IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA385/2021
[2023] NZCA 358

BETWEEN	WAYNE ERNEST GOODWIN Appellant
AND	THE KING Respondent

Hearing: 15 June 2023

Court: Wylie, Thomas and Brewer JJ

Counsel: A M S Williams and K E Bucher for Appellant
J M Webber for Respondent

Judgment: 9 August 2023 at 12 pm

JUDGMENT OF THE COURT

The appeals against conviction and sentence are dismissed.

REASONS OF THE COURT

(Given by Brewer J)

Introduction

[1] On 25 November 2019, Judge Zohrab sentenced Mr Wayne Goodwin to 350 hours' community work and to pay reparation of $52,010.29 on one representative

charge of accessing a computer system for a dishonest purpose.[1] He now appeals his conviction and sentence.[2]

[2] Mr Goodwin had pleaded guilty to the charge. Shortly before the sentencing hearing he provided Mr Bamford, his then counsel, with an application to withdraw his plea of guilty. Mr Bamford emailed the application to the District Court on 24 November 2019 and advised that Mr Goodwin would need time to arrange alternative representation. The content of the application is relevant to issues in the appeal against conviction and so we reproduce it:[3]

> Application to withdraw Guilty Plea
>
> 1. At a Judicial Conference on 03 September 2019, both Defendants (Mary and Wayne) instructed the Court via their counsel that the Trial format would be Judge Only.
> This was confirmed to Court by Tony Bamford before 11.00 a.m. on Thursday 05 September 2019.
>
> 2. At 4.00 p.m. on Thursday 12 September 2019, Mary met with her counsel, Steven Zindel, who informed Mary that she now had a Jury Trial.
>
> 3. Steven Zindel had, without any consultation or consent from his client, unilaterally and arbitrarily instructed the Court to change the Trial process. **This is an unlawful act.**
>
> 4. On the morning of Friday 13 September 2019, I visited my counsel Tony Bamford seeking an urgent solution to the **unlawful act** committed by Steven Zindel the previous day. I confirmed with Tony that it was my human right to settle out of Court. I then asked Tony to put forward an outrageous offer to the Crown in order to rescue my highly distressed wife from the unlawfully obtained Jury Trial looming on the morning of Monday 16 September 2019. I offered $50,000.00 distress payment to the Crown in exchange for immediate discharge from the unlawfully obtained Court Jury Trial to prevent any further distress and suffering to my innocent wife.
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> 5. The Crown rejected my offer.

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1 *R v Goodwin* [2019] NZDC 26797 [Sentencing decision]. The offence is created by s 249(1)(a) of the Crimes Act 1961. The maximum penalty is seven years' imprisonment.

2 *Goodwin v R* HC Auckland CRI-2020-442-1, 19 April 2021. The appeal was filed first by mistake in the High Court. Mr Goodwin represented himself. It was not pursued and on 19 April 2021 was deemed abandoned. On 29 June 2021, Mr Goodwin filed a notice of application in this Court for leave to appeal against the High Court's abandonment decision. This was also an error. Mr Goodwin's trial was to be before a jury. His first appeal, therefore, is to this Court. We have treated his notice as a notice of first appeal.

3 (Emphasis preserved).

6. This matter has already been dealt with in Dunedin District Court, yet remains extant.

7. Dunedin Crown Prosecutor, Robin Bates, has already declined to implement proceedings on the matter, as he considers the claim would not succeed in Court due to lack of merit.

8. Jonathon Hauschild (JHBE28) of Nelson Police has resubmitted a corrupted version of the VANZ Dunedin claim to the Nelson District Court. This corrupted version is more erroneous than the first attempt in Dunedin and therefor[e] has a much more unlikely merit of success in court.

9. The Crown came back with a counter proposal after rejecting my offer.

10. It was in the form of Blackmail that the Crown would permit the discharge of my innocent wife and my innocent self, if I would enter a false plea of being guilty to having access to a computer on which I had the opportunity to do some dishonest act. Almost everyone today is in that same position.

11. Included in the Crown offer was the opportunity for Restorative Justice discussions with the Crown in order to provide a solution to their unmerited claims.

