Richard David Arthur v The Attorney General

Jurisdiction:	Jersey
Judge:	Collas JA
Judgment Date:	28 November 2018
Neutral Citation:	[2018] JCA 217
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Court:	Court of Appeal
Date:	28 November 2018

Text

[2018] JCA 217

COURT OF APPEAL

Before:

James W. McNeill, **Q.C., President**

John V. Martin, **Q.C., and**

Sir Richard Collas

Richard David Arthur
and
The Attorney General

N. M. C. Santos-Costa, **Esq., Crown Advocate**

Advocate D. S. Steenson **for the Defendant**

Authorities

AG v Arthur [2018] JRC 129.

R v Barrick (1985) 81 Cr.App.R.(s).78.

Whelan on Aspects of Sentencing in the Superior Court of Jersey.

AG v Bryce Richards [2005] JRC 138A

Companies (Jersey) Law 1991

Proceeds of Crime (Jersey) Law 1991

AG v Lewis, Christmas and others [2012] JRC 177

The Court of Appeal (Jersey) Law 1961

Bhojwani v Attorney General [2011 JLR 249]

Harrison v Attorney General [2004 JLR 111]

AG v Speck [2004] JRC 100

Wood v AG [1994] JLR N-15a

Investors (Prevention of Fraud) (Jersey) Law 1967

Appeal — application for leave to appeal against sentence.

Collas JA
Introduction

1 On 25 April 2018, Richard David Arthur ("Appellant") appeared in the Royal Court on an indictment containing nineteen counts. He pleaded guilty to three counts of fraud (Counts 2, 4 and 15 on the indictment), three counts of fraudulent conversion (Counts 7, 11 and 14) and four counts of falsification of accounts (Counts 16, 17, 18 and 19). On 2 July 2018 he appeared before the Superior Number of the Royal Court (JA Clyde-Smith, Commissioner and 5 Jurats) for sentencing. He was sentenced to a total of 7 years imprisonment. The Court delivered its reasons in a judgment handed down by the Superior Number on 19 July 2018 *AG v Arthur* [2018] JRC 129.

2 The Appellant has applied for leave to appeal against his sentence. This is the judgment of the Court.

3 Crown Advocate Nuno Santos-Costa appeared on behalf of the Crown both at first instance and at the hearing of this application for leave to appeal sentence. Advocate Steenson appeared for the Appellant in both Courts.

The Facts

4 The Appellant is a Chartered Accountant who at all material times was the Managing Director of BDO Alto Limited, an accountancy firm that operated in Jersey from 2004 until the end of 2011 ("BDO"). He was suspended from BDO on 19 May 2009. The offences concerned three different clients of BDO: first, the Humberstone Trust, a Jersey law discretionary trust settled by Desmond Humberstone on 16 May 1997, the only beneficiaries of which were Mr Humberstone's two daughters; second, an elderly French resident and third, an elderly Jersey resident. In total, the dates pleaded in the charges spanned a period of seven and a half years from 6 March 2002 to 25 September 2009. The amounts lost by the victims totalled £1,927,601.

5 The most serious of the offences concerned the Humberstone Trust. The Appellant was a director of the company that was the trustee of the Trust and for a period of time (from 21 December 2007 to 1 July 2009) he was a personal trustee of the Trust. Count 2, a fraud offence, involved the sum of £750,000 which was transferred from Faircliff Property Limited ("Faircliff"), a company belonging to the Humberstone Trust, to another company. The Appellant was a director of both companies and had control of the bank accounts of the receiving company where he was the sole signatory and the bank statements went to his home address. In order to extract the money from Fairfield, the Appellant informed two of his colleagues that the money was to be loaned to another local client of BDO as a short-term loan. His colleagues were persuaded by him to act on his representation without knowing it was false. The Sentencing Court was told by the prosecution that, within days of receipt of the money, the Appellant funded the purchase of a Formula One racing car and he made payments to four companies including a company, Solar GB, in respect of which he was the main investor and shareholder. The Sentencing Court was also told that the Appellant would say that the sum of £750,000 was loaned to yet another individual who used it to purchase the racing car; the Crown said that it could neither confirm nor deny that fact. In short, the sum of £750,000 was taken by the Appellant dishonestly. The Appellant subsequently misled Mr Humberstone by saying the money had been loaned by Faircliff and would be re-paid on 18 December 2003. In reality there was no such loan and no re-payments have ever been made.

6 Count 4 alleged that the Appellant falsely represented to the same two colleagues that Faircliff was to loan the sum of £1,131,500 to Iris Property Holding Limited ("Iris") to purchase and refurbish a property at 18 Lennox Gardens, London. He told them that Mr Humberstone had agreed that Faircliff lend that amount to purchase the property on an 80 year lease. In fact, only £610,000 was sent to the London solicitors who were acting in the purchase and the balance of £522,500 was paid to Aqua Invest Limited ("Aqua"), a company owned by the Appellant and his wife. The directors of Aqua were the Appellant

and another client of BDO but the Appellant had control of Aqua's bank accounts. Of that sum of £522,500, £30,800 was transferred to the solicitors acting in the purchase of the London property. The balance was used by the Appellant and was transferred over a period of time, in a number of payments, to Solar GB. Later, on 28 December 2003, the Appellant wrote to Mr Humberstone to say that the Lennox Gardens loans had been redeemed, that £1,150,089.20 had been paid to Faircliff and that £400,000 had been re-loaned to a company belonging to the Humberstone Trust. That statement was false. Ultimately, at the end of 2006, the Lennox Gardens property was sold and £755,383 was paid to Faircliff.

