IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA277/2022
[2022] NZCA 537

BETWEEN	TE WHITINGA MARK HUIRUA Appellant
AND	THE KING Respondent

Hearing:	30 September 2022
Court:	Goddard, Ellis and Dunningham JJ
Counsel:	J H C Waugh and E C Copeland for Appellant C B Wilkinson-Smith for Respondent
Judgment:	14 November 2022 at 11.00 am

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Ellis J)

[1] Mr Huirua pleaded guilty to six charges of using a forged document[1] and one charge of carrying on a business fraudulently.[2] On 27 May 2022, Gendall J sentenced him to two years and 11 months' imprisonment.[3]

[2] Mr Huirua now appeals that sentence.

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1 Crimes Act 1961, s 257(1)(a); maximum penalty of 10 years' imprisonment.
2 Companies Act 1993, ss 380(1) and 373(4)(f); maximum penalty of five years' imprisonment.
3 *R v Huirua* [2022] NZHC 1262.

The offending

[3] The summary of Mr Huirua's offending is taken from the summary of facts as amended just before the entry of his guilty pleas.

[4] Ngaa Rauru Kiitahi is one of eight generally recognised Taranaki iwi. As part of the Crown's settlement of their Treaty grievances, Ngaa Rauru Kiitahi received $32 million in redress.

[5] Te Kaahui o Rauru (TKOR) was established as the governance entity for Ngaa Rauru Kiitahi. TKOR is a charitable trust, governed by "Paepae Representative" Trustees (the Trustees).

[6] In 2016 Mr Huirua was appointed as a director of Te Pataka o Rauru Ltd (TPOR), the company heading the iwi's investment arm. He had banking and investment experience as a result of his then role at the National Australia Bank.[4] Along with the other directors, Mr Huirua was responsible for ensuring iwi funds were invested and managed appropriately for the benefit of the iwi.

[7] A Statement of Investment Policy and Objectives (SIPO) set out the Trustees' instructions to TPOR about their investment approach. Historically the approach had been conservative but Mr Huirua's advice was that TPOR should be permitted to diversify and make "direct investments" of funds. Mr Huirua was closely involved in drafting amendments to the SIPO to reflect this change and, after lengthy consultation, the SIPO (now renamed the Investment Governance Policy (IGP)) was adopted by the Trustees. The IGP authorised the executive directors of TPOR (including Mr Huirua) actively to manage direct investments for TKOR up to a value of $26 million.

[8] Mr Huirua then established two companies — Society One NZ Ltd and Imdabradaz Capital Ltd — and opened bank accounts for them. Mr Huirua was director and the sole shareholder of these companies. Mr Huirua chose the former name deliberately, because there is a large Australian financial institution called "Society One", which has an annual turnover of one billion dollars. Mr Huirua chose

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4 Mr Huirua lived in Australia at that time.

a similar name for his company so that other employees of TPOR would believe investments were being made with or through the Australian company.

[9] Between 4 May 2018 and 29 May 2019 Mr Huirua caused TKOR to make numerous payments which were channelled through either Society One NZ or Imdabradaz Capital to various brokers' accounts. $2.6 million was lost as a result of investments in cryptocurrencies through "Coinspot", "NABTRADES", "IG Markets" and "Tradezero Inc". Payments totalling $500,000 were also transferred through Mr Huirua's companies into his own bank account.

[10] When queries were raised by auditors about Society One NZ and Imdabradaz Capital, in August and September 2019 Mr Huirua sent six emails, using fictitious identities and email addresses, in an attempt to cover up what he had done.[5] By way of example, one such email (from a fictitious sender) falsely confirmed that certain payments had, indeed, been made to Society One Australia.

[11] When confronted at a hui held in November 2019 Mr Huirua confirmed he had acted alone. He maintained he had the authority to do as he had done. He said he had had a run of bad luck and had lost money himself. He said he was willing to work for the iwi at reduced wages to pay off the debt. He resigned as a director of TPOR and from his other roles within the iwi.

