IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA20/2022
[2022] NZCA 267

BETWEEN	WENTING ZHANG Appellant
AND	THE QUEEN Respondent

Hearing:	12 May 2022
Court:	Miller, Duffy and Ellis JJ
Counsel:	N P Chisnall and L A Elborough for Appellant A M McClintock for Respondent
Judgment:	27 June 2022 at 11.30 am

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Ellis J)

[1] On 14 May 2021, Ms Wenting Zhang pleaded guilty in the High Court to 26 dishonesty charges: 10 of theft by a person in a special relationship,[1] six of obtaining by deception,[2] two of using a forged document,[3] one of false accounting,[4] and seven of dishonestly using a document.[5]

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1 Crimes Act 1961, ss 220 and 223(a) [maximum penalty of seven years' imprisonment].
2 Sections 240(1)(a) and 241(a) [maximum penalty of seven years' imprisonment].
3 Section 257(1)(a) [maximum penalty of 10 years' imprisonment].
4 Section 260(a) [maximum penalty of 10 years' imprisonment].
5 Section 228(b) [maximum penalty of seven years' imprisonment].

[2] On 17 December 2021, Gordon J sentenced Ms Zhang to two years and 10 months' imprisonment.[6]

[3] Ms Zhang appeals that sentence and says material errors in the sentencing process resulted in a manifestly excessive outcome. She says the starting point taken was too high and that the Judge gave insufficient credit for her remorse, financial restitution and personal circumstances.

The offending

[4] The details of the offending were set out in an agreed summary of facts which, by Ms Zhang's guilty plea, she accepted. The précis that follows is only a thumbnail sketch of a considerable number of complex and interrelated dealings and transactions over a two-year period.

[5] Mr Li and Ms Wang — the victims in this case — had applied to immigrate to New Zealand under the Government's investor immigration category. Investment requirements form part of the approval process to obtain permanent residence.

[6] The couple's immigration consultant in New Zealand was one of Ms Zhang's co-defendants, Mr Long. Ms Zhang acted as the couple's investment broker. In September 2015 Mr Li and Ms Wang came to New Zealand for the first time. Mr Long and Ms Zhang persuaded them to join them and the third co-defendant, Mr Pian (also an investment broker) in a syndicate for the purpose of purchasing land for investment. Ms Zhang helped them open a bank account here.

[7] Mr Li was induced to contribute funds to purchase land in Hobsonville on the basis that it would be developed by the syndicate. Ms Zhang and her co-offenders conveyed the impression that there were other investors (including themselves) when, in fact, Mr Li would be entirely responsible for funding the purchase. There were misrepresentations that involved overstating the purchase price for the land and Mr Li's share of the deposit. Mr Li was also told that a $4 million "under the table"

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6 *R v Long* [2021] NZHC 3522 at [116] [Sentencing notes].

payment to Mr Pian's "boss" was required and that Mr Li's contribution (based on his supposed 50 per cent investment) was to be $2 million. All of that was a lie.

[8] Rather than contributing any money themselves, Ms Zhang and her co-offenders funded the remainder of the purchase of the Hobsonville property through a loan, using forged documents purportedly signed by Ms Wang.

[9] In late 2015, the offenders incorporated a company, WOW Development Limited (WOW), to facilitate the land development.[7] Mr Long was appointed as a director; Mr Li was falsely told that he was not eligible to hold a directorship. The couple were told that Ms Wang was to hold 50 per cent of the shares in WOW and Mr Li was deceived into paying for these shares, which were in reality held by Ms Zhang, Mr Long and Mr Pian.

[10] The frauds were perpetuated through false bank statements and a false LINZ title document to conceal the fact that a mortgage was registered over the property.

[11] Mr Pian withdrew from the scheme in August 2016. In December that year, Mr Li became aware that he had been deceived. This prompted Ms Zhang and Mr Long to agree to allow Mr Li to take a more active role in WOW. He and Ms Wang were then appointed the sole directors and all shares in WOW were transferred to Ms Wang. Ms Zhang and Mr Long also made compensatory payments to the couple at this time.

[12] Despite all this, new frauds were then conceived and executed:

(a) Mr Li was deceived into paying false invoices issued by WOW's accountant for works allegedly done on the development. Mr Li made payments to the trust account of a law firm, which disbursed the funds to the appellant, Mr Long and their associates.

(b) Ms Zhang and Mr Long also issued false invoices purporting to be from a company called CJ Construction Limited, for earthworks. No such

[7] WOW was the eventual purchaser of the land.

work was completed. Mr Li made payments directly to the account shown on the invoices.

[13] Overall, the summary of facts stated that Mr Li was deceived into paying over some $6 million as a result of the various frauds. But the core investment (the development on the Hobsonville land) was real and, in fact, proved profitable. Because Ms Wang had become the 100 per cent shareholder of WOW, and WOW owned the Hobsonville land, she and her husband reaped the benefit from that. As a result of the profit made on the land, and other repayments and reparations made to Mr Li and Ms Wang by Ms Zhang and her co-defendants, the couple ultimately suffered no loss.

