

**IN THE DISTRICT COURT
AT AUCKLAND**

**I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKĀURAU**

**CRI-2019-004-010982
[2020] NZDC 21726**

SERIOUS FRAUD OFFICE
Prosecutor

v

TE RANGIHIROA WHAKARURU
Defendant

Hearing: 14 October 2020

Appearances: T Simmonds and K Bannister for the Prosecutor
G Foley and A Roberts for the Defendant

Judgment: 14 October 2020

NOTES OF JUDGE E M AITKEN ON SENTENCING

[1] Mr Whakaruru, you appear for sentence in respect of five charges of obtaining by deception which carry each a maximum penalty of seven years' imprisonment and one charge of supplying false or misleading information to the Serious Fraud Office (SFO) which carries a maximum of 12 months' imprisonment or a fine.

[2] Your offending arose in the context of your role as the principal private secretary to King Arikinui Tuhetia, the Maori King. You also, over your years of service, occupied the roles of general manager and/or the chief executive officer of the Ururangi Trust. That trust was then a registered charitable trust set up to provide support to the office of King Tuhetia. Funds were

received that were tax free and were then spent in accordance with its charitable purposes.

[3] Waikato Tainui Iwi is the kaitiaki of the kingitanga and that iwi is made up of about 55,000 members affiliated with 68 Marae from 33 hapu. Also involved in this was Te Whakakitenga which is an incorporated society with 136 elected officials. It represents the rights and interests of Waikato Tainui and ensures that the benefits of the Treaty settlement grow for future generations. It is accountable to the members of the Waikato Tainui tribe. Te Arataura is the executive committee of Te Whakakitenga and it is Te Arataura that features in the course of your offending.

[4] Between 1 April 2015 and 31 March 2018 King Tuhetia received financial support from Waikato Tainui through a deed of funding and the parties to that were Waikato Tainui and Ururangi Limited. The trust received an annual budget to carry out a number of charitable objectives and the budgeted funds were paid to the Ururangi Trust. When funds were required in addition to those budgeted, the deed of funding provided that Ururangi Trust could apply for funding for unbudgeted purposes.

[5] Te Arataura was responsible for approving or declining the applications for additional funding and if a proposal for additional funding was approved before any payment could be made, there were a number of checks and balances in place and through your roles and associations with the Kingitanga you were well aware of these financial arrangements and processes.

[6] I turn then to deal briefly with the facts that relate to each of the offences. The first, obtaining by deception, this took place on 17 December 2015 when, with consent, you purchased a trailer on behalf of the trust. The actual cost of the trailer was \$8,200, that was the original invoice you received. However, having got permission to make the payment from your personal funds and to then seek reimbursement from the Trust, the invoice was altered to reflect a total cost of \$11,255 with you obtaining the benefit of the difference. In the course of obtaining that benefit you emailed the Trust noting that "this is the invoice I paid for the trailer" that was clearly not true. The benefit to you amounted to \$2,875.

[7] The second charge reflects more serious offending, and this arises in the course of your own personal gastric by-pass surgery and the funds here came from the additional funds to which I have earlier referred. You were admitted to a private hospital in May 2016 for an operation and discharged about five days later. The cost of that operation to you was \$27,650.

[8] Just prior to your surgery you prepared a confidential internal memorandum seeking an additional \$200,000 from the trust. You said that the funds were required to cover the forecasted medical treatment and costs of King Tuheitia. You said that the King's primary advisors and medical team included the CEO of the Mercy Hospital Group even though they were not involved in his medical treatment at the time.

[9] Members of the trust agreed to the additional funds and they were paid. They resolved to pay a significant amount across and you were advised of that decision. You were also told that invoices were required before payment could be made. You received an invoice from the Mercy Hospital for your medical procedure. You then asked the CEO of that hospital to change the details of that invoice so that, in effect, your name and the details of your procedure did not appear. Not suspecting any foul play, the hospital re-issued the invoice in the name of the Trust and referring to the service as being 'medical services and treatment for King Tuheitia'. The amount coincided with the cost of your own procedure.

[10] You then asked your executive assistant to draft a purchase order setting out a breakdown of a range of procedures that could be attributable to the King. Your executive assistant prepared that purchase order and sent that, and the amended invoice, through to the accountants for the Trust. In effect, you deceived the Trust's accountants who acted as if the invoice that you had created, and the purchase order, were genuine. The CEO and the Chair of Te Arataura received that information and, believing it all to be true, subsequently made payment in a sum far in excess of the cost of your medical procedure, but in particular making payment of the \$27,650 in accordance with the amended invoice. That money was clearly used by you to offset the account of that operation.

