived, sophisticated and determined set of frauds and forgeries. Whether he did so over eight years or six years makes no difference.

[63] There is no disparity between the sentences imposed on counts one and two. The learned judge made it clear that he thought the extent and pattern of the applicant's dishonesty called for a sentence greater than 12 years, which was the maximum

which could be imposed on count two. Although contained in two counts the offending was a continuous course of deceit and deception extending over many years. The division of the offence into two by reference to dates reflected only the change in maximum penalty in December 2008. The sentences do not indicate that the offending isolated in count two was worse than that in count one. Having concluded that 12 years was insufficient for the overall criminality his Honour was faced with a number of alternatives. He could have imposed a sentence less than the maximum on each of counts one and two, and made them cumulative or, as he did, impose maximum concurrent sentences and a cumulative sentence on another count. He was right, I think, not to accumulate the sentences for forgery and uttering with the fraud in counts one and two because they were incidents of that course of fraudulent conduct. Count five did represent a distinct and separate course of fraud so the sentence for it was the appropriate one to accumulate. It did as well, as the judge acknowledged, call for separate punishment because of the offensive misappropriation of money set aside for charitable purposes.

[64] The legal principle was expressed by the Court (Fitzgerald P, Davies and McPherson JJA) in *R v Cook and Heiser ex-parte Attorney- General* [1997] QCA 14:

> "However, there is no principle that no matter how many offences are committed, how long the period over which they are committed, or how much is involved cumulative sentences exceeding the maximum permissible for a single offence should never be imposed. It is necessary to ensure that the punishment imposed is proportionate to the total criminality, and it is permissible to achieve this by requiring some sentences to be cumulative upon others."

To the same effect is the judgment of Gleeson CJ in *Johnson v The Queen* (2004) 78 ALJR 616 at 618 citing with approval the judgment of Wells J in *Attorney-General v Tichy* (1982) 30 SASR 84 at 92-93.

In *R v Daswani* [2005] QCA 167 McMurdo P said:

> "[11] Counsel for Mr Daswani contended that the head sentence of 12 years imprisonment is manifestly excessive because the offences should be regarded as amounting to a single course of conduct and the maximum penalty for the most serious of the offences ... is 10 years imprisonment. …
>
> [12] The flaw in that argument is manifest. Mr Daswani was not charged with one count but with 27 counts, 11 of which were each punishable by up to ten years imprisonment. Whether sentences are imposed concurrently or cumulatively, the primary consideration is that the effective punishment imposed adequately reflects the seriousness of the criminal conduct. It is not the law that if one crime is committed another crime of the same sort can be committed with little or no increase in punishment. … Cumulative sentences for multiple offences occurring during a single course of conduct can be imposed, providing the effective sentence reflects the overall criminality … ."

[65] The applicants' last argument is manifest excess. The authorities are against him.

[66] *Daswani* approved a head sentence of 12 year's imprisonment imposed in respect of 15 counts of dishonestly using the position of company director under s 184(2) of the *Corporations Act* 2001; 11 counts of dishonestly inducing a person to deliver property under s 408C of the *Criminal Code* (Qld), and one count of dishonestly obtaining a benefit, namely $8,650,000, also under s 408C of the Code. The offences occurred between July 1998 and September 2000. Daswani was the controlling mind of 16 family companies which sold jewellery and clothing from outlets in Brisbane, the Gold Coast, the Sunshine Coast, New South Wales and Victoria. The business failed and Daswani had employees prepare false invoices to defraud creditors. When liquidators were appointed to the companies Daswani and his family fled. He was arrested in Hawaii and returned voluntarily. The counts under the *Corporations Act* were committed by taking the companies' money to pay for his and his families' escape to Hawaii and their living expenses there. The counts brought under s 408C concerned monies raised in an attempt to keep the businesses operating. The total amount misappropriated was just over $11 million. The net amount lost after the sale of the businesses was about $6 million.

[67] The sentence in *Daswani* supports the sentence imposed on the applicant. Daswani's attempt to avoid prosecution is an aggravating factor absent from this case but the applicant caused a substantially greater loss, it was caused to a greater number of victims who were less well able to cope with their losses than the businesses Daswani defrauded. Daswani's offending also lacked the egregious misappropriation of monies raised for charity.

[68] Of some, though lesser relevance, is *R v Gadaloff* [1998] QCA 458 in which the male applicant was sentenced to eight years' imprisonment for fraud. He was a 33 year old cashier employed by the Brisbane City Council who, over four or five years, systematically stole about two and a half million dollars from the council's receipt of coins paid into parking meters. The sentence was upheld on appeal, the court noting the gross breach of trust by an employee, the loss of public money, the substantial amount involved and the protracted period over which it was taken. The first two factors are absent in this case though the breach of trust in taking money from friends and acquaintances was as great as that against an employer, and the victims were less able to absorb the loss than was the Council. The amount stolen was much less than the applicant took.