12. In order to protect my wife from further distress (already 8 years plus), I reluctantly accepted the Crown counter proposal. However, the core value of the Crown proposal terms were withdrawn on Thursday 19th September via text from number +64273612988, leaving nothing but a Sentencing Hearing obtained by blackmail and fraud. The Crown counter proposal is now **NULL & VOID.**

13. Accordingly, I withdraw my plea.

14. I have been denied the right to be heard before any Court.

Sincerely,

Wayne Ernest GOODWIN

[3] Mr Goodwin represented himself at the sentencing hearing. In an oral judgment, Judge Zohrab considered the matters contained in the application and was not prepared to exercise his discretion to allow Mr Goodwin to withdraw his plea of guilty.[4] The Judge then proceeded to sentencing.

[4] Mr Goodwin's ground for appealing his conviction is that Judge Zohrab erred in declining permission to withdraw the plea of guilty. Mr Goodwin submits that his

4 *R v Goodwin* [2019] NZDC 23608.

decision to plead guilty was not a fully informed decision and there has been a miscarriage of justice as a result such that this Court is required to allow the appeal.[5]

[5] Alternatively, as the basis of his appeal against both conviction and sentence, Mr Goodwin's case is that he was not given a proper opportunity to advance an application for a discharge without conviction. He submits that his conviction should be quashed and his case should be remitted to the District Court for an application for discharge without conviction to be advanced.

Background

[6] Mr Goodwin and his wife, Mrs Mary Goodwin, were both charged with accessing a computer system for a dishonest purpose.

[7] The summary of facts records that the charges arose from their receipt of a war disability pension paid to Mrs Goodwin's father, Mr Ashley Patterson. Mr Patterson died on 11 October 2008. The pension was not payable after his death. Mr and Mrs Goodwin had power of attorney for Mr Patterson and were authorised signatories on his bank accounts.

[8] Veteran Affairs New Zealand (VANZ), responsible for the payment of Mr Patterson's pension, was not told of his death. So, it kept paying the pension fortnightly into his Westpac bank account. Mr and Mrs Goodwin transferred each payment of the pension into their own account. They did not notify VANZ of Mr Patterson's death.

[9] Mr and Mrs Goodwin continued to take the pension payments for just over three years, until 7 November 2011, which was when VANZ found out that Mr Patterson had died.

[10] The total amount of the overpayments taken by Mr and Mrs Goodwin was $54,162.32. VANZ asked Mr and Mrs Goodwin to repay this sum. They refused and claimed that all of the pension payments were credited against a debt ledger being

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5 Criminal Procedure Act 2011, s 232(2)(c).

carried by a credit facility they had arranged for Mr Patterson with a company of which Mr and Mrs Goodwin were the sole directors and shareholders.

[11] Mr and Mrs Goodwin claimed that this credit facility was set up to cover the costs to them of caring for Mr Patterson, although his rest home care was fully paid for by Work and Income | Te Hiranga Tangata | and the Ministry of Health | Manatū Hauora |.

[12] VANZ sought reparation of $52,010.29, being the amount of the overpayment less a funeral grant to which Mr Patterson's estate was entitled.

[13] As the date for the trial neared there were negotiations between Mr Bamford and Crown counsel for a resolution of the charges against Mr and Mrs Goodwin. We will come to the details later. But, a resolution was agreed:

(a) Mr Goodwin would plead guilty and the charge against Mrs Goodwin would be withdrawn.

(b) The Crown would take a neutral stance on an application by Mr Goodwin for a discharge without conviction, provided that Mr Goodwin paid reparation of $50,000 by the sentencing date.

[14] Mr Goodwin entered his plea of guilty on 16 September 2019, the day the trial was due to start.

[15] The Crown discontinued its prosecution of Mrs Goodwin and Mr Webber advised us that she was formally discharged pursuant to s 147 of the Criminal Procedure Act 2011.

[16] Mr Goodwin did not pay any reparation. Instead, he applied to withdraw his plea of guilty in the terms reproduced at [2].

The appeal

[17] Mr Goodwin accepts that he agreed to the resolution with the Crown and that he entered his plea of guilty accordingly. But, he says, a key part of the deal was that there would be a restorative justice process with VANZ during which the issue of reparation would be negotiated.

[18] Mr Goodwin's case is that he understood that once a reparation figure was agreed, he would automatically obtain a discharge without conviction upon payment of that amount. It was on that understanding that he entered his plea of guilty.

[19] However, VANZ decided not to engage in restorative justice. Mr Goodwin's case is that this negated the resolution agreed with the Crown.