[11] The final three charges of obtaining by deception also relate to claims for medical treatment or procedures in relation to King Tuhetia and on this occasion a family member. The King did require medical procedures, but they were undertaken in the public health system at no cost to him or the Trust. However, again, and in this case shortly before the King's operation, you prepared a confidential internal memorandum and requested additional funds. You followed a similar process where you set out proof of expenditure and in the memorandum stated that the disbursement of the budget should give consideration and be focused on the King's medical procedures, lead ups to his treatment, and pre and post-operative arrangements. Again, you also involved the Mercy Hospital claiming them to be his primary specialists and advisors when in fact they were not.

[12] The Trust went through its various and usual processes and agreed to provide the additional funds. You were advised of that. You then tried to create a false invoice. You were unable to do so so you instructed an employee of the Trust to do it for you and a single invoice was created on the Mercy Ascot letterhead and addressed to Ururangi Limited for a total payment of \$80,263, made up of a variety of entries that referred to the King and his medical procedures and on one occasion to one of his family members.

[13] You clearly knew exactly what you were doing and that is clear from email correspondence between you and your then executive assistant. You sent the email to the acting CEO, asked for it to be paid before Christmas, told her the three invoices had already been paid by the King, and another was overdue. You went a little further on this occasion, Mr Whakaruru, because you put a 'received' stamp on the invoices, you put a date and then you purported to record the cheque with which they have been paid - but that was not a legitimate cheque number on either of the two occasions that that happened. In short, the acting CEO approved the invoices and a significant payment was made, including for the amounts of those three invoices, variously \$17,451.25, \$48,000 and \$14,812 and they came from the additional funds.

[14] You knew that those monies were dishonestly obtained and when you were interviewed by the Serious Fraud Office some several years later, on 25 and 26 September, you were required, as is everyone interviewed by that office, as a matter

of law, to lawfully answer the questions. You failed to do so. You told the investigators that payments had been made from one of your personal accounts to cover the cost of your own personal surgery knowing that that was not true. You were given an opportunity to attend a second interview and bring the documentation that was required to prove that. You failed to bring that documentation and continued to maintain your earlier account.

[15] The total amount involved in the course of those five deceptions was \$110,788.25.

[16] I turn now to assess the starting point because the starting point is a term of imprisonment but to assess the starting point, having regard to your culpability and in particular the nature of this offending, requires the court to take into account a number of factors which I deal with as follows.

[17] Firstly, as I have alluded to, the nature of the offending, here the magnitude and sophistication of it. It is clear that you relied on your knowledge of how the funding system worked. It is clear you relied on your reputation and your standing within these various organisations. You relied on your knowledge of the King's health issues and perhaps even one of his family members. Your offending involved the production of false invoices and documents to support your application for this additional funding on four out of the five offences. Your offending involved five separate transactions, some much more detailed in their deception than others. Your offending was clearly premeditated and, in my view, moderately sophisticated.

[18] As to the period of the offending, it spanned one year from December 2015 to December 2016. Two losses have been involved, firstly the amount you received, \$110,788.25, but secondly there has been, in my view, clearly a loss to the Waikato Tainui Iwi as a result of your offending. That loss is calculated, and I am going to use the word perhaps approximated, at close to \$30,000 being legal fees incurred in complying with the SFO investigation and forensic documentation search fees that were involved in that investigation. I will come back to that point in a moment. However, those are the financial amounts or claimed losses.

[19] There are of course victims of your offending and I turn to have regard to the type, circumstances and number of victims and the impact on them. I found this a more difficult head to assess. There is no victim impact statement. There was a direction, as is always the case where there are identifiable victims for a restorative justice process to be undertaken, but the formal court mandated process has not gone ahead for various reasons, none of which I can sheet home to you as the defendant, Mr Whakaruru, nor indeed to any of the victims, it has simply been unable to proceed.

[20] The victims here are, of course, the members of the Waikato Tainui Iwi and those who might have benefited from these additional funds were it not that those funds no longer existed because of your dishonesty. The Ururangi Trust was investigated by the Charities Commissioner and then by the SFO with all of the attendant publicity that would have gone with that.

[21] I do not have sufficient material to reach any definitive conclusion on the real impact on your victims of your offending but I proceed on the basis that at the very least the reputation of the office of the King, and those persons and agencies responsible for his welfare, have been very adversely compromised by your actions. I am advised that there has been a restorative justice process in accordance with Tikanga, that that has occurred and will continue to occur and in the circumstances I will place some weight on that although it is a rather oblique reference and the court would have been assisted by more information in that regard.