7 Count 7 concerned an offence of fraudulent conversion. It charged that on or about 7 May 2008 the Appellant, being a director of Faircliff, fraudulently took or applied the sum of £416,658, the property of Faircliff, to fund the purchase of an investment in Tangible Securities Limited ("Tangible") on behalf of himself and others. The prosecution said that the Appellant had become interested in purchasing shares in Tangible and in order to pay the vendor of the shares, he had used moneys held by BDO on behalf of Faircliff. He then sought to cover his tracks by creating records of loans and interest payments that were fictional.

8 Count 11 also concerned fraudulent conversion. On or about 30 June 2008 the Appellant, being a director of Faircliff, fraudulently took or applied the sum of £180,243 belonging to Faircliff to fund a payment to Her Majesty's Revenue and Customs on behalf of Solar GB Limited. Solar GB was the English company mentioned above into which the Appellant had invested heavily. It had been losing large sums of money for some considerable time and by June 2008 could not pay its tax bill. The Appellant took the money from Faircliff to pay the amount owed by Solar GB to HMRC.

9 Count 14 was charged against both the Appellant and a co-defendant, Alaric Kaarl Coombs ("Coombs"), who was indicted on that Count only. Unlike the Appellant, Coombs pleaded not guilty. The Appellant gave evidence against Coombs but he was acquitted of the charge. The charge was that the two of them, being directors of Library Place Investments Limited ("Library Place"), fraudulently took £69,000 from that company for their own use or benefit by paying that sum to Bianco Property Holdings Limited ("Bianco"). Library Place was owned by an elderly BDO client who lived in France. The Appellant asked Coombs to instruct Library Place's bankers to pay £69,000 from that company to Bianco, saying that they would split the amount two ways. In fact, the Appellant paid £60,000 to Solar GB which was being pressed by its creditors. The Appellant subsequently paid £34,500 to Coombs out of a Bianco bank account.

10 Count 15 concerned a third client of BDO, another elderly client, who was a Jersey resident. The Appellant told him that he needed £90,000 to fund a loan for the purposes of an animal sanctuary and said that the loan would be repaid in the sum of £95,000 within three weeks. The £90,000 was never used in relation to the animal sanctuary but instead the Appellant used it to repay an individual who he had persuaded to invest in Tangible (the subject of Count 7) and who had demanded the return of his investment as he was

disenchanted with Tangible.

11 Counts 16 to 19 to which the Appellant pleaded guilty all charge him with falsification of accounts. Between them they cover the period 1 November 2003 to 30 June 2008. The Appellant produced or caused to be produced a series of false accounts for the purpose of hiding from Mr Humberstone the moneys which the Appellant had fraudulently taken from the Humberstone Trust and its underlying company, Faircliff. The Appellant received demands from one of Mr Humberstone's daughters to produce accounts and reconciliations. Amidst mounting pressure from her, he produced accounts that falsely recorded transactions that had not occurred and falsely concealed transactions which had occurred.

12 In summary, the Appellant pleaded guilty to obtaining and using for his own benefit the total sum of £2,637,401. The Superior Number was told that after deducting moneys that had been returned to the victims or paid away for legitimate purposes, the total amount lost by the victims in relation to the Appellant's fraudulent activity was £1,927,601. The three victims, Mr Humberstone, the French resident and the Jersey resident were all elderly. They had all reposed trust in the Appellant and he abused that trust for his own benefit and personal gain.

The Sentencing Hearing

13 At the sentencing hearing, the Crown produced a bundle containing: the indictment; the Crown's summary of facts and its Conclusions; a number of sentencing authorities; a social enquiry report; a psychological assessment report prepared by a chartered psychologist, Dr Ruth Emsley, dated 8 June 2018; and victim personal statements from Mr Humberstone, from one of his daughters and from the Jersey resident victim. The Court was told that the French resident victim was too frail to provide a statement. On behalf of the Appellant, Advocate Steenson produced for the Court his written observations on the Crown's Conclusions supported by further authorities and he produced letters from the Appellant and his wife.

14 In its Conclusions, the Crown referred to a number of Jersey sentencing decisions and to extracts from Whelan on Sentencing. It assessed the gravity of the Appellant's offences against the criteria set out in *R v Barrick* (1985) 81 Cr.App.R.(s).78 to which we refer below and, having regard to all the circumstances, reached a starting point of nine years and six months. Allowing for mitigation, including the Appellant's guilty pleas, the Crown concluded that the total sentence be six years imprisonment.