[20] Mr Goodwin is critical of the advice given to him by Mr Bamford. Accordingly, he waived privilege and both he and Mr Bamford provided affidavits and were cross-examined before us.

[21] Mr Goodwin's affidavit evidence is that Mr Bamford did not explain the restorative justice process to him. Neither did he explain the legal test for a discharge without conviction. As a result, he entered his plea of guilty under a fundamental misapprehension as to the effect of the agreed resolution.

[22] Mr Goodwin also deposes that he mistakenly believed that restorative justice would be organised and facilitated by the Crown. There would be someone acting like a judge who would run the process and deal with any factual disputes. Therefore, when he was advised that there would not be a restorative justice process, he interpreted that as the Crown simply refusing to uphold the agreed resolution now that it had secured his guilty plea.

[23] Mr Goodwin accepted that he had a meeting with Mr Bamford after he had received the advice that there would not be a restorative justice process. But, he deposed, Mr Bamford did not explain why restorative justice could not proceed. Nor did he explain that restorative justice was not facilitated by the Crown. He did not address Mr Goodwin's concern that the Crown was reneging on its agreement.

[24] Mr Goodwin also deposed that, notwithstanding his guilty plea, he has a "valid defence to the charge". However, the only description he gives of the defence is:

> 26. I deny the offending. There was no overpayment and my wife and I were entitled to transfer the funds from her father's account to our account to satisfy a debt which was owing. In doing so, we did not act dishonestly or unlawfully.

[25] In cross-examination, Mr Goodwin said that extracting his wife from the proceedings was a prime part of the resolution negotiation. He agreed that Mr Bamford's advice was that to achieve a resolution, he would have to repay the overpayment. But he did not accept that this meant he would have to repay $50,000. When confronted with the statements in Mr Bamford's affidavit that he had advised Mr Goodwin he would have to pay $50,000, Mr Goodwin, although not denying receiving the advice, repeatedly said that he always understood that the amount was negotiable. He said he was prepared to pay up to $50,000 if that was the outcome of the restorative justice discussions.

[26] Mr Goodwin also maintained his position that the agreement with the Crown would not only see Mrs Goodwin discharged, but that he would not be convicted if he paid the negotiated sum.

[27] In cross-examination by Mr Webber on the subject of what advice Mr Goodwin received from Mr Bamford after Mr Goodwin was told there would not be a restorative justice process, there was this exchange:

> Q. No, let's take a step back. You got the message saying no restorative justice. Agreed?
>
> A. Correct.
>
> Q. You contacted Mr Bamford, agreed?
>
> A. Yes, yes.
>
> Q. You have a discussion about what happens next?
>
> A. Yes.
>
> Q. He says, even if restorative justice did not take place, it's important that you arrange to borrow and pay the $50,000 reparation sum as that was the only basis upon which he could see you getting a discharge without conviction?

A. If the Crown decide in its wisdom to cancel the agreement that they made…

Q. No.

A. I will not plead guilty, I will cancel that as well.

Q. Mr Goodwin you're just not answering my questions, you're just repeating what you want to say. My question was, after RJ had been, or you knew RJ wasn't happening, Mr Bamford advised you that it was still important that you borrow and pay the $50,000 reparation sum if you were to obtain a discharge without conviction.

A. Yes, he did.

Q. He did right.

A. Along those lines anyway.

Q. And he says you understood that and he believed you were going to explore options to borrow the money so that the payment could be made prior to sentencing?

A. Yes.

Q. That's what you left him believing, right?

A. That sounds correct.

Q. Yep. And he even said that, look if you couldn't get the full sum all at once, if you could commit to a repayment arrangement over a reasonably short period, you might still be able to achieve the discharge without conviction?

A. It was discussed as well, yes.

[28] Later, Mr Goodwin accepted that on 9 October 2019 he told the writer of the PAC report that he had offered to pay $50,000 conditional upon being discharged. He then said that was his initial offer and that when it was not accepted by the Crown prosecutor and the agreed resolution was reached, the $50,000 became a maximum figure.

[29] In re-examination, Mr Williams referred Mr Goodwin to Mr Bamford's email to the Crown prosecutor (quoted at [33] below) agreeing to the Crown's proposal in which it was said that the reparation issue could be dealt with in the course of any restorative justice process. Mr Goodwin's response was to the effect that he understood that quantum would be negotiated.