Mr Pian's sentencing

[14] Mr Pian pleaded guilty (following a sentence indication) to three charges of obtaining by deception on 4 September 2020. On 16 October 2020 Moore J sentenced him to eight months' home detention.[8]

[15] In setting a starting point of four and a half years' imprisonment, the Judge noted that:[9]

(a) the offending had been of "moderate sophistication, given the use of the corporate structure and use of legal advisers";

(b) the magnitude of the fraud was significant, "with approximately $6,000,000 in total being paid by [Mr Li] through fraud"; and

(c) Mr Pian had not been involved for the whole period of the offending.

[16] The Judge then considered how account should be taken of the reparations that Mr Pian had made. He noted that while there was agreement between counsel that those payments were relevant to sentence, there was disagreement between them about

8 *R v Pian* [2020] NZHC 2724 at [44].
9 At [22] and [25].

whether those payments should reduce the starting point or whether they should be considered, subsequently, as mitigating personal factors. He said:

> [27] On this point, I note that in *Elmiger v R* this Court considered such a discount is relevant in determining the starting point. In *Elmiger* the first instance Judge in the District Court ordered the repayment, and a discount of approximately 10 per cent was deducted from the starting point on appeal to reflect the fact the victim had suffered less harm because of the repayment. For the same reasons, I consider this to be the appropriate approach here and should be considered in setting the starting point. As a matter of conventional and orthodox sentencing practice, that must be correct. The repayment of funds obtained by fraud is not a personal mitigating factor. It is a feature relevant to assessing the seriousness of the offending in setting the appropriate starting point.
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> (Footnote omitted.)

[17] In determining the extent of such a discount in Mr Pian's case, the Judge noted that a distinction was drawn in the cases between voluntary and involuntary payments:

> [29] In *Patterson v R* the Court of Appeal discussed the difference between "voluntary" and "involuntary" repayments. A voluntary repayment may be viewed as a true sign of relief; it is present where a defendant has "done [their] best to atone financially for the fraud" and is deserving of a discount in terms of s 9(2)(f) of the Sentencing Act. In contrast, where there is an involuntary or directed repayment, culpability is not significantly reduced and "[the defendant] is still a fraudster and would not have voluntarily returned the money … but for being caught".
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> [30] In my view the mitigating value of the relevant conduct in the present case sits somewhere between these two bookends. You were not ordered to repay the funds by the Court, but made the decision to do so after you were confronted by [Mr Li]. In that way it cannot be said that payment was wholly voluntary in the sense it was an unprovoked response driven out of sincere, reflective contrition and remorse. But for the confrontation with [Mr Li], it is far from certain that you would have made the payment.
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> [31] I note that there has been a complete recovery of the funds [Mr Pian] received. I also note this investment enterprise has ultimately proved successful. The victims have not suffered materially according to [Crown counsel] .... It follows that the seriousness of the offending is to some extent mitigated by the victims' loss, if there was a loss at all, being relatively modest.

[18] Overall, he discounted the starting point by 20 per cent to reflect that and the reparations already made by Mr Pian.[10]

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[10] At [32].

[19] From that discounted starting point of three years and five weeks' imprisonment, the Judge afforded discounts for personal factors as follows:[11]

(a) previous good character: 10 per cent (which was agreed appropriate by both counsel);

(b) remorse: five per cent ("modest" due to a concern that Mr Pian's reparation discount not be double counted);

(c) assistance to authorities: 15 per cent; and

(d) guilty plea: 15 per cent (the full amount was not granted because it was not entered "particularly early").

[20] The resulting end sentence of just under 17 months' imprisonment was, as noted earlier, converted to eight months' home detention.

Ms Zhang's sentencing

[21] Ms Zhang and Mr Long were sentenced by Gordon J together.

Starting point

[22] At the beginning of her sentencing notes the Judge set out the Crown's position as to the payments dishonestly "received" by Ms Zhang and Mr Long at the three different stages of their fraud.[12] However, she ultimately proceeded on the more global basis taken in the summary of facts, namely that Mr Li was deceived into paying $6 million.[13]

[23] The Crown submitted to the Judge that a starting point in the vicinity of seven years was appropriate. Defence counsel had implicitly put it somewhere between five and five and a half years (before any discount for mitigating factors of the offending).

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11 At [34]–[39].

12 Sentencing notes, above n 6, at [8]–[15].

13 For this reason, the appellant's "preliminary point" that there was a "modest" mistake made in how each set of payments received by Ms Zhang were quantified is not relevant.

[24] Early on in her sentencing notes, the Judge noted the factors identified by the Court of Appeal in *R v Varjan* as being relevant when assessing the gravity of offending of this kind, namely:[14]

(a) the nature of the offending;

(b) its magnitude and sophistication;

(c) the type, circumstances and numbers of victims;

(d) the amount of losses involved; and

(e) any breaches of trust.