15 In response to those Conclusions, Advocate Steenson submitted that the Crown had deliberately sought a higher sentence than was appropriate in order to guard against the risk of the Court discounting sentence by more than it recommended. The Crown had agreed to recommend a full one-third discount in return for guilty pleas despite the fact that

the pleas were entered only four weeks before the Appellant's trial was expected to commence. Advocate Steenson said that by asking for a higher starting point than was appropriate, the Crown were seeking to take away with one hand what it had given with the other. He submitted that the Crown had determined the final sentence it wished to recommend and had then reverse engineered the sentencing exercise in order to reach a starting point. He said that was the wrong approach to follow and by doing so the Crown had given insufficient credit for the other available mitigation which was more substantial than had been recognised. He also reviewed the earlier decisions from which, he submitted, it was difficult to discern any obvious precedent in relation to starting points but nonetheless could find no support for a starting point of nine and a half years. Whilst recognising all the difficulties, he suggested that if there had to be a starting point, eight years would be more consistent with earlier authorities. That starting point would then have to be discounted substantially to take account of all the available mitigation.

The Sentence of the Royal Court

16 The Appellant's personal circumstances were summarised in the judgment of the Superior Number *AG v Arthur* [2018] JRC 129:

> ***"5. The defendant became an equity partner in 1989 at the age of 28, and in the 1990's, estimated his earnings at £400,000 a year. In 1998, he sold his interest in his trust company for some £4.4 million, so that by any definition, he and his family were wealthy. However, this led to an extravagant lifestyle and imprudent investments. He had, for example, invested in an English company called Solar GB, which was developing LED lighting for high tech industrial applications, and which was a constant cash drain on the defendant, its sole source of funding. It eventually folded. In the 2000's, and for entirely unrelated reasons, the income of the firm reduced and even though we were told that the defendant was still earning £150,000 per annum, he came under financial strain. He had a personal overdraft secured over the matrimonial home, which was continuously at its limit of £600,000, although none of this seemed to dent his extravagant lifestyle. In essence, he helped himself to the funds of these three clients in order to meet his financial obligations and continue that lifestyle."***

17 In its written judgment, the Royal Court referred to the prosecution's review of cases involving professionals in the financial services sector which have brought discredit on the Island and quoted from Whelan at page 209:

> ***"it is undoubtedly of paramount importance that the reputation and integrity of the financial business on this island should be preserved and its reputation remain untarnished"*** .

The Court assessed the Appellant's offending against the criteria set out in *Barrick*. Having reviewed a number of Jersey cases, the Court said it had found some assistance in the

case of *AG v Bryce Richards* [2005] JRC 138A where the Court had taken a starting point of nine years. However, the Court was of the view that the frauds involving the Humberstone Trust were more serious and thus determined that ten years was the appropriate starting point in respect of those frauds. After discounting for all the available mitigation, the finishing point for the Humberstone Trust frauds would be five years and seven months.

18 The Sentencing Number quoted the prosecution's submissions that:

> ***"Sentences in these cases do not follow a formula based on the amount involved in the fraud.*** In *AG v Hanley 1993/134* ***(14th October 1993), the Court quoted the following passage from the English Court of Appeal case of*** *Higgs* (1986) 8 Cr.App.R (S).440 ***as follows*** :-
>
> ***"One must not be over dazzled by the total sum involved.*** That sum is obviously not the only factor to be considered but it may in many cases provide a useful guide … One does not proceed by mathematical progression to add years or months to a sentence in direct proportion to the amount of money taken until one reaches a very large number of years. But the amount taken cannot be regarded as irrelevant, nor can it be said that after a certain ceiling of stealing has been reached, any further stealing should make little or no difference to the period of the sentence.""

19 In relation to the French resident's company which had been defrauded of £69,000, the Court took a starting point of six years which, after mitigation (including the giving of evidence by the Appellant against his co-accused, Coombs), it reduced to two years.

20 In relation to the Jersey resident who had been defrauded of £90,000, the Court again took a starting point of six years which, after mitigation, it reduced to three years and three months.

21 Those sentences totalled ten years and ten months. Having regard to the totality principle, that was too high so the Court reduced the total sentence to seven years. It determined that the sentences in respect of the Humberstone Trust (based principally on Count 2) be five years and in respect of the French resident (Count 14) it imposed a consecutive sentence of two years with a concurrent sentence of three years and three months in relation to the Jersey resident (Count 15).

22 The Court disqualified the Appellant from participation in corporate management or directorship for a period of twelve years, pursuant to Article 78(1) (a), (b) and (c) of the Companies (Jersey) Law 1991 as amended. Applications in relation to compensation and confiscation under the Proceeds of Crime (Jersey) Law 1991 were adjourned to a later date. The Appellant has not applied to this Court in respect of those matters.

Grounds of Appeal

23 The Appellant lodged a Notice of Appeal on 30 July 2018 pleading the following grounds of appeal:

> *"1. The sentence imposed was too severe.*
>
> *2. The Royal Court's approach to sentencing was, and remains, unclear.*
>
> *3. The Royal Court appears to have adopted a starting point method for sentencing purposes, only then, seemingly, to abandon it or adapt it for arbitrary reasons.*
>
> *4. The Royal Court was wrong to give additional credit for the Defendant giving evidence simply in respect of one count.*
>
> *5. The imposition of consecutive sentences was inappropriate for these circumstances.*
>
> *6. A matter of law of importance arises in respect of the correct approach to be adopted in sentencing."*

The Appellant's Contentions on Appeal

24 In his written submissions on behalf of the Appellant, Advocate Steenson repeated the submissions he had made before the Superior Number in which he contended for a starting point of eight years. He said the proper approach should be to adopt the approach in drugs cases of identifying the most grave offence and adding an uplift to cater for additional offending before giving a discount for mitigation which, in the circumstances of this case, including a full one-third for the guilty pleas, is substantial. He referred to Count 14 where the total discount given by the Royal Court was two-thirds and said that if the same discount had been applied to all the Counts, it would have required a starting point of twenty-one years to arrive at a finishing point of seven years. That would have been similar to the aggregate of the starting points adopted by the Royal Court of twenty-two years and that, the Court had decided, would be too high.