[22] As to the seriousness of the breach of trust this was, Mr Whakaruru, a very gross breach of trust by someone who held the role as principal private secretary to King Tuhetia. You had also held those other roles within the Ururangi Trust and you clearly used your position, your mana, your standing and your years of service to obtain significant personal benefits to yourself.

[23] That brings me to the motivation for this offending and again this is a troubling aspect of this case. Clearly there was some motivation, initially, to cover your medical costs but the probation report includes a statement from you denying the use of funds for personal gain yet there is no other explanation and nor does your counsel provide one and I proceed on the basis of really the only conclusion available to me which is

this money was obtained and used by you for your personal gain and I am dealing with a situation of someone acting dishonestly not through need but potentially through greed.

[24] An assessment of culpability impacts directly on the starting point and one of the principles of sentencing is for the court to strive to reach appropriately similar outcomes in appropriately similar cases. I turn very briefly to address the authorities to which I have been referred.

[25] *R v Varjan* is the usual starting point for offences of this kind.¹ A mobile mortgage manager who defrauded the victims in a sum just in excess of half a million dollars over a period of time where a three-year starting point was reached. Things have moved on since Mr Varjan.

[26] In the case of *Brown* this was benefit fraud over a period of 15 years, \$250,000 where the starting point of three years was fixed on appeal by the High Court. I do not regard that decision as particularly helpful. Of course, there was an aspect of premeditation but there was not the substantive breach of trust nor the sophistication that I describe here with your offending.

[27] The case of *Fitzmorris* has featured in my consideration, a decision of the High Court in 2013 where over the course of five years a member of the Catholic priesthood defrauded the church of an amount of \$149,000 taking relatively small amounts on no less than 735 occasions over a period of five years using withdrawals from the ATM, taking money meant for parishioners in a systematic prolonged and relatively serious course of dishonesty. A number of matters of mitigation were advanced but prior to that the High Court fixed a starting point of three years focusing on the motivation in that offending which attached directly to the defendant's gambling addiction.

[28] I have also been referred to *Te Ahuru*. This was a fraud of 1.2 million over a 15-month period, 43 payments to the defendant, a significant abuse of a position of trust, a starting point of six years in that particular case.

¹ *R v Varjan* CA97/03, 26 June 2003.

[29] *R v Grant*, again a case that has caused me some anxious consideration.² Ms Grant held a number of positions within charitable authorities. Like you she had spent a great part of her adult life contributing to her community but over a four-year period she obtained funds in the sum of 1.3 million to which she was not entitled. They were not, it was determined, for her personal gain but rather to support the various trusts and charities that she wanted to support and because of that a starting point of four years was determined. If it had been for personal gain the High Court commented that five and a half years would have been appropriate. However, I must have regard to a starting point of four years for a fraud involving \$1.3 million.

[30] *SFO v Thompson* has also weighed with me, a finance manager of a trust over a five-year period defrauding the trust of \$171,000 which were diverted into her personal account. That came at significant consequences for the trust and resulted in 43 employees losing their jobs, a four-year starting point was reached on that occasion.

[31] I have not found this an easy assessment to make, Mr Whakaruru, it is not easy to determine like when it comes to comparisons of culpability. On the one hand a three-year starting point has been adopted for amounts considerably greater than here but where there was not so gross a breach of trust nor so venal a motivation. On the other hand, I must weigh into the mix that this was in your case five discrete instances over a period of one year but relatively sophisticated.

[32] I have reached the view that the starting point should fall within the range of three to three and a half years, three and a half years being half the maximum penalty and in this particular case, having regard to the authorities to which I have referred, I fix the starting point at three years three months' imprisonment.

[33] There does need to be an uplift for the SFO offending, the two separate interviews where you continued with your fraud and continued to deceive. In my view a relatively modest uplift of three months is appropriate because from a totality perspective, in my view, having regard to all of the offending, a starting point of three and a half years is appropriate.

² *R v Grant* [2017] NZDC 20420.

[34] I turn then to have regard to matters of mitigation and there are some. You are now 57 years old, of Ngati Kahungunu Tuwharetoa and Ngati Awa descent. Section 8(1) of the Sentencing Act 2002 requires the court to take into account your personal, family, whanau, community and cultural background and circumstances and I have had the benefit of the cultural report provided by Tania Eden. That report describes an upbringing characterised by a transient family lifestyle and violence likely at the hands of your alcoholic father. It also, however, includes experiences of love and support in the relationships with your mother and grandmother but acknowledges a degree of social deprivation which offered you few opportunities as you grew up.