[25] The Judge also noted the comments in *Varjan* that assistance could be gleaned from sentencing in other similar cases.[15]

[26] In arriving at her own assessment of the seriousness of the offending by Ms Zhang and Mr Long, the Judge began by referring specifically to two comparator cases:[16]

(a) *Ryan v R,* in which the Court of Appeal reduced a starting point of nine years' imprisonment to one of seven years and six months' imprisonment in a sentence appeal involving a more sophisticated Ponzi scheme fraud that caused losses of $4.4 million to hundreds of vulnerable investors;[17] and

(b) *R v Scott*, in which a starting point of seven years' imprisonment was imposed for a fraud that was less sophisticated but had continued over a period of for 13 years and had caused $2.1 million in losses.[18]

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14 At [26], referring to *R v Varjan* CA97/03, 26 June 2003 at [22].
15 At [27], referring to *R v Varjan*, above n 14, at [23].
16 At [50]–[51]. She also footnoted other cases that had been referred to her by the Crown: *Watson v R* [2012] NZCA 17; *Robertson v R* [2020] NZCA 218 and *Arnott v R* [2015] NZCA 236.
17 *Ryan v R* [2018] NZCA 586. The total amount involved in the fraudulent scheme was $8.3 million.
18 *R v Scott* [2017] NZHC 2510. The total amount involved in that scheme was $5,425,875.

[27] And in terms of the other relevant *Varjan* factors, she said:

> [52] For sentencing purposes today, I adopt the figure of $6 million, which is the amount the agreed summary of facts says Mr Li was deceived into paying, which he would not otherwise have been required to pay. This is a substantial amount. I accept [Crown counsel's] submission that your offending was moderately sophisticated. In sentencing Mr Pian, Moore J adopted an initial starting point of four and a half years' imprisonment. In my view, the operation increased in sophistication after Mr Pian ended his involvement, because you started to use fraudulent documents and engaged lawyers in the operation in a similar way to *R v Scott.* Your actions were in flagrant disregard of Mr Li, who was your friend and a recent immigrant to New Zealand. He trusted you on multiple levels.
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> [53] I accept [defence counsel's] submission that Mr Li has a lower level of vulnerability however than some of the other victims in *R v Scott* and *Ryan v R,* due to the fact that he is an international investor. But you still breached Mr Li and Ms Wang's trust on multiple occasions, even after Mr Li became suspicious of the operation. I agree with the submission that greed was the primary motivation for both of you.
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> [54] In light of the cases that have been referred to the Court and the submissions from counsel, I find that the aggravating factors for both of you are the extent of the loss, premeditation, your motivation and breach of trust. While these features are common in dishonesty offending, the amount of money involved in this scheme was significant. It is apparent there was premeditation involved throughout the offending as you lied to Mr Li on a number of occasions and made conscious decisions to continue to lie to Mr Li once he realised he was being deceived. This was not opportunistic dishonesty offending. It continued from the end of 2015 to 2017. Finally, the motivation for the offending, as already discussed, was clear. You acted in your own self-interest. You were friends with Mr Li but also held yourself out as an immigration consultant and finance broker to him. He trusted you and you breached that trust.

[28] The Judge declined to draw any meaningful distinction between the roles respectively played by Ms Zhang and Mr Long. After acknowledging that she should take the same approach as Moore J in reducing the starting point to take account of the fact that no loss had been suffered, she adopted an "initial" starting point of six years' imprisonment.[19] She then turned to consider the question of a further adjustment to take account of the reparations that had been made.

[29] There was a difference between the Crown and defence counsel as to the amounts received by each of the defendants and the amounts repaid. In Ms Zhang's case, defence counsel asserted she had personally received a sum of $2,507,000 as a

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19 *R v Pian*, above n 8, at [58].

result of the offending.[20] The Crown, by contrast, argued Ms Zhang had directly and indirectly obtained the benefit of $3,566,874.04.[21]

[30] Ms Zhang's counsel submitted that she had made repayments to Mr Li to the tune of $3,185,000, comprising:[22]

(a) three payments amounting to $960,000 in funds ($300,000, $100,000 and $560,000);

(b) $825,000 equity in WOW;[23]

(c) a property at an agreed valued of $1.4 million.

[31] Defence counsel submitted that, given their assessment of the amount Ms Zhang personally received, she had more than repaid Mr Li. Accordingly, counsel argued that a 20 per cent discount should be applied. By contrast, the Crown submitted that on their assessment of the sums involved Ms Zhang's repayments fell short by some $644,016.54. Accordingly, the Crown argued that only a 15 per cent discount for reparation was appropriate. [24]

[32] The principal reason for the difference in sums was because the Crown did not accept that the value of the WOW share transfers to Mr Li should be taken into account when quantifying reparation.

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20 Sentencing notes, above n 6, at [59].

21 At [12].

22 At [59]. The Judge also recorded defence counsel's submission that Ms Zhang had made offers of repayment before she was charged.

23 Mr Long's 50 per cent shareholding in WOW (half of which was held on behalf of Ms Zhang) had a gross value of $1.65 million. Because the entirety of that shareholding had been transferred to Mr Li, each defendant submitted that $865,000 should be included in their respective reparation payments.