25 In his oral submissions before us, Advocate Steenson focussed on two aspects, both the methodology adopted by the Court and the final sentence which he submitted was manifestly excessive. He urged the need for consistency in sentencing so as to maintain confidence in the administration of justice in the Island. He submitted that, aside from a one-third discount for guilty pleas, the Court failed to have due regard for the other mitigation. The Appellant had given evidence against his co-defendant in a difficult trial where he was severely tested. There had been considerable delay: the Appellant was sanctioned by the Jersey Financial Services Commission in 2009 after five years of investigation; and his appearance before the Royal Court earlier this year came three years after he was first charged in the Magistrate's Court during which time he had been under stringent bail conditions. There had been a massive change in his personal circumstances

including a complete change in his lifestyle. Whilst the total sum pleaded in the fraud charges was approaching £2 million, the amount that he claims was received by him was £1.3 million of which £1.1 million had been repaid to victims following the settlement of civil claims and the sale of his matrimonial home. The Court had failed to appreciate the extent of the remorse he felt as detailed in the letters to the Court from the Appellant and his wife, the social enquiry report and the psychological assessment. Finally, there was little or no danger of the Appellant reoffending. In short, the four months discount afforded by the Court for such mitigation was manifestly too little and a total discount of 50% would not be unjustified.

26 Advocate Steenson criticised the Crown's approach of beginning with a finishing point and reverse engineering, as he called it, a starting point. He conducted an arithmetical analysis of both the Crown's approach and the Court's approach to show that he could not reconcile the two and hence it was difficult to follow how the Royal Court had arrived at a sentence of seven years. He said that consecutive sentences were inappropriate, instead, the Court should have adopted the approach in drugs cases of applying an uplift to the most serious offence. Had the Court done so, and had the Court given the appropriate discount for all the available mitigation, it would have arrived at a sentence of less than six years. By way of comparison with other decisions. Advocate Steenson highlighted the sentences imposed in the case of *AG v Lewis, Christmas and others* [2012] JRC 177 where the longest sentence was four and a half years after a fully contested trial.

The Crown's Contentions on Appeal

27 The Crown seeks to uphold the sentence for the reasons set out in their earlier Conclusions. Crown Advocate Santos-Costa concedes that the prosecution had calculated what the final sentence should be and then worked back to arrive at a starting point which allowed for a one-third discount and a further four months for the other available mitigation. He submitted that a sentence of seven years imprisonment is within the reasonable range available to the Court and should not be interfered with. It would not be appropriate to follow the methodology the Court adopts in drugs cases. He acknowledged the difficulties inherent in adopting starting points in fraud cases where there may be a number of victims and a number of charges making it very difficult to take individual starting points. He emphasised the position of trust held by the Appellant in his role as managing director of BDO where he had control over the company and the financial resources of the victims.

The Appeal – Legal Principles

28 Article 24 of The Court of Appeal (Jersey) Law 1961 provides a right of appeal " ***with the leave of the Court of Appeal against any sentence passed on the person for the offence (whether passed on his or her conviction or in subsequent proceedings), unless a sentence is one fixed by law***".

29 The principles which apply on an appeal against sentence in Jersey are well established. They were confirmed in *Bhojwani v Attorney General* [2011 JLR 249] following *Harrison v Attorney General* [2004 JLR 111]. In *Bhojwani*, Beloff JA delivering the decision of the Court said the following:

> ***"200 The principles which apply and are followed in Jersey are set out in the judgment in*** *Harrison v. Att.Gen.* (13). ***The*** *Harrison* ***judgment refers*** (2004 JLR 111, ***at para.29) to the statement in*** (*Att.Gen.* v Sampson (6) 1965 J.J. at 499) ***that "the Court will not alter a sentence merely because members of the court might have passed a somewhat different sentence."*** *Harrison* ***states*** (2004 JLR 111, ***at para. 30)***:
>
> ***"In*** *Att. Gen. v. Gorvel* ***… this approach was further refined by reference to the English authorities. The judgment contains this passage*** (1973 J.J. at 2511): ***"The practice of this court in considering appeals against sentence is to change a sentence only if satisfied that it is either manifestly excessive, in the circumstances of the case, or for some reason wrong in principle." The adoption of this approach rather than the literal construction of the English statute or the Jersey law has been of considerable benefit in excluding unmeritorious applications for leave to appeal in both jurisdictions, and in the importance of the principle has frequently been asserted by this court, most recently in*** *Morgan v Att.Gen* ***… "It is not the function of this court to tinker with sentences which were well within the range open to the sentencing court simply because we might ourselves have fixed a lower level of imprisonment." The approach was also re-emphasized in*** *Hunt v. Att, Gen* ***… and we endorse it."***
>
> ***201*** *Harrison* ***sets out (ibid., at para 31) the position also presaged in*** *Sampson* ***and adopted in the jurisdiction of Jersey with reference to the summary in Archbold, Criminal Pleading, Evidence & Practice, 2003 ed., para 7–136, at 966*** :
>
> ***"In broad terms, it is submitted that the court will interfere: (a) where the sentence is not justified by law, in which case it will interfere not as a matter of discretion but of law; (b) where sentence has been passed on the wrong factual basis; (c) where some matter has been improperly taken into account or there is some fresh matter to be taken into account; or (d) where the sentence was wrong in principle or manifestly excessive."***
>
> ***This is the basic point from which the Court of Appeal starts its analysis of a Royal Court sentencing decision."***

