

Joseph Russell, the defendant, pleaded guilty in the lower court to 10 counts of fraud and appears in this Court for sentence. The facts are as follows. In February 2021, the defendant moved to Tasmania from New South Wales. On 18 February 2021, Michelle Herweynen met the defendant through a dating application. They started communicating with each other by text message. A short time later they met in person and formed a relationship. The two initially stayed at the defendant's home in Glenorchy but later the defendant spent most nights at Ms Herweynen's home. The defendant told her he worked for the Macquarie Bank as a stockbroker and that he had previously lived and worked in New York. He told her he had got mugged while living in Sydney and lost sight in his left eye as a result, that he chose to move to Hobart because he wanted to avoid large crowds, that he has Asperger's syndrome, and that he had attended St Joseph's boarding school in New South Wales from the age of 8 and graduated early because he was a genius. As will be explained there is a kernel of truth in relation to his vision difficulties. The defendant also befriended John Herweynen, Michelle's father. He also told Mr Herweynen that he was a stockbroker. Early on in the relationship, the defendant told Ms Herweynen that he had been offered a job as the head of the Macquarie Bank in North America, but he didn't want to take it as he claimed he would rather stay in Hobart with her. Later, the defendant said he was leaving his employment with the Macquarie Bank to start his own consulting company.

Ms Herweynen cared very much for the defendant and started to think that she was ready to settle down with him. They had conversations about her share portfolio and her finances in general, as well as the defendant's business investments. The defendant told Ms Herweynen that there was an initial public offering of shares in a Texas oil company in which he was involved, and that it would offer her great returns as she would receive ten times her investment. Ms Herweynen decided to invest in the share offer and on 12 March 2021 she transferred \$20,000 to a MyState Bank account provided to her by the defendant, in the belief that he would purchase shares on her behalf. Ms Herweynen was told the account was called "Russell Capital Pty Ltd". However, that account was in fact a personal savings account, opened by the defendant on 2 March 2021. It had \$10.51 in it before the \$20,000 transfer. After further discussions with the defendant, Ms Herweynen decided to sell her share portfolio and invest more money in the share offer. On 26 March 2021 and 29 March 2021, she electronically transferred a further combined sum of \$40,000 to the same bank account. On 8 April 2021, the defendant told Ms Herweynen that he wanted a new car "because he likes nice things". The defendant paid out Ms Herweynen's lease on her Subaru, totalling some \$28,000 odd dollars, which was then traded in on the purchase of a BMW for \$105,000 in her name. The defendant paid \$42,888 towards the purchase of the vehicle but all of the money came from the funds that Michelle and John Herweynen had given him to invest.

During the same period, John Herweynen became aware that the defendant was purporting to invest large sums of money on behalf of other people. He asked the defendant about this and the defendant suggested that he could also invest money on his behalf in a share offer relating to "Texas Oil Tech Laboratories". Mr Herweynen agreed to invest in the share offer for \$50,000. On 19 March 2021 and 20 March 2021, he transferred \$25,000 to the 'Russell Capital Pty Ltd' MyState Bank account, in the belief that the defendant would purchase the shares in on his behalf.

Neither Michelle Herweynen nor John Herweynen received any documentation from the defendant relating to their investments.

A further person became involved in the defendant's scheme. In April 2021, the defendant and Ms Herweynen put an offer on a house which for sale. Through his dealings with the defendant the real estate agent involved in the sale introduced him to his brother, Mustafa Merdivenci. The defendant told Mr Merdivenci that he was an investment consultant and broker and claimed again to have worked at the Macquarie Bank overseas but had returned to Australia in 2019. Knowing that the Herweynen's had previously invested money with the defendant, Mr Merdivenci believed that the defendant was a legitimate investment broker. The defendant told him about the same share offer in the Texas oil company but said that only high-end investors associated with him would be able to access it. The defendant provided Mr Merdivenci considerable detail about this proposed investment – telling him that the share offer was valued between \$2.5 and \$3 billion. He assured him that all of the money invested would be fully insured, claiming it cost him over \$1 million per year to insure his clients. The defendant also told him he would receive high returns in the vicinity of five times his investment and possibly more. Mr Merdivenci was convinced by the information provided, and agreed to invest. The defendant gave him the 'Russell Capital Pty Ltd' MyState Bank account details and claimed that he could not provide any confirmation of his investment because the share investment was going to be under the defendant's allotment of shares in the company.