Procedural history and sentencing

Charges and guilty pleas

[12] A few days after the hui, on 5 November 2019, Mr Huirua was charged with a single charge of theft by a person in a special relationship.[6]

[13] The Crown Charge Notice was later amended to include a further nine charges. A six-week trial in the High Court was set down for May 2022. On 24 February 2022 following resolution discussions with the Crown, Mr Huirua pleaded guilty to the

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5 These six emails form the basis of the six charges of using a forged document.

6 Crimes Act, ss 220 and 223(a); maximum penalty of seven years' imprisonment.

six charges referred to at [1] above on the basis of an amended summary of facts. Most notably, there was no longer any charge of theft in a special relationship.

Sentencing

[14] In sentencing Mr Huirua, the Judge did not specifically identify a lead or index charge. But early in his notes, he said:[7]

> [10] It is important to note here that Mr Huirua is not for sentence for theft of any money from the victims or for the direct loss of these funds. It is not a crime to make a poor investment decision. He is primarily for sentence for the panicked and dishonest actions he took following his realisation that the money entrusted to him by the iwi had gone. There is, as I understand it, no guideline judgment for this type of offending.

[15] In assessing the starting point, the Judge referred to the decision in *R v Varjan* where this Court said that culpability in cases of this kind was to be assessed by reference to such factors as the nature of the offending, its magnitude and sophistication; the type, circumstances and number of the victims; the motivation for the offending; the amounts involved; the losses; the period over which the offending occurred; the seriousness of any breach of trust involved; and the impact on the victims.[8] The Judge adopted those factors as a framework for his analysis.

[16] In terms of the nature of the offending, the Judge considered the using a forged document charges and the Companies Act 1993 charge. In relation to the latter, he noted Mr Huirua had created two companies with names deliberately designed to mirror the names of successful investment companies so as to mislead members of his iwi and to avoid suspicion.[9] The Judge went on:[10]

> Although the establishment of the companies and investment of funds may have been broadly authorised, and your actions to conceal this trading to an extent involved perhaps what is said to be panic on your part Mr Huirua, the fact is that you deliberately [misled] those who were entitled to the funds and purposely delayed investigation and discovery of the losses.

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7 *R v Huirua*, above n 3.
8 At [26], referring to *R v Varjan* CA97/03, 26 June 2003 at [22].
9 At [30].
10 At [30].

[17] The Judge expressed the view that both setting up the companies and the subsequent attempts to cover up what had occurred was "somewhat sophisticated".[11] In terms of the number of victims, he noted that there were over 4,400 registered members of Ngaa Rauru Kiitahi, and that all parties had accepted the impacts of the offending would be felt for generations.[12] He said:[13]

> Sadly, it is also relevant that the offending in question is further harm against an iwi directly resultant [sic] from an attempt also to make restitution for historic harms against that iwi.

[18] The Judge recorded Mr Huirua's position that his motivation was to benefit his iwi and not to achieve personal gain. Although the Judge accepted this might be the case, he said:[14]

> … it must be borne in mind at the same time that notwithstanding these explanations by you Mr Huirua, you also transferred $500,000 from the funds in question into your own personal bank accounts. The writers of the victim impact statements on behalf of the iwi said Mr Huirua, and I quote, "you saw opportunities to misappropriate funds and rather than contributing to our development, you in your egotistical style only considered your own personal gain." I conclude that it may well be somewhat difficult here to reconcile your claimed motivation Mr Huirua for the actions you took with your later persuasive and convincing deceit relating to all these matters.

[19] The Judge then noted that $3.1 million had ultimately been lost to the iwi as a result of Mr Huirua's activities although the impact was wider that:[15]

> …[i]t adds insult to injury, they say, that the source of the funds in question was indeed redress from the iwi settling their Treaty of Waitangi grievances in 2005. This $3.1 million as I understand it represents approximately 10 per cent of the monetary redress the iwi received. If this is seen as mismanagement relating to funds it will continue to affect the iwi considerably, especially when considering the beneficial outcomes the moneys could have achieved otherwise.

The Judge nonetheless specifically observed this needed to be kept in perspective "given the nature of the offences which Mr Huirua is facing".[16]

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11 At [31].
12 At [32].
13 At [32].
14 At [34].
15 At [36].
16 At [36].