24 At [64]–[67]. The Judge noted that it also made a difference whether the value of the CJ Construction invoices was taken into account as sums received by the defendants. But, as she further noted, regardless of whether the defendants had received those sums, they had been paid for their benefit and both accepted liability for those amounts.

[33] The Judge resolved the issue in favour of Ms Zhang and Mr Li. While acknowledging the merit in the Crown's position (because Mr Li had always been the only contributor to WOW and the transfer of shares simply reflected that) she said:[25]

> … given the need for consistency in approach as between you and Mr Pian, the Court is required to take into account the fact that the development sold at a profit. The transfer of 50 per cent of the shares to Mr Li enabled him to receive 100 per cent of the profit on the sale of the land.
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> … having regard to the amount of reparation paid, I make a deduction of 20 per cent from the six year initial starting point to reach an adjusted starting point of four years and nine months' imprisonment (rounded down in your favour) before considering factors personal to you.

[34] Having thus arrived at an adjusted starting point of around four years and nine months' imprisonment, Gordon J then discounted by 40 per cent for personal factors, as follows:

(a) 10 per cent for good character;[26]

(b) 15 per cent for guilty plea;[27]

(c) five per cent for remorse;[28] and

(d) 10 per cent for family matters that the Judge took into account under both s 27 of the Sentencing Act 2002 and in terms of s 8(h) (factors that make imprisonment a disproportionately severe sentence).[29]

[35] Ms Zhang's final sentence was two years and ten months' imprisonment (rounded down). Home detention was not therefore available.

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25 At [69]–[70].
26 At [95].
27 At [99]: while the guilty plea came shortly before the trial was set to begin, Gordon J considered this was largely because of issues surrounding late disclosure.
28 At [103].
29 At [114]: the background factors include Ms Zhang's two sons and newborn daughter and the fact that her husband and parents are in ill-health, making it challenging for them to raise the children.

The appeal

[36] Ms Zhang's counsel, Mr Chisnall, submitted that the Judge imposed a manifestly excessive sentence because:

(a) the starting point was too high when compared with similar cases and should have been in the vicinity of five years' imprisonment;

(b) insufficient allowance was made under ss 9(2)(f) and 10 of the Sentencing Act for the exceptional fact that the appellant and her two co-offenders had not only entirely made good the loss (including through a half million dollar payment by Ms Zhang said to have been misattributed by the Judge), but had placed the two victims in a financially advantageous position; and

(c) insufficient credit was given for Ms Zhang's personal circumstances that make a sentence of imprisonment disproportionately severe for her, including her newborn baby.

Starting point

[37] The focus of the first aspect of the appeal coincides substantially with the second — the fact that there was no real loss. It was the absence of loss that Mr Chisnall said made the comparator cases relied on by Gordon J when setting the starting point inapt (or, at least, inapt without some adjustment). He emphasised this point by reference to a number of other cases involving very significant actual losses, and no repayment, where the same or lesser starting points had been adopted.[30]

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[30] *Tallentire v R* [2012] NZCA 610, [2013] 1 NZLR 548: starting points of six and a half years' imprisonment upheld on charges arising from the collapse of a finance company with many investors harmed and actual losses of $12.1 million; *Hamilton v R* [2015] NZCA 28: starting point of five years' imprisonment adopted on 14 charges of theft under s 220 of the Crimes Act 1961 against a solicitor who assisted the principal of a finance company to structure his affairs in order to conceal an "elaborate" fraud which caused losses of approximately $12.5 million; *R v O'Leary* [2013] NZHC 2784: starting point of five years' imprisonment adopted on nine dishonesty charges against a director who made prohibited loans which caused the collapse of their finance company and losses of $3.8 million; and *Ludlow v R* [2013] NZCA 196: starting point of six and a half years' imprisonment upheld on seven dishonesty charges, among others, for a director's deception of investors and misappropriation of their funds, causing total loss of $14 million and involving theft of $5.45 million.

[38] Equally, however, Ms McClintock for the Crown pointed to a number of other similar (or less serious) cases that had been referred to Gordon J, where higher starting points had been adopted.[31] And she pointed out that in *R v Borlase* Fitzgerald J — who had conducted her own review of sentencing in fraud cases — concluded:[32]

> In cases where benefits of between approximately $1m to $3m had been obtained, starting points in the vicinity of seven to nine years imprisonment have been adopted. Where the benefits obtained were around $500,000 to $750,000, starting points of around five to seven years' imprisonment have been adopted.

[39] Overall, the cases plainly demonstrate that the six year "initial" starting point was easily within range for fraud offending involving a benefit of $6 million. We can discern no error in the first stage of the Judge's approach to the starting point.

Reparation and improvement in the victims' financial position

[40] Section 10 of the Sentencing Act requires a sentencing court to take into account, among other things, any offer of amends by the offender, "the response of the offender or the offender's family" to the offending, and "any measures taken" by the offender or the family to "make compensation to any victim".[33] And as this Court said in *Grant v R*, an offer of amends made by an offender is relevant to sentencing for three reasons:[34]

> … first, it may be an indication of remorse [s 9(2)(f) of the Act]; secondly, it may go some way to remedying the harm [s 10(1)(e) of the Act]; and thirdly it may constitute a penalty to the offender.