On five separate occasions between 6 April 2021 and 13 April 2021, Mr Merdivenci transferred amounts to a total of \$125,000 to the "Russell Capital Pty Ltd" bank account in the belief that the defendant was going to invest that money and buy shares in the Texas oil company. During that seven day period, the defendant was in contact with Mr Merdivenci, telling him that he had been trading overnight and all was going well with the shares. On about 12 April, suspicions were raised when a friend told the Herweynen family that they could not find any record of the defendant attending St Joseph's boarding school. A family friend then showed John and Michelle Herweynen an episode of 'A Current Affair' from September 2016, which revealed that the defendant had used false names to defraud people of significant amounts of money and had gone to jail. The next day, Michelle and John Herweynen reported the matter to Tasmania Police and to MyState Bank. That day, Mustafa Merdivenci watched the footage, immediately recognised the male as the defendant, and went straight to the ANZ Bank to report the fraud. He then reported the matter to police.

In total, the defendant obtained a benefit of \$235,000 as a result of his fraudulent conduct.

On or about 15 April 2021, the defendant left Tasmania and returned to New South Wales. In the days following this, Mr Merdivenci exchanged several text messages with him in an attempt to get his money back. The defendant claimed that he was still in Tasmania and he could not return the money as the account had been frozen. The defendant assured him that he was co-operating with the bank so that the money could be returned and then said that a friend could come to Tasmania and pay him the cash. Of course this did not happen. On 14 April 2021, the MyState Bank "Russell Capital Pty Ltd" account was frozen. The bank statements reveal that the money the defendant received from his three victims was used by him to support a lavish lifestyle. This included trips to Melbourne and Sydney which involved spending some \$2,000 at a Sydney restaurant in Sydney, staying at the Hilton Hotel and paying \$1,000 for one night's accommodation. The defendant also spent the money on Uber trips, top restaurants and exclusive hotels, expensive clothing and a corporate suite at an AFL match in Melbourne. There were transactions indicating that he gambled at various casinos, as well as making

payments to a bookmaker. He also withdrew a total of \$15,400 in cash. The balance of the MyState account as at 15 April 2021 was \$84,528.59 in credit.

On 18 August 2022 the defendant was located in New South Wales and arrested. He appeared before a magistrate and did not oppose his extradition back to Tasmania the following day. On 19 August 2022, the defendant was interviewed by police and made full admissions. His statements included the following:

- He agreed that he was given money by each of the victims to buy stock in the Texas oil company but he did not invest it as promised. Instead he spent some of the money on Michelle Herweynen and Mustafa Merdivenci, and on gambling in the hope that he could win enough money to pay for whatever they wanted;
- He took Michelle Herweynen to Melbourne and Sydney using the money that she and her father had given him;
- He accepted that he used some of the money himself and withdrew amounts in cash;
- He has been diagnosed with Asperger's syndrome and wanted people to like him.

Following the police interview, the defendant was charged and remanded in custody to appear in the Magistrates Court. He pleaded guilty to all matters on both complaints on 18 October 2022. The defendant has been in custody in relation to this matter since his arrest on 18 August 2022. Michelle and John Herweynen have not been repaid any of the money they gave to the defendant. However, MyState Bank paid to Mr Merdivenci, the balance remaining in the account as he was the last person defrauded. Michelle Herweynen was able to sell the BMW back to the dealer at a loss and buy back her Subaru, at a loss of \$15,000.