[20] The Judge recorded there had been a difference of view between counsel about the period over which the offending occurred.[17] The Crown position was that the relevant period was between 2 May 2018 and 15 October 2019, whereas defence counsel had submitted that "apart from the admittedly misleading naming of the companies, the bulk of the offending occurred only between 5 August 2019 and 15 October 2019": the period during which the forged emails were dishonestly drafted and sent. The Judge preferred the Crown view. He said:[18]

> The incorporation of a company with a name specifically designed to mislead members of his iwi is plainly relevant to the fact of his dishonest offending. It demonstrates an intention to be dishonest and to hide Mr Huirua's dealings as he knew they would be at the expense of members of his own iwi. I consider this demonstrates an ongoing attempt to be dishonest.

[21] In terms of breach of trust the Judge referred to the two victim impact statements that had been prepared: one on behalf of all iwi members and one by the previous directors of TPOR. He recorded the expressions of "significant anger and disappointment" at being duped by Mr Huirua, particularly given he had been appointed as one of the directors (and ultimately to the position of Chair) on the basis of his whakapapa to Ngaa Rauru Kiitahi and what had been understood to be a highly regarded banking career.[19] The Judge recorded that Mr Huirua himself acknowledged the breach of trust involved, which was to his credit.[20]

[22] The Judge returned to the iwi's victim impact statement later, specifically in the context of remorse. He said:

> [53] It is fair to say the writer of the victim impact statement on behalf of the members of the iwi does not believe Mr Huirua is genuinely remorseful. After noting that they "d[id] not believe that you will ever be able to understand the harm caused by your actions", he went on to say that "[a]t no point did you show any remorse for the damage and harm you have caused". The writer then went on to state, "Your arrogance and selfish individualised attitude that you displayed to us has left us feeling that you would resort to anything in order to save yourself, but you showed us that you are not prepared to get your hands dirty in order to do this." This last comment it seems is a reference to the fact that, as the writer says, Mr Huirua made it clear that jobs at the marae such as sweeping the floors, doing the dishes and cleaning the toilets were beneath him. "While you consider yourself," the writer states,

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17 At [37].
18 At [38].
19 At [39]–[40].
20 At [42].

> "we are left with the trauma now imposed on a whole tribe. We are left with having to mend the harm you have caused."
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> [54] Mr Huirua also it seems attempted to justify his actions at the hui following the discovery of his offending and as I note did decline to do the work suggested, being work that the iwi advised him would help to resolve in time some of the issues he had caused. I do note Mr Huirua's remorse as evidenced in his letter of apology before the Court. However I also accept the Crown submissions that there does seem to be some undercurrent of self-pity for the situation in which Mr Huirua has found himself. In these circumstances I reach the conclusion that a further discount for remorse of some five per cent is appropriate here.

[23] In the end, the Judge adopted a starting point of four and a half years' imprisonment which he discounted by 35 per cent for Mr Huirua's mitigating personal circumstances. That discount comprised 20 per cent for guilty pleas, five per cent for remorse and 10 per cent for prior good character.[21] The end sentence was accordingly 35 months' (two years and 11 months) imprisonment.

The appeal

[24] Mr Huirua's principal contention on appeal was that when arriving at his starting point, the Judge wrongly took into account the monetary losses suffered by the iwi and the monetary gain to Mr Huirua as aggravating factors. It was submitted:

(a) Mr Huirua did not intend to deprive the victims of any money, nor personally gain from the offending;

(b) those losses were not attributable to the offending for which Mr Huirua was being sentenced; and

(c) the offending did not result in any monetary gain to Mr Huirua.

[25] Mr Waugh, counsel for Mr Huirua, also maintained that the Judge had been wrong in his assessment of the duration of the offending, submitting (as he had in the High Court) the focus for that purpose should be confined to the activities giving rise to the using a forged document charges.[22]

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21 At [46] and [49]–[58].

22 Being the six emails sent after the monetary loss had occurred.

[26] Issue was also taken with the Judge's discounts for the relevant personal mitigating factors in Mr Huirua's case. Mr Waugh said the Judge had wrongly taken into account unproven and disputed allegations contained in the iwi's victim impact statement, and in particular what had been said about Mr Huirua's absence of remorse as demonstrated by his refusal to perform menial tasks at the marae. The discounts afforded for guilty pleas and previous good character were also said to be inadequate.