[41] In this case, Mr Chisnall raised two key issues around the question of reparation:

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31 *Robertson v R*, above n 16: starting point of seven years' imprisonment related to dishonesty surrounding investments that caused loss of $1.47 million; *Arnott v R*, above n 16: starting point of seven years' imprisonment for personal use by a financial trader of $2.5 million which he had received from investors for trading; *Ryan v R*, above n 17: starting point of seven and a half years' imprisonment for an "elaborate farce" which defrauded over 900 investors and caused an estimated loss of approximately $4.4 million.

32 *R v Borlase* [2017] NZHC 236 at [73].

33 Section 10(1). Section 10(2) of that Act provides that, in deciding to what extent any offer of amends should be taken into account, the court "must take into account" whether the offer was genuine and capable of fulfilment, and whether it has been accepted by the victim as mitigating the wrong.

34 *Grant v R* [2018] NZCA 452 at [25], referring to *M v R* [2008] NZCA 112 at [31].

(a) the effect of a mistake said to have been made by Gordon J when quantifying the amount repaid by Ms Zhang; and

(b) whether inadequate account was taken by Gordon J of the facts that:

(i) Ms Zhang has repaid the victims the entirety of the amount she received or had the benefit of as a result of her fraud (or more than that amount); and

(ii) the victims ultimately made a profit as a result of the fraudulent property investment venture.

Mistake in quantifying the amount of Ms Zhang's repayments

[42] Mr Chisnall and Ms McClintock were agreed that Gordon J mistakenly credited to Mr Long a sum of $1,125,715 that was repaid to Mr Li and Ms Wang when credit for that should have been apportioned equally between Mr Long and Ms Zhang.[35] So a further reparation payment totalling $562,857.50 should have been attributed to Ms Zhang, with the result that she has made restitution to Mr Li and Ms Wang totalling $3,747,857.50: significantly more than the amount she personally obtained and $180,982.96 more than the amount received by her.

[43] While on its face this error seems significant, we do not consider it would, or should, have made a material difference to Ms Zhang's sentencing.

[44] First, we are not persuaded that the Judge did, in fact, proceed on the mistaken basis just articulated. Between [59] and [63] of her notes she recorded the competing contentions about the amounts repaid and the difference left owing by each defendant. It is true that in her summary of defence counsel's figures here, the Judge appears to have repeated the error made in them.[36] But she also correctly recorded the Crown's position, which was based on calculations contained in its memorandum dated

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35 Ms Zhang's counsel note "the genesis of the error was a miscalculation in the submission made by counsel for Ms Zhang, which omitted reference to the appellant's share of $562,857, and which perpetuated an error contained in a joint memorandum".

36 She refers at [62] to Mr Long's submission that he had made (amongst other things) "pre-charge cash repayments of $1,120,000".

14 December 2021 where the $1,125,715 repayment *had* been correctly split between Ms Zhang and Mr Long. Those calculations showed (as the Judge also recorded) that the repayments made by Ms Zhang left an amount still "owing" of $644,016.54 and those made by Mr Long left a shortfall of $1,044,445.33.

[45] As noted earlier, the Judge then accounted for the difference between defence counsel's and the Crown's calculations largely on the basis that the Crown had maintained that credit should not be given to either Ms Zhang or Mr Long for the transfer of the WOW shares. That had nothing to do with defence counsel's mistake in failing to split the $1,125,715 repayment. And the fact that the Judge resolved that issue in the defendants' favour simply meant that 50 per cent of the value of the shares would have been added to each amount said by the Crown still to be owing. In other words, Ms Zhang would be in credit by around $200,000 and Mr Long would have owed approximately $200,000. The difference between them remained the same.

[46] In any event, it is plain that despite the differences between Ms Zhang and Mr Long in terms of the amounts each had received and each had paid back, the Judge considered that the 20 per cent discount on the starting point was apt for both.[37] We do not consider that the attribution error would have made any material difference to the sentencing outcome.

Significance of the restoration of and improvement in the victims' original position

[47] Mr Chisnall submitted that because the victims were completely restored and have even improved their position as a result of the fraud perpetrated on them, this case is "unique". He says that the 20 per cent discount on the starting point took insufficient account of these unusual factors and involved an over-reliance on Moore J's alleged misapplication of *Patterson* in *Pian*.[38] In particular, he was critical of the Judge's classification of the repayments as "involuntary", and the implication that such repayments are worth less credit than voluntary ones. He said any such implication did not sufficiently recognise the systemic value in offenders making such

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[37] The Judge's notes at [66] record that this approach (in terms of both the extent of the discount and its equal application) was consistent with the submissions of defence counsel.

[38] *R v Pian*, above n 8, at [30], citing *R v Patterson* [2008] NZCA 75 at [42].

payments, which obviate the need for either the victim or the State to pursue civil remedies against them.