30 In the present case we are concerned principally with (d). The contention is that the sentence is manifestly excessive as a consequence of the methodology adopted by the Royal Court.

31 Counsel have both referred to the criteria in *Barrick*. We agree that the Commissioner was correct when he directed the Jurats at paragraph 8 of the Judgment in the following terms:

> ***"8. It is well established that the Court will have regard to the checklist of criteria set out in the English Court of Appeal decision of*** *R v Barrick* (1985) 81 Cr.App.R.(s).78 ***which is as follows:-***
>
> ***"(i) The quality and degree of trust reposed in the offender including his rank*** .
>
> ***(ii) The period over which the fraud or the thefts have been perpetrated*** .
>
> ***(iii) The use to which the money or property dishonestly taken was put*** .
>
> ***(iv) The effect upon the victim*** .
>
> ***(v) The impact of the offences on the public and public confidence*** .
>
> ***(vi) The effect on fellow employees or partners*** .
>
> ***(vii) The effect on the offender himself*** .
>
> ***(viii) His own history*** .
>
> ***(ix) Those matters of mitigation special to himself such as illness; being placed under great strain by excessive responsibility or the like, where, as sometimes happens, there has been a long delay, say over two years, between his being confronted with his dishonesty by his professional body or the Police and the start of his trial; finally, any help given by him to the Police.***""

32 We also adopt the *Barrick* criteria and we consider them seriatim. Regarding the first of the criteria we agree with the Royal Court's conclusion that:

> ***"it is difficult to think of circumstances in which there could be a greater quality and degree of trust than that which was reposed in the defendant.*** Reference is made in *Barrick* ***to "rank".*** Looking at Whelan, frauds ***committed by professionals within the financial services sector were perpetrated in the main by trust and company administrators, but the defendant was the managing director of BDO, a firm with an international network, and it must have been unthinkable to the victims that a man in such a position could commit such offences."***

33 The second criterion is the period of time. The frauds and the resultant falsification of accounts in an attempt to cover up his fraudulent acts were perpetrated and maintained by the Appellant over seven and a half years. During five years or so of that period the Appellant was under investigation by the JFSC but that did not prevent him from committing

the two frauds charged under Counts 14 and 15 and he continued to attempt to hide the traces by falsifying accounts and thereby committing the offences in Counts 16 to 19.

34 The money taken was used by the Appellant for his own benefit, including supporting his extravagant lifestyle at a time when his earnings had reduced but he was still earning £150,000 per annum. It is difficult to say precisely how much was spent on his lifestyle because part of the money was used to fund his investments, in particular, to support his investment in Solar GB where he had become the principal supporter of a loss-making venture. In relation to Count 2, the Court must be taken to have accepted the Appellant's contention that the bulk of the £750,000 taken from the Humberstone Trust was paid to a third party because the Crown said it was unable to refute what the Apellant claimed.

35 The effect upon the victims was profound. Mr Humberstone, a 96 year old widower, described learning of the false statements and accounts as having come as a great shock to him especially as the Appellant had steadfastly protested his innocence over a period of nine years. He described having sustained horrendous legal and professional costs, suffering from awful headaches and being unable to enjoy a proper night's sleep with little hope of making any sort of recovery in the limited time he had left to him. Mr Humberstone's daughter wrote of her unspeakable anger. She said that because of the frauds, her father had not been able to mourn properly the death of his wife who had died two months before a meeting with the Appellant at which they first became aware of what had occurred. As a result of the Appellant's behaviour, she no longer trusts anyone and she will never be her old self again. She felt let down by the Jersey authorities and was left with the impression that that is how Jersey and its institutions prefer it. She too has suffered sleepless nights as a result.

36 The Jersey resident who was the victim of the fraud in Count 15 also made a heart-rending statement. He is 86 years old. He had trusted the Appellant without reservation and had complete faith in him. Discovery of the fraud has taken a terrible toll on him and has caused great upset. He wrote " *I suffer from nervousness, and I can no longer sleep longer than 3 hours a night, I'm constantly on edge, and easily irritated*". He cannot enjoy the money that he had worked hard to earn and could not even fly to the UK for his brother's funeral as he has lost all his self-confidence. The elderly French resident was not well enough to make a statement.