The defendant is now 44 years old. He has a very extensive record of prior convictions for fraudulent and deceptive offending in New South Wales, Victoria, Queensland and South Australia. The history of offending starts in New South Wales in 2009. After four court appearances up to 2001 resulting in suspended terms of imprisonment, he was actually imprisoned in August 2002 for a period of 20 months with a non-parole period of 15 months. Numerous offences of fraud and dishonesty followed with consequent periods of imprisonment. He received a sentence of four years' imprisonment with two years non-parole in October 2013. All of this was punctuated by offending and imprisonment in 2004 and 2007 in Queensland and 2011 in Victoria. On 2 February 2018 on an apparently single charge of dishonesty obtaining a financial advantage by deception, the defendant was sentenced in New South Wales to six years' imprisonment commencing on 17 December 2015, with a non-parole period of four years. That was for offending committed in January 2016. I have a document purporting to be an "Agreed Statement of Facts" that was put before the court. Although the defendant does not agree that they are precisely what was ultimately alleged, it is clear that the offending was of a very similar nature to the current offending. He represented himself using a false name holding himself out as a stock broker purporting to provide advice to victims, suggesting they should invest in shares in various companies around the world. He told them they would receive significant returns on their investments. His fraudulent representations netted him some \$935,000. I was told that it is not clear what he did with all of the money, but it appears he was spending some on luxury items, and such items that gave others an impression of wealth. As soon as he was released on parole in relation to that matter, he was extradited to Victoria to face a charge of dishonesty committed in that State. He pleaded guilty and on 5 August 2020 he was sentenced to 14 months' imprisonment, about half of which had been served by way of pre-sentence detention. As soon as he was released from custody in Victoria, he went back to New South Wales and then moved to Tasmania. It appears that this offending

occurred while still subject to parole in New South Wales. Without going through the exercise of precisely tracking offending and imprisonment dates, the clear impression is that almost immediately after being released from prison the defendant reoffends, and course, that is the case with this current matter.

I have the benefit of detailed submissions of counsel and a comprehensive report from Carla Ferrari, forensic psychologist, dated 13 January 2024. Relevant personal circumstances are as follows. The defendant was born prematurely and was hospitalised until he was six months old, receiving treatment for a congenital eye condition and a rare bowel disorder. His parents separated when he was ten, and his mother has remained supportive. He struggled at school and was bullied due to his myopia and the need to wear thick glasses. He left in year 10 due to bullying and learning difficulties, and then worked for a freight company from the age of 15. But he also experienced bullying and harassment in that workplace. It seems he has continually suffered with depression since about that time. He has been unable to maintain employment for more than a few months and does not seem to be able to maintain any significant relationships, the longest being for about nine months ending in 2016 when he was charged in that year. The defendant has a number of serious medical issues. He is now legally blind in both eyes due to his congenital eye problem. As to this, counsel informed me that effective total blindness occurred while the defendant while in custody late last year. This followed complications from bouts of surgery in relation to bowel difficulties, which in turn, followed the administration in prison of anti-inflammatory medication for his eye condition. For a time he had a colostomy, necessitating the use of a bag for a time, but that procedure has been reversed. Ms Ferrari has provided diagnoses of Autism Spectrum Disorder, Persistent Depressive Disorder and a current major depressive episode in the context of a recurring Major Depressive Disorder. She notes it appears that the defendant has developed a learned pattern of behaviour in which he engages in self-aggrandizing behaviour purporting to be someone he is not, betraying himself as success and wealthy in order to obtain approval from potential acquaintances, friends and romantic partners; he seeks acceptance and connection. This pattern stems from his childhood and adolescence. In her view, these offences can be understood in the context of his ASD and to a degree his desire/need to be accepted and liked, and in a sense, having no limits as to what he might do to secure these relationships even temporarily. She is of the opinion that he has come to appreciate the wrongfulness of his behaviour, but in the moment, he fails to apply his past experiences to the current situation and consider how it will end or what the ramifications will be. Importantly, Ms Ferrari does not suggest that there is a causal relationship between the defendant's ASD and his offending behaviour, nor suggests that he does not appreciate the wrongfulness of his actions. However, as a result of his ASD, she says he displays an impaired capacity to fully appreciate the impact of his behaviour on others and to understand the emotional and psychological effect his actions have on his victims. She says that while overall the defendant's several conditions do not excuse or justify his offending, they do give some explanation for his repeated offending in the similar manner in which he offends. She emphasises the need for prioritisation in his psychological treatment and considers the defendant a moderate to high risk of re-offending if he does not receive appropriate treatment. The defendant is now supported under the NDIS scheme. As I understand it, that will allow for some psychological treatment while in prison, and support directed towards preparing him for living in the community with his disability. Counsel outlined the difficulties the defendant faces in prison. Because he is now effectively blind and because of the nature of the construction of the various units, in order to accommodate his situation he is detained in the maximum security division despite having minimum security clearance. Being in that section, he has experienced a considerable number of days in complete lockdown. His means of occupying himself are limited to audio books and listening to the