[48] Ultimately, Mr Chisnall submitted that a discount of 40 per cent was appropriate, and warranted, here.

[49] The first and most obvious point in response is that (as Gordon J recorded) Ms Zhang's counsel in the High Court contended that 20 per cent was the appropriate discount.[39]

[50] Secondly, it is helpful to refer to the relevant dicta in *Patterson*. The Court said:

> [41] There are several ways in which [the repayment] issue can be addressed. Perhaps the most logical approach is to acknowledge "involuntary" recovery of money stolen in the starting point analysis and "voluntary" reparation as a mitigating factor — taking care, of course, not to double-count. We have already indicated that fraud offending where no recovery is achieved is "more serious" than fraud offending with complete recovery, if only because in the latter case the victims' loss is transitory and not permanent. The offender gets some credit for that in the starting point adopted, but not much. Not much because the offender's culpability is not significantly reduced: he or she is still a fraudster and would not have voluntarily returned the money or thing stolen but for being caught. Such a credit in the starting point has been taken into account in our decision to uphold the judge's nine and a half year starting point.
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> [42] "Voluntary" reparation is quite different. Where an offender exhibits genuine remorse and has done his or her best to atone financially for the fraud, whether by selling assets or borrowing or promising to make recompense by instalments from future earnings, credit is appropriate as a mitigating factor. The reparation is material evidence of remorse, a factor recognised in s 9(2)(f) of the Sentencing Act. The present case does not exhibit reparation or remorse of this character.

[51] In our view there was no error in Moore J's original assessment — or in Gordon J's concurrence with it — that the payments made here could not fairly be seen as genuinely indicative of remorse (and so, voluntary) rather than being prompted by the confrontation with Mr Li after his discovery of the fraud. As Moore J said, but for the discovery and the confrontation the repayments would almost certainly not have been made. And we think it is particularly significant in Ms Zhang's case (by

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39 Sentencing notes, above n 6, at [66].

contrast to Mr Pian's) that she and Mr Long continued to perpetrate new frauds on Mr Li (by dint of which they received considerably more money than they had through their initial fraud) even after that confrontation. That hardly seems indicative of genuine remorse or sincere atonement.[40] As Mr Li said in his victim impact statement "I don't think they have any guilt about their crimes".[41]

[52] The short point is that the dicta from *Patterson* are almost a complete answer to the complete restoration point. To reiterate, even in cases of complete recovery, where the repayments have been involuntary (or more involuntary than voluntary) there should be "some credit for that in the starting point adopted, *but not much*" because the offender's culpability is not significantly reduced. In our view, 20 per cent is considerably more than "not much".

[53] We acknowledge that — as Mr Chisnall pointed out — there are cases where more significant discounts have been afforded, even where the reparation made is not for the full amount defrauded. But the two in which the most significant reparation discounts were applied (50 and 33 per cent) are thirty years old (pre-dating the Sentencing Act) and involved offending at a much lower level.[42] The sentencing analysis and approach evidenced in those cases was, with respect, significantly briefer and more broad brush than is orthodox today and we derive no real assistance from those decisions.

[54] The other three cases to which Mr Chisnall referred us do not persuade us that Ms Zhang's sentence — and the adjustment made for reparation — was not

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40 One reason Gordon J did not reduce the starting point for Ms Zhang and Mr Li's sentencing by *less* than the 20 per cent discount afforded in Mr Pian's case was because she had already taken the post-discovery renewal of their offending into account as a separately aggravating factor when arriving at her "initial" six year starting point.

41 To the extent Mr Chisnall also submitted that separate recognition should be given to "the systemic benefit of voluntary payments" as a discrete mitigating personal factor, he did not cite any authority for that proposition. While we acknowledge that there is such a benefit, it is difficult to see how it adds anything of significance to the point made in *Patterson*, which is that such payments can operate to reduce the starting point (somewhat) because they diminish the seriousness of the offending.

42 *R v Thacker* CA392/90, 22 March 1991 and *R v Criminal Appeal* CA246/92, 4 September 1992.

appropriate. Two involved such different facts and issues that we do not consider them further.[43] But the High Court's decision in *R v Mitha* is rather more instructive.[44]

[55] Like the present situation, *Mitha* was one of those rare cases where the full amount that had been dishonestly obtained was repaid by the offender. It may also have been the first case where the potential impact of reparation payments on a sentencing starting point (rather than as a mitigating personal factor) was recognised.

[56] Mr Mitha was a well-paid financial controller. Over a seven-month period he systematically stole around $350,000 from his employer, by way of a scheme involving fictitious invoices. After an audit the defalcations were discovered and Mr Mitha immediately accepted his wrongdoing. He pleaded guilty to a single charge of theft and repaid all the money, most of which he had simply kept in a separate bank account.

[57] The sentencing Judge adopted a starting point of four years' imprisonment to which he then applied discounts for what were said to be personal mitigating factors:

(a) one year (25 per cent) for guilty plea and remorse; and

(b) nine months (19 per cent) for reparation and the fact that the offending was motivated by Mr Mitha's concern that he would need the money to pay for the care of his terminally ill father.