37 In mitigation, the Appellant sought credit for the amount of £1.1 million paid to his victims out of the sale of his matrimonial home. Whilst that is one of the factors to be considered, the strength of the feelings expressed in the victim personal statements demonstrate how inadequate they felt that compensation to be in relation to the extent to which his fraudulent activity had impacted on them and their lives.

38 In relation to the fifth criterion, the strength of Jersey's economy rests in very large part on the continuing success of the financial services sector which in turn depends upon a reputation for professionalism, honesty and integrity. The Appellant's conduct will have

brought discredit on the Island, as the Royal Court correctly identified in its judgment. Fraud at any level in an organisation is damaging, and where the dishonesty exists at the very top it is even more damaging not only to the organisation concerned but to the Island as a whole.

39 The next criterion is the effect on fellow employees and partners. Here, as we have said, the frauds were perpetrated by the managing director of the company. We fully endorse the words of the Royal Court:

> ***"22. The next criterion is the effect on fellow employees or partners of frauds committed by their Managing Director. Counts 2 and 4, for example, involve the defendant in making false representations to two of his colleagues in BDO, whose signatures he required to perpetrate the frauds involved and who were therefore unwittingly caught up in criminal activity at the instigation of their own Managing Director. We have no impact statements from those involved at BDO, but it is not unreasonable to suppose that the discovery of these frauds, the process of the defendant's suspension as Managing Director, and the various internal and external investigations that took place, would have had a serious impact upon his colleagues. The defendant makes no reference to them in his letter to us."***

40 The effect on the Appellant and his family is set out in the letters written by him and his wife who was unaware at the time of his criminal activity as he had kept the details of his business life from her. They both describe the impact of his offending (and his loss-making business ventures) on their family life. Following the payment of some compensation, the Appellant has been left without assets and had been working in a supermarket stocking shelves. His wife had been able to re-house the family out of her one-half share of the proceeds of sale of the former matrimonial home. The letters give the impression that he is more concerned about the impact of his crimes on his three daughters than the impact on his victims although in mitigation in Court, his Advocate stated that he shows genuine remorse for everyone affected, including his partners and employees who he had failed to mention in his letter. The sentencing court said in its judgment:

> ***"15. In terms of mitigation, the defendant is a man of good character, and we had letters both from him and his wife. He expressed remorse for his actions, although we felt that he had little remorse for his victims, other than the local resident, and no remorse for his colleagues. A devastating effect of imprisonment upon the defendant will be his separation from his family, and in particular his daughters. As noted in Whelan at page 240, cases of this kind invariably involve not just a loss of career and professional status, but cause severe damage to family life."***

41 Before us, Advocate Steenson said that the social enquiry report and the psychological assessment gave further evidence of the Appellant's remorse. In our view, neither of them contradicts the opinion formed by the sentencing court. In paragraphs 27 and 28 of the social enquiry report, the Probation Officer wrote:

> *"27. Whilst Mr Arthur regrets the distress and hurt these proceedings have caused his family, his consideration for the direct victims of his financial crimes and appreciation of the emotional impact is, I believe, less obvious*.
>
> *28. My discussions with Mr Arthur lead me to believe that as a coping mechanism he is emotionally detached from the range of issues and impacts for all involved, including himself. Perhaps because Mr Arthur has emotionally detached himself from his situation, he struggles to appreciate the emotional impact his offending behaviour has had on his victims."*

In her assessment, Dr Emsley wrote that " *He is clearly remorseful that he has caused distress to his mother, mother-in-law and his immediate family*". She went on to say that *"he believes that Mr Humberstone is not angry with him"*, a statement which was written without knowledge of the personal victim statements and is clearly incorrect. However she did say that he regretted being unable to apologise to the Jersey resident who was the victim of Count 15.

42 In our judgment, the sentencing court had sufficient evidence before it to support the Court's view as expressed in paragraph 15 of the judgment quoted above.

43 We have set out details of the Appellant's history above. He had worked hard and achieved considerable financial success early in his career but failed to cope maturely with the wealth he had acquired, living an extravagant life-style and making unwise investments in speculative ventures.

44 The last of the *Barrick* criteria concerns the mitigation that is special to the defendant. The most significant mitigation in this case is the one-third discount for his guilty pleas recommended by the prosecution and accepted by the Royal Court as it enabled a six week trial to be avoided even though the pleas were entered only four weeks before the trial was scheduled to commence.

45 The Superior Number took account of two other points of mitigation; delay, and the giving of evidence against Coombs. In addition to the period when the Appellant was under investigation by the JFSC, to which we have referred, there was a delay of three years between the date the Appellant was arrested and charged, 20 May 2015, and the day the trial was due to start in May, 2018. The Royal Court did not have a full explanation for all of the delay but accepted there had been substantial delay which was not the responsibility of the Appellant and which was to be taken into account in mitigation. When considering the length of delay it is to be noted that the Court gave the Appellant a full one-third discount for his guilty plea notwithstanding that the pleas were entered only four weeks before the trial and therefore some three years after he had first appeared in Court.

46 The Court also took into account the fact that the Appellant gave evidence against Coombs

during the latter's trial in June when Coombs was acquitted. However, as the assistance related to Count 14, the least serious of the Counts involving the Appellant, we agree that the Royal Court was entitled to apply the credit to the sentence imposed on that Count only.