[69] As a subsidiary argument the appellant contended that the learned judge had given insufficient weight to circumstances of mitigation. He particularly complained that the judge did not regard him as remorseful. I was no more convinced by the applicant's protestations of remorse than was the primary judge. His criticism of his lawyers, and his quibbles over points of factual detail immaterial to his criminality, both indicate a lack of empathy for those who suffered at his hands, and of remorse. His argument sought to minimise his culpability and blame circumstances, rather than his own dishonesty, for the losses.

[70] The only real factor in mitigation was the applicant's early plea of guilty which was recognised by the setting of the parole eligibility date. It cannot be said he co-operated with the administration of justice when he seeks to challenge the schedule of facts put forward as the basis for his sentencing and to argue the duration of his offending was less than that to which he pleaded guilty.

[71] The applicant complained also that the primary judge had not given sufficient weight to the report of Dr Curtis, a psychiatrist who examined the applicant for the

purposes of sentence. The judge thought the report unhelpful because the account of wrongdoing which the applicant gave Dr Curtis as the basis of the report was "a misstatement of the true position". The applicant had apparently told Dr Curtis that the frauds occurred "in the midst of a company reorganization, presumably aimed at trading out of [the applicant's] financial problems." The trial judge rejected that categorisation. He said:

> "Your whole modus operandi was fraudulent. It's not a case, and never was, of a legitimate business going bad and of you then using unlawful means to try to keep it afloat. … your conduct throughout has been callous and despicable and deserving of heavy censure."

[72] There is no basis for disagreeing with the learned judge's assessment of the weight to be given to Dr Curtis' report or his characterisation of the applicant's criminal misbehaviour.

[73] The applicant's challenges to the sentences imposed upon him fail. The only point calling for consideration is that the sentences were disproportionately heavy to the scale and seriousness of the offences. That contention should be rejected. The sentence is supported by the cases to which I have referred. The complaint that the learned judge undervalued the factors of mitigation has not been made out.

[74] Two of the purposes of criminal punishment are of particular relevance, deterrence and retribution. Deterrence, both general and personal, is specifically important, and so obvious as to need little discussion. Persons such as the applicant who set out to plunder their fellow citizens leaving them destitute must be convinced that the game is not worth the candle. The profit stolen from others must be more than offset by a tangible and substantial personal loss, as an example to others.

[75] The second aspect, retribution, is not usually given prominence, but is, I think, important in cases like this. Justice for the victims of the fraud requires condign punishment. The applicant's criminal misconduct has caused them substantial hurt. He has blighted lives, ruined hopes and inflicted serious financial hardship.

[76] There is another reason for retribution. Society, itself has been harmed by the fraud. The applicant's widespread dishonesty has had a discernable effect on the trust which must exist between citizens if society is to function and its members do business together. A recurring theme in the victims' statements is their sense of betrayal and their loss of trust in others. It will be remembered that the applicant was personally known to the victims or recommended by those whom the victims knew. Social and commercial cohesion is diminished by fraud of the type the applicant performed. For its own protection society requires retaliation.

[77] The same approach commended itself to Judge Chin of the United States District Court, Southern District of New York, who sentenced Bernard Madoff for his Ponzi scheme. Judge Chin noted that Mr Madoff had a life expectancy of 13 years and that "any sentence above 20 or 25 years would be largely … symbolic." The Judge went on:

> "But the symbolism is important, for at least three reasons. First, retribution. One of the traditional notions of punishment is that an offender should be punished in proportion to his blameworthiness. Here, the message must be sent that Mr Madoff's crimes were extraordinarily evil, and that this kind of irresponsible manipulation

> of the system is not merely a bloodless financial crime that takes place … on paper, but that it is instead … one that takes a staggering human toll. The symbolism is important because the message must be sent that in a society governed by the rule of law, Mr Madoff will get what he deserves, and that he will be punished according to his moral culpability.
>
> Second, deterrence. Another important goal of punishment is deterrence, and the symbolism is important here because the strongest possible message must be sent to those who would engage in similar conduct that they will be caught and that they will be punished to the fullest extent of the law.
>
> Finally, the symbolism is also important for the victims. … Mr Madoff's very personal betrayal struck at the rich and the not-so-rich, the elderly living on retirement funds and social security, middle class folks trying to put their kids through college, and ordinary people who worked hard to save their money and who thought they were investing it safely …"

[78] I do not regard the sentence in this case as merely symbolic. The punishment is no token or metaphor. It is a reality which operates as a deterrent and as retribution, signifying to the victims and society that the hurt done to the one and the harm inflicted on the other have been recognised and addressed by making the perpetrator suffer commensurately.

[79] The sentence is not manifestly excessive. The application for leave to appeal against it should be dismissed, as should the application for leave to adduce fresh evidence.

[80] **ATKINSON J:** I have had the advantage of reading the reasons of McMurdo P. I agree that, for those reasons, the orders proposed by her Honour should be made.