[58] On appeal to the High Court, Panckhurst J observed that while it was standard practice to view reparation as a mitigating personal factor, it could also be a matter relevant to the seriousness of the offending and so the starting point.[45] He said that the fact that complete reparation had been made by Mr Mitha was, in his experience,

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43 The two cases were: *R v Simpson* CA43/05, 27 May 2005, in which the offender was afforded a 50 per cent discount for his guilty plea and efforts to recover the rare books he had stolen and *Rosenberg v R* [2015] NZCA 97, which involved significant gains made through the dishonest underreporting of gas consumption and where the issue on appeal was whether a reparation order should have been made on top of the sizeable sum paid by the appellant to settle civil litigation with the liquidators of one of the companies involved.

44 *Mitha v Police* HC Auckland, CRI-2006-404-266, 28 September 2006.

45 At [13]–[14].

unique and "marks this case apart from the run of fraud cases".[46] He also placed considerable weight on the report of a clinical psychologist who had addressed the causes of Mr Mitha's offending.[47] And the fact that Mr Mitha had kept, rather than dissipated, the money he had taken supported the view that Mr Mitha's motivation was not to benefit himself, but to enable his father to receive the medical care he needed.[48]

[59] For those two reasons (complete reparation and "selfless" motivation) Panckhurst J reduced the starting point of four years adopted in the District Court by one year (25 per cent).[49] Observing that the 43 per cent discount for personal factors allowed by the District Court was "generous",[50] the Judge then discounted further by nine months (25 per cent) for guilty plea and remorse and five months (14 per cent) for other mitigating matters (recognising that some of these had already to some extent been taken into account in the reduction of the starting point).[51] The end sentence substituted on appeal was one year and 10 months' imprisonment.

[60] In our view *Mitha* cannot fairly be relied on to suggest that the 20 per cent reduction to the starting point here was an inadequate reflection of the reparations made. Unlike Mr Mitha, Ms Zhang's motivation for her offending was not compassionate or mitigating. And once that is removed from the equation the reductions are very much on a par. As with Mr Mitha, a discrete discount was afforded to Ms Zhang for remorse (notwithstanding that reparation had also reduced the starting point) and we did not understand Mr Chisnall to take issue with that.

[61] We acknowledge that the factor *not* present in either *Mitha* or (so far as we are aware) any other case is that the victims' position was (ultimately) improved as a result of the offending.[52] But Gordon J undoubtedly took this factor into account.

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46 At [15].

47 At [16]–[21]. As a refugee from Adi Imin's Uganda who had lost his mother at a young age and was about to lose his father, the psychologist diagnosed Mr Mitha's offending as a clinically maladaptive response to the extreme stress an otherwise "competent, caring and high responsible" man was facing.

48 At [22].

49 At [26].

50 At [27]. The District Court discount had, of course, made more allowance for reparation because it had not been taken into account at the starting point stage.

51 At [27]–[28].

52 Although we note that in *R v Thacker*, above n 42, the appellant's counsel submitted that Mr Thacker had in fact repaid more than he had dishonestly received.

As explained earlier, she did so by rejecting the Crown's submission (which she had otherwise found attractive) that the transfer of the WOW shares should not be taken into account when calculating the amount of reparation made. On our reading, she was effectively prepared to treat the arguably mitigating fact that the development sold at an (apparently unspecified) profit to the benefit of Mr Li as broadly equivalent to attributing to Mr Long and Ms Zhang further reparation payments of $825,000 each.[53]

[62] We agree with the Judge's inclination that the profit ultimately made by the venture is more appropriately seen as a consequence of the fact that Mr Li was duped into providing the entirety of the funding for the property investment venture (and so rightly became the 100 per cent owner of WOW) rather than as a matter that warrants any further discount to the starting point. There is a sense in which the payment does no more than make Mr Li financially whole. In any event, we consider that it was entirely open to the Judge in a case such as this, where an assessment of relevant gains and losses involved unpicking a series of complex payments and repayments, to take a robust "swings and roundabouts" approach of the kind we have just described.

Personal circumstances

[63] As acknowledged by Mr Chisnall, the 40 per cent discount received by Ms Zhang for personal mitigating factors was "relatively generous". He (rightly) took no issue with the discounts of 15 per cent for guilty plea or the five and 10 per cent afforded for remorse and previous good character, respectively. The focus on appeal was the 10 per cent discount for personal circumstances and, in particular, the fact that she had a seven-week-old baby at the time of sentencing and that her two older children were living with her parents in China who, themselves have serious health conditions. Because of COVID restrictions Ms Zhang has been separated from her older children for over three years. But as we understand it, her husband remains in New Zealand. Mr Chisnall said a discount of 15 per cent was required to recognise these matters.

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[53] Sentencing notes, above n 6, at [68]–[69]. It may be observed that if $825,000 was taken off the repayment calculations for Ms Zhang, even on Mr Chisnall's analysis, she would no longer be in "credit".