47 The only other matter of mitigation raised by Advocate Steenson was the fact that the Appellant is not likely to reoffend. That is very often so in cases of this nature and is generally reflected in the sentences for this type of offence.

Decision

48 There is no legal principle that requires every sentencing court to set a starting point as well as a finishing point. The Jersey courts have not found starting points to be necessary in cases of fraud and similar offences where the circumstances of the offender and the offence may vary so widely from one case to another. The use of starting points in drugs cases is well established; sentencing guidelines have been adopted that suggest sentencing bands by reference to the class of drugs, the quantity, weight and, on occasion, the street value of the illicit drugs involved. Very often those are the most significant factors when determining the gravity of a drugs offence and other factors such as the methods employed in the drug operation will determine where the case falls within the relevant sentencing band. In such cases, the guidelines help to ensure consistency in sentencing which in turn helps to ensure public confidence in the sentencing process and also sends out a clear message to those who might be contemplating an offence that their criminal conduct will be dealt with severely.

49 In a small jurisdiction such as Jersey, where all cases involving serious fraud and the like are heard in the Royal Court, it is easier to maintain consistency than, for example, in England and Wales where it has been found necessary to introduce sentencing guidelines for such offences. In the case of *AG v Speck* [2004] JRC 100, the Court said:

> ***"we really cannot usefully fix a starting point in a case such as this, notwithstanding what the Court said in the previous case, merely that it would try, where it could, to fix a starting point.*** This is one of those cases where we think the whole exercise would be too difficult and too artificial and therefore we will continue to do what we have always done, which is to have regard to the aggravating and mitigating factors, have regard to the appropriate bracket and within that bracket the correct sentence lies" .

In subsequent decisions the Royal Court has on occasion adopted a starting point but on other occasions it has not.

50 Starting points can be helpful when referring and comparing one case with another but they are less useful in the types of offence where the factors properly considered by the Court are so variable. The much-quoted remarks of Le Quesne J.A. in *Wood v AG* [1994] JLR N-15a are pertinent:

> ***"It is necessary to refer to earlier cases when dealing with appeals against sentence in order to ensure, as far as possible, that the right degree of consistency is achieved between one case and another.*** Indeed, it is for this purpose that both this Court and the Royal Court have, on occasion, when passing sentence, not only dealt with the particular offender before them, but have also laid down guidelines to be followed in subsequent cases .
>
> ***It is necessary and important, however to remember that reference to earlier cases is made in order to see the principles and guidelines which have been laid down there and to follow them.*** The purpose of referring to earlier cases is not to analyse the exact sentence which was then passed and the precise reasons why the Court arrived at it. This would be an impossible undertaking since sentencing is a discretionary exercise in every case and the reports do not include every feature which influenced the Court in exercising its discretion on earlier occasions .
>
> ***We notice a tendency, particularly in appeals against sentence in drug-related cases, to try to calculate the exact effect given by the Court in earlier cases to each factor and then to say that those effects must be reproduced in the case at hand.*** This is a misleading exercise since, as I have said, it is impossible from the reports to disclose every consideration which influenced the Court. It is also an exercise which, if it could be achieved, would be inconsistent with the discretionary nature of the sentencing function. That discretion, like all discretions, has to be exercised on proper grounds and with due regard to relevant principles, but the important fact remains that in deciding upon the sentence of every case the Court is exercising its discretion upon the facts of that case."

51 Sentencing is an art not a science and it is not helpful to seek to analyse the sentences imposed in the present case as if they were the product of an arithmetical exercise. It was pleaded in the grounds of appeal that it was wrong for the court to have adopted a starting point approach and then to have abandoned it. In his submissions, Advocate Steenson described the process adopted by the Court as one of reverse engineering of having started with a finishing point and then worked back to a starting point.

52 It is understandable that the Royal Court began by deciding on a starting point for each of the frauds. The Court wanted to give a full one-third credit for the guilty pleas and to demonstrate that it had done so. The Court also decided to give extra credit to the Appellant for having given evidence against his co-defendant but to restrict that credit to the Count to which it related. One way of doing so was to have separate starting points and then work to a finishing point. That led the Court to an aggregate sentence that was too high having regard to the totality principle, so the Court then had to reduce the finishing point to a sentence that it considered was appropriate. Whilst it was not wrong in principle to have taken that approach, the difficulties it created illustrate why it was that in *Speck* the Court had said such an exercise was difficult and artificial in fraud cases.

53 The Court was not required to take the most serious offence and then to add an uplift to it to take account of the additional offending. Advocate Steenson correctly states that is the approach commonly used in drugs cases but in those cases the circumstances are normally very different. For instance, there may be a single act of importation involving more than one type of drug. In the present case, the Appellant was being sentenced for frauds committed against three separate clients, all unconnected. Each was a serious offence in its own right and it was appropriate to look at each of them individually. It was not wrong in principle to consider consecutive sentences. In his submissions, Advocate Steenson argued that the credit given to the Appellant for having given evidence against a co-accused should have been applied across the board to all counts. We disagree. The Royal Court was entitled to take it into account only in relation to the offence to which it applied. The Court said that it had given the Appellant additional credit for giving evidence against the co-defendant and by making the sentence on Count 14 consecutive to the sentences on the other frauds; it can be inferred that if he had not given that evidence the Appellant would have received a sentence longer than seven years.