[35] However, unlike many, Mr Whakaruru, you were given a key opportunity when you travelled to Hawaii and had the opportunity to live and work there for many years, to upskill and study at the Polynesian Cultural Centre. You went from there to Australia where you lived for 20 years, you worked hard, you established a business and on return I appreciate you were profoundly impacted by the murder of your grand niece's child and that you still carry a sense of failure in your inability to protect that child and your niece. You went on to involve yourself here in Aotearoa, New Zealand, with a range of charitable work with children as you had done in Australia and work that has benefitted both Maori and non-Maori alike. In particular you have served the Kingitanga for more than 29 years and you remain extremely loyal to the King and that movement.

[36] Ms Eden refers to you having had a life of challenge, refers to you having held high profile roles but also having faced a lot of heartbreak and historical trauma endured as a result of your childhood. While I accept wholeheartedly her assessment, with great respect to her I do not find a clear link between that background and your dishonest offending. The report is helpful when it has regard to your future and when the writer refers to the factors that might reduce your risk of re-offending and the report does affirm what your counsel submits is your genuine remorse. However, I do not attach any discrete credit because I can see no direct or even indirect link between the trauma that you have invariably suffered and your dishonesty on these particularly occasions.

[37] There are other discrete matters of mitigation which are raised. I turn to deal with remorse. This is, as I have said, described as genuine by Ms Eden. For myself that is not so readily apparent. The probation report refers to you feeling justified in withholding information from the SFO, it refers to you agreeing to admit your guilt but denying that you accessed the funds for personal gain when clearly, on at least two occasions, that is absolutely obvious.

[38] I have read the letter that you have written to King Tuhetia and I accept the matter as between you and him. I am not in a position to assess your relationship with him nor your remorse when it comes to that personal level. Your letter does acknowledge the impact of your offending on him and on those who work with him and it does appear to express genuine regret for the impact of your offending on the King. It is however silent as to the impact of your offending on the wider victims of the Tainui Iwi and the Trust and other agencies generally, and I must acknowledge a degree of doubt and uncertainty as to your attitude to those others involved in your offending and having to live with the repercussions of it.

[39] What is more clear is the significant level of support that you have, and I have read the many letters that have been filed in support the authors of which see your conduct on this occasion as very much out of character. The references speak to your unwavering dedication, loyalty and support for the late Queen and the current King Tuhetia and the Kingitanga movement and Maoridom in general. That support has included your commitment to Maori in Australia and New Zealand in real, practical and aspirational ways.

[40] The references refer to your significant business and organisational skills, they also refer to your remorse and what they believe to be a lack of any risk of re-offending. They refer also to your determination and your very real ability, in their view, to go on and contribute in a meaningful and positive way to your community and on your behalf they plead with the court for a chance to continue to contribute to the wider community and to Maori in particular. They plead for a community-based sentence and not a term of imprisonment. In the words of the Reverend Tarahu, who has provided a letter: "...a chance to do good and make things new."

[41] That brings me to one step you have taken to 'do good', if I can use that phrase, and that is reparation. There has been some significant discussion between the court and both counsel on the issue of reparation particularly as to its source. I proceed on the basis that there is no obvious evidence from which I could discern you have misled the court in any way and I accept that there is today a genuine offer of reparation in full, with an amount of \$90,000 available today. That would leave around \$20,000 owing but it puts you in a very strong position in terms of reparation, Mr Whakaruru, because the court does have real confidence that any order of reparation will be paid in full.

[42] It could be said, however, that any reduction in sentence is not necessarily appropriate when all you are doing is returning money that was never yours in the first place but in this case I take into account the views in particular of the Crown that a discrete credit is available to you for reparation and certainly I accept that in paying reparation in full that is tantamount, in my view, to a real acceptance of responsibility and may reflect the genuine remorse to which you and others refer. To that extent I do take into account that I can and will order reparation and I intend to order a nominal amount towards the costs to Waikato Tainui Iwi. I will come to that in a moment.

[43] I have already referred to my difficulties in discerning your motivation.

[44] I turn then to your lack of prior convictions. At 57 years old you appear before the court for the first time albeit in respect of six different offences. To some extent it cannot be said by the sixth offence that you were a first offender, but you appear for the first time to be sentenced and I do put some considerable weight on your lack of prior convictions.

[45] I am reminded, in considering your position Mr Whakaruru, of the comments made by the High Court in *Fitzmorris* that regardless of the height of your fall from grace your past character does demand some recognition and High Court in *Grant* also took a very generous view of the role that the defendant there had played in her community and I can see from the references before me that you too have played a significant and positive role in your community.