radio. He is generally immobile and vulnerable, and suffers bullying and taunting. He spends most of his time alone in his cell. He has an appointed inmate carer, the identity of whom changes from time to time and he finds them generally unreliable.

Plainly, general deterrence and specific deterrence are very prominent factors in the sentencing process. The defendant employed grandiose promises of great wealth. He betrayed the trust of these people, one of whom he had become particularly close to. As the State takes no issue with Ms Ferrari's report, it can be taken that the defendant's ASD makes it difficult for him to fully appreciate the impact of his behaviour on others, and his ability to learn from periods of imprisonment. That provides some explanation for his continued offending, but there is nothing to suggest the state of his mental health gives rise to any degree of compulsion or irresistible need to dishonestly take money from people; in particular, those who he befriends. He does understand the wrongfulness of his conduct. As his counsel conceded, the point has been reached where the court must consider the aspect of public protection. All of that said, there are things which operate in the defendant's favour. He pleaded guilty in the lower court at an early stage; that of itself has some significance. The matter has taken a long time to finalise but that is no fault of his. One factor in this was the obtaining of the lengthy psychological report. Those pleas have utilitarian value and have spared the victims from giving evidence. Next, there is no doubt that because of his blindness, mental health state and other health issues, in particular his blindness, he will find continued life in prison much more difficult than a sighted person would. I have already outlined the difficulties he faces and they should be given due weight. The issue of the defendant's record of prior similarly offending needs to be addressed. In short, the impact of an offender's history cannot be so significant as to result in a penalty that is disproportionate to the objective gravity of the offending. There is no principle that requires offenders be punished more heavily each time they reoffend. Previous offending removes some aspects of mitigation. In a case like this, what such a history does show is that the offending is not an uncharacteristic aberration, but a continuing pattern of dishonesty to the detriment of others, and an attitude of disobedience to the law.

Mr Russell, I have explained the facts of these crimes, set out your personal circumstances along with what I see to be the relevant considerations. As I have mentioned, whilst the state of your mental health provides some insight, that you have again extensively lied to people who you have befriended with a view to making money from them which you use to your own purposes is a matter of grave concern. That you may use to spend the money on them, is of no relevance as that is ultimately also for your personal benefit, as distinct from financial gain. I take into account the pleas of guilty and the significant difficulties your effective blindness along with your other mental and general health issues create for you in prison. A lengthy term of imprisonment must be imposed but I will provide an opportunity for parole. You are convicted of the crimes and sentenced to three and a half years' imprisonment to commence on 18 August 2022 when you were first taken into custody. I order that you not be eligible for parole until you have served 25 months of that sentence. I make compensation orders in favour of Michelle Herweynen in the sum of \$75,000, John Herweynen in the sum of \$50,000 and Mustafa Merdivenci in the sum of \$40,471.41.