54 The Appellant's principal contention is that the sentence of seven years imprisonment was manifestly excessive. His counsel had submitted that a starting point of eight years would be appropriate. In doing so, he was accepting that these were serious offences and he was right to do so.

55 The Royal Court had regard to previous sentencing decisions in the Jersey Courts and decided that the most relevant was the case of *AG v Bryce Richards* [2005] JRC 138A about which it said the following:

> ***"There, a trust and company administrator had defrauded a trust holding property valued at £2.5 million (it was not clear from the case note whether all of that was defrauded), over a period of 18 months, a trust of which she was intended to be the ultimate beneficiary.*** In effect, she advanced her interest so that she benefited before the death of the settlor's widow. The prosecution moved for a starting point of 10 years, reduced by the Court, presided over by Sir Richard Tucker, Commissioner, to 9 years."

56 The Royal Court held that the frauds committed by the Appellants involving the Humberstone Trust were more serious and determined that 10 years was the appropriate starting point. Whilst the precise details of the fraud in the *Bryce Richards* case are not known, it easy to see by reference to the *Barrick* criteria that the present frauds were more serious. For example, there is the matter of the "rank" of the Appellant who was not a trust and company administrator but the managing director of a trust company with an international reputation. The period over which the frauds and the cover up were perpetrated was more than seven years, not eighteen months. The effect upon the victims, Mr Humberstone and his daughters, was almost certainly more serious bearing in mind that in the earlier case, the fraudster was the ultimate beneficiary of the trust.

57 Advocate Steenson has invited this Court to have regard to the sentences imposed by the

Royal Court in the case of *AG v Lewis, Foot, Christmas and Cameron* as being at least as helpful as any of the other cases. He highlighted the following factors: the timeframe was four years, 2004 to 2008; the overall loss was greater at approximately £4.2 million; losses were sustained by 57 people of whom 18 were victims; concurrent sentences were imposed totalling four and half years in respect of the defendant Lewis who received the longest sentence; and there had been a contested trial so there was no discount of one-third, suggesting that without a trial the longest sentence would have been three years.

58 In our judgment, the facts in that case were very different. The offences were charged under the Investors (Prevention of Fraud) (Jersey) Law 1967 and included charges of fraudulent inducement to lend money and fraudulent inducement to invest. We were told that the maximum sentence under the statute was seven years. The offences concerned a scheme to invest in US residential properties in Florida and Colorado and in order to be successful would have required a rising property market. The venture failed partly because it was highly leveraged and in order to fund mortgage payments as well as the costs of servicing the properties, the principals behind the scheme required fresh funds from investors even before the property market crashed in 2007. Some of the money received from some of the later investors went to redeem investments by earlier investors. The defendants misled investors by lying to them about the true state of the investments and by concealing that the venture was on the brink of imminent collapse. It is difficult to draw direct comparisons between that case and the present appeal. For instance in the earlier case, the amount lost was £4.2 million of which a small portion was paid to the defendants for their own benefit but most of the investors' money was lost in paying property expenses and in the collapse of the property market and the fall in property values.

59 We consider that the Royal Court gave proper consideration to the delays that had occurred. Thus we are satisfied that the Royal Court gave consideration to the mitigating factors that were relevant and it did so appropriately.

Conclusion

60 The principal consideration in this case is the seriousness of the offences for which the Appellant was sentenced. The Royal Court was right to assess them against the criteria in *Barrick* and it did so appropriately. Advocate Steenson has correctly not sought to minimise the gravity of the offending. The Court had regard to earlier sentences imposed in this Island for fraud and similar offences. Again that was correct. The Jersey Courts are not obliged to adopt English sentencing guidelines; instead they take account of local factors such as the public interest in maintaining the reputation for integrity and honesty of the financial services sector. The circumstances of individual cases vary considerably and there have been insufficient cases to be able to lay down sentencing guidelines, in any event, we do not consider it necessary to do so although it is appropriate to look at earlier decisions in order to show consistency. In this case, when it looked at other Jersey cases, the Court correctly concluded that there was no direct comparison. For the reasons it identified, this was more serious and merited a longer sentence.

61 The Crown had offered its Conclusions which the Court was not bound to follow. It is apparent from the Court's reasoning that it chose not to do so because it considered that the offences were more serious than the Crown had indicated. However the Court did accept the recommendation that the Appellant be granted a one-third discount for his guilty pleas which then led it down the path of starting points for each of the separate frauds when there was no need to do so. It is to be inferred from the Court's decision that if the Appellant had not entered guilty pleas but had been convicted after a trial on all ten Counts, his sentence would have been ten and a half years after allowing for the other mitigation available.

62 There was no need to begin the sentence exercise by identifying individual starting points. Instead, the Royal Court could have decided on a finishing point that was appropriate in all the circumstances. Whilst we do not agree with the methodology adopted by the Court, we do accept that it had regard to all the relevant factors, for the reasons we have stated. We are satisfied that the sentence of seven years imprisonment is not manifestly excessive. It is within the range of sentences that could have been imposed and we will not interfere with it.

63 In conclusion, we grant leave to appeal the sentence but we dismiss the appeal.