Discussion

Starting point

[27] Underlying Mr Waugh's submissions on appeal appears to be the proposition that the charges of using a forged document, which carried the greater maximum penalty, had, or should have, been taken as the lead offending. It was on that basis that he maintained:

(a) the question of loss and gain (both of which had no causal connection with the use of the forged documents) was not relevant; and

(b) the offending window was considerably shorter than that adopted by the Judge.

[28] We do not consider that was either what the Judge did, or what he was required to do. Despite first noting that Mr Huirua was primarily for sentence for his "panicked and dishonest actions" following the monetary loss (that is, for the charges of use of a forged document) it is clear from the way he then described the nature of the offending (set out at [16] above) that he was taking a global approach to the starting point that included consideration of the Companies Act charge. His choice to approach the matter in that way was not only open to him, but understandable. Despite the lesser maximum penalty, the Companies Act charge was in a number of respects more serious. And once it is accepted that it was appropriate to have regard to the charge of carrying on a business fraudulently in this way — as we consider it is — the basis for this aspect of the appeal falls away. Mr Waugh responsibly recognised as much in the hearing before us.

[29] As the Judge himself noted, when the Companies Act charge is taken into account it cannot be said that the relevant offending period was confined to a few months in 2019.[23] But more fundamentally, the reality is that Mr Huirua deliberately established two companies as a deceptive means of avoiding scrutiny of, and accountability for, his investment decisions. Had he conducted his investment activities properly and in a transparent way, the loss trajectory might well have been identified earlier, and (perhaps) the tide stemmed. Moreover, it was only by dint of his establishment and control of those companies that he was able to channel iwi funds totalling $500,000 into his own account, again with little fear of scrutiny or oversight. The references in the summary of facts to both the losses to the iwi and the gain to Mr Huirua are highly relevant in this context.[24]

[30] Nor do we accept that the summary of facts can be interpreted as saying the general authority to make direct investments given by the Trustees to TPOR extended to doing these things.[25] While there may have been authority to make direct investments, that does not authorise setting up and operating deliberately deceptive companies. And there is certainly nothing in the summary of facts to suggest that Mr Huirua had the authority to pay himself any amount from iwi funds, let alone whatever amount he saw fit.

[31] For all these reasons we are unable to discern any error in the overall starting point adopted by the Judge. So we turn now to the question of discounts.

Discounts

[32] As far as the iwi's victim impact statement is concerned, we acknowledge the Judge referred to the writers' views that Mr Huirua was not genuinely remorseful and their assertion that he had not been prepared to undertake menial work at the marae. But the Judge also referred to Mr Huirua's letter of remorse and said it was to Mr Huirua's credit that he had accepted the very significant breach of trust involved

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23 *R v Huirua,* above n 3, at [38].

24 The summary records: "$2.6 million was lost in trading and a further $500,000 was used for personal expenditure by the Defendant. The Defendant did not advise TKOR of the losses."

25 All that the summary says about the authority (other than recording Mr Huirua's assertion that he was authorised to do what he did) was that the IGP authorised TPOR's executive directors (including Mr Huirua) "to actively manage large 'direct investments' for TKOR up to a value of $26m."

in his actions. Importantly, we do not consider the five per cent discount ultimately afforded for remorse can be seen as reflective of the Judge giving undue (or any) weight to this aspect of the victim impact statement. Rather five per cent is an entirely orthodox discount in a case where a defendant's remorse is accepted by the Court as genuine.

[33] Nor are we able to discern any error in the discounts for guilty pleas and for previous good character. As Mr Wilkinson-Smith for the Crown submitted, the latter was arguably generous, particularly once account is taken of the true duration of Mr Huirua's offending activity. And while we accept that Mr Huirua did plead guilty as soon as the Crown indicated a preparedness to reduce the charges for resolution purposes, a discount of 20 per cent is, again, entirely orthodox in such circumstances.

Result

[34] We are not persuaded that there was any error of approach in the Judge's sentencing of Mr Huirua. The final sentence was plainly within range for offending of this kind.

[35] The appeal is dismissed.

Solicitors:
Crowley Waugh, Whanganui for Appellant
Crown Solicitor, Whanganui for Respondent