[46] Concluding then on matters of mitigation, having regard to your prior good character including your service and contributions to the community over many years; having regard to the potential for rehabilitation and the significant support that is offered by your whanau and whanau whanui, your refined skill set and your ability to continue to make a contribution; having regard to your ability to pay reparation in full; and to some rather more limited extent to your claim to remorse, in my view the discount that should attach to all of those factors combined could be up to 20 per cent and your guilty plea, which was entered on the very first appearance, an unusual event as your counsel notes, would attract a discount of 25 per cent. That is therefore a total of 45 per cent. That is an amount of 18.9 months, I will round that up to 19 and that takes me down to an end point sentence, on my calculation, of around 23 months.

[47] That brings me to the point where I must determine whether or not a term of imprisonment is appropriate or whether the purposes and principles of sentencing can be met by a sentence of home detention. I have found this also, Mr Whakaruru, a troubling aspect of the case, whether or not the end point sentence hovers just below or just above the 24-month cut off point. However, ultimately, I am persuaded that there would be an unfairness if Ms Grant were to receive a sentence of home detention and you were not, because the ultimate conclusion by Lang J in sentencing her is applicable also to you. It makes no sense to send, in this case, a 57 year old person to jail in circumstances where they have never offended in the past and are unlikely to come before the courts again.

[48] I am satisfied in the particular circumstance of this case that a full sentence of home detention coupled with community work and reparation is the least restrictive sentence available for many of the reasons that I have articulated but in particular because reparation will be paid in full, because you are of prior good character, because you have significant support which should reduce the risk of re-offending. I do not profess to have a crystal ball into which I can gaze and be certain that you will not re-offend but on the material before me I am satisfied that any risk that there might be is indeed a very low one.

[49] I am mindful that the purpose of sentencing is firstly to hold you accountable and promote in you a sense of responsibility. The process of arrest and charge, coming

before the court, conviction and sentence, the fall from grace, the attendant publicity, the period of time over which you have waited since your plea of guilty until today - in my view those process factors have played a significant part in holding you accountable and promoting a sense of responsibility.

[50] I am mindful that one of the purposes of this sentence must be to denounce and to deter you and others. In that regard the attendant publicity is relevant, so too the fall from grace, so too the loss of mana that would have accompanied that, so too the fact that home detention is not a soft option, it is a significant loss of liberty, as I suspect many in our community are finding out as they spend as little as 14 days in isolation.

[51] I am mindful that a purpose of sentence is to provide for the interests of the victims and reparation for the harm done and there will be an order of reparation and a sentence of community work which will be an opportunity for you - but from the court's perspective a requirement - to give back to the wider community against which you have offended.

[52] In terms of the penalty it will be a maximum sentence of home detention. The offending is different in type from *Fitzmorris* and there needs to be some distinction in my view in the ultimate end point.

[53] For those rather lengthy reasons, Mr Whakaruru, in respect of all six charges you are convicted and sentenced now to serve a term of 12 months' home detention on the standard conditions set out in the probation officer's report to be followed by six months' post detention conditions.

[54] The special conditions, as I said, are set out in the probation officer's report [and include]:

- (a) You are required to travel directly to the designated address. You will be fitted with the electronic monitoring bracelet, and

- (b) You are required, amongst other things, to attend and complete any programme, treatment or counselling at the direction of your probation officer and to notify that officer prior to commencing, terminating or varying any employment.

[55] In addition to that maximum sentence of home detention you are also sentenced to complete 300 hours of community work designed, as I have said, to give back to the community against which you have offended.

[56] You are directed to pay reparation in full in the sum of \$110,788.25 and you are directed to make an additional payment of \$5,000 reparation. That is a payment towards the costs likely incurred by the Waikato Tainui Iwi in dealing with the fallout of your offending and I can make it clear that I would have granted more if the details were available to the court.

[57] When it comes to the payment of reparation the \$90,000 is to be paid within 48 hours, the balance, which will be the balance from the \$110,000 plus the \$5,000, is to be paid within three months.

[58] That brings me to the end of my sentencing remarks. There is one outstanding matter I understand from the Crown perspective. The charge ending CRN 566, the seventh charge, that charge is dismissed pursuant to s 147 of the Criminal Procedure Act 2011.

[59] Mr Whakaruru, that concludes my remarks. Just to be clear, you are to travel, once you have signed your papers and received the documentation, from the court directly to the home detention address but the court observes that it could take up to six hours and the electronic monitors will need to be cognisant of the fact that you will be there on or before 8 pm, but it is about travelling directly there.

[60] My sincere thanks to both counsel for your very helpful and thorough submissions on what was far from a straightforward sentencing matter.

Judge E M Aitken
District Court Judge

Date of authentication: 12/11/2020
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.