[64] Counsel advised us that Ms Zhang is presently housed with her baby in the "Mothers with Babies Unit" in the Auckland Region Women's Corrections Facility (ARWCF).

[65] It seems the Judge regarded these matters as being relevant primarily to s 8(h) of the Sentencing Act in that they would make a sentence of imprisonment disproportionately severe for Ms Zhang. We understood Mr Chisnall to agree with that, although he also referred to s 8(i) (offender's family and cultural background to be taken into account when imposing a sentence with a partly or wholly rehabilitative purpose). He also called in aid art 3(1) of the Convention of the Right of the Child, which requires that:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

[66] We acknowledge that special considerations may apply when sentencing women with dependent children. This is reflected in the United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders with their Community (the Bangkok Rules), which were adopted in 2010.[54] In general terms, the Rules are predicated on the proposition that women prisoners are a vulnerable group with specific needs. More particularly, r 64 provides:

> Non-custodial sentences for pregnant women and women with dependent children shall be preferred where possible and appropriate, with custodial sentences being considered when the offence is serious or violent or the woman represents a continuing danger, and after taking into account the best interests of the child or children, while ensuring that appropriate provision has been made for the care of such children.

[67] And in *R v Petherick* the Court of Appeal of England and Wales observed (inter alia):[55]

> … a criminal court ought to be informed about the domestic circumstances of the defendant and where the family life of others, especially children, will be affected it will take it into consideration. It will ask whether the sentence

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[54] *United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules)* GA Res 65/229 (2011).

[55] *R v Petherick* [2012] EWCA Crim 2214 at [20] and [22]–[24] (footnotes omitted, emphasis added).

> contemplated is or is not a proportionate way of balancing such effect with the legitimate aims that sentencing must serve.
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> ...
>
> … it will be especially where the *case stands on the cusp of custody* that the balance is likely to be a fine one. In that kind of case the interference with the family life of one or more entirely innocent children can sometimes tip the scales and means that a custodial sentence otherwise proportionate may become disproportionate.
>
> … the likelihood, however, of the interference with family life which is inherent in a sentence of imprisonment being disproportionate is inevitably progressively reduced as the offence is the graver … .
>
> … in a case where custody cannot proportionately be avoided, the effect on children or other family members *might* [emphasis in original] afford grounds for mitigating the length of sentence, but it may not do so. If it does, it is quite clear that there can be no standard or normative adjustment or conventional reduction by way of percentage or otherwise. It is a factor which is infinitely variable in nature and must be trusted to the judgment of experienced judges.

[68] New Zealand has not ratified the Bangkok Rules, but the Government position is that women offenders are managed in a manner that takes into consideration their specific needs and family circumstances.[56] And as Ms Zhang's sentencing itself reflects, it has long since been accepted that the impact of a sentence on an offender's dependent children can engage s 8(h) and require the sentencing court to take that into account if it would render an otherwise appropriate sentence disproportionately severe.

[69] There are a number of difficulties presented in Ms Zhang's case that make it difficult to give further recognition to the impact of her sentence of imprisonment on her children.

[70] First, Ms Zhang's newborn baby — who must have been conceived well after the time the charges were laid against her (in November 2018) and quite soon before her trial was scheduled to commence — is with her in prison. And while we acknowledge, at a general level, Mr Chisnall's submission that prison is no place for a child we received no evidence that Ms Zhang's baby is being adversely affected by Ms Zhang's present circumstances. As we understand it, the child is housed with

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[56] *New Zealand's Sixth Periodic Report on the United Nations Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment of Punishment* CAT/C/NZL/6 (2013) at [152].

Ms Zhang in a special part of ARWCF designed for that purpose. There would necessarily be much greater cause for concern if her incarceration had caused her to be separated from her baby.

[71] Secondly, and in light of our conclusions earlier in this judgment, Ms Zhang's is not a "case [that] stands on the cusp of custody".[57] Even if we were prepared to allow a further five per cent discount under s 8(h), home detention would still not be even particularly close to being an option.[58] There is no real balance to tip in favour of a non-custodial sentence here.

[72] Thirdly, we accept that there is hardship in the long separation of Ms Zhang from her other children. But that separation was caused by a decision taken by her family (to shield them from the shame of her offending by removing them to China) and a global pandemic. We simply do not know whether — if home detention were an option — they could or would return to New Zealand to be with her.

[73] Overall, we consider that the discounts given for personal factors here were generous. For example, another Judge may well have afforded no discount (rather than 10 per cent) for previous good character, given the sustained nature of Ms Zhang's offending and the fact that it continued even after the first fraud had been uncovered by Mr Li.

[74] Again, we are unable to discern any relevant error that might make the end sentence imposed manifestly excessive.

Result

[75] The appeal is dismissed.

Solicitors:
Crown Solicitor, Auckland for Respondent

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57 *R v Petherick*, above n 55, at [22].

58 A further five per cent would reduce her end sentence by two months — still eight months shy of the home detention threshold.