[30] Mr Goodwin was also cross-examined on whether he had a defence to the charge. We think it fair to observe that no clear defence was articulated despite Mr Webber's endeavours to elicit one. It might be inferred that Mr Goodwin claims ignorance of whether the pension was payable after the death of his father-in-law.

[31] We turn now to Mr Bamford's evidence, beginning with his affidavit.

[32] Mr Bamford deposes that he met with Mr Goodwin on a number of occasions to prepare for the trial. His advice on Mr Goodwin's proposed defence of claim of right was not optimistic. As the trial neared, Mr Goodwin voiced increasing concern about his wife going through a trial. Mr Bamford's advice was that if a deal was to be offered it would have to include repayment in full of the overpaid sum:

> 7. … I discussed a proposal where that would be offered on the basis that the charges against both him and his wife would be withdrawn once payment in full was made. He agreed and confirmed that I was instructed to offer such a resolution to the Crown.

[33] On Friday, 13 September 2019, with the trial due to start on Monday, 16 September 2019, Mr Bamford put the proposal to Crown counsel, Mr Cameron. He recorded it by email:

> Further to our telephone discussions this morning, I have instructions from Mr Goodwin to put to the Crown the following proposal to resolve this matter:
>
> 1. The defendants will pay the sum of $50,000 to the Veterans Association of NZ ("VANZ") to settle any claim for overpayment of Mr Patterson's pension fully and finally ("the agreed repayment sum");
> 2. The payment will be made on or before 30 September 2019 to an account nominated by VANZ;
> 3. Mr Goodwin will enter a plea of guilty to the charge he faces on Monday;
> 4. No conviction will be entered pending payment of the agreed repayment sum;
> 5. If payment of the agreed repayment sum is made on or before 30 September 2019 then charges against both defendants will be withdrawn by the Crown.
>
> Please confirm if the above terms of resolution are acceptable?

[34] At 1.30 pm Mr Cameron replied:

> The Crown position is the entering or otherwise of a conviction should be the result of a Court process and make the following counter proposal:
>
> 1. Mr Goodwin enters a guilty plea on Monday,
> 2. Crown withdraws the charge against Mrs Goodwin,
> 3. No conviction is entered,
> 4. Remanded for RJ, during which or independently Mr Goodwin … may make reparation payment of $50,000,
> 5. Crown undertake to adopt a neutral position on any s106 application advanced by Mr Goodwin (if reparation of $50,000 is paid prior to sentencing).
>
> On the face of things the prospects of a discharge without conviction would seem high on these grounds.

[35] Mr Bamford deposes that he then met with Mr Goodwin and they discussed the Crown's proposal. Mr Bamford explained that the key issue was ensuring the payment of $50,000 to VANZ. He deposes also that he outlined what a restorative justice process involved and that if agreement on reparation was finalised in that forum that would likely help with securing a discharge without conviction.

[36] Mr Bamford deposes:

> 9. I always give a summary of the fact that restorative justice is operated by independent facilitators and required victims to agree to participate. I find it hard to accept that Mr Goodwin thought it was operated by the Crown. In any event, it was clear from the email from Mr Cameron, and I also stressed this in our discussion on the Friday afternoon, that whether or not it was part of restorative justice, Mr Goodwin had to ensure that the $50,000 agreed sum was paid if he had any prospect of securing a discharge without conviction. He advised me that he was reasonably confident that he would be able to borrow the money.

[37] Mr Bamford says that Mr Goodwin instructed him to accept the Crown's proposal. Mr Bamford did this in an email to Mr Cameron sent at 4.54 pm that same day:

> I now have confirmed instructions from Mr Goodwin to agree to the proposal. As I see it the reparation issue will be able to be dealt with in the course of any restorative justice process.

[38] Importantly, Mr Bamford sent the email chain to Mr Goodwin at 4.58 pm on 13 September 2019, saying that he would telephone Mr Goodwin on the Sunday.

[39] Mr Bamford deposes that there was a meeting on the Sunday. Originally this was intended to be a final briefing. But, since resolution had been agreed, that was the topic of discussion. Mr Bamford said he talked again about the risk of going to trial and the benefit gained of having the charge against Mrs Goodwin withdrawn. Mr Bamford further deposes:

> 11. I explained that there was the possibility of a meeting between him and a representative of the Veterans Affairs as part of restorative justice where he could apologise and where he might gain some acknowledgement that the VANZ had contributed to the whole situation by not regularly reviewing the payment eligibility of their members.

[40] Mr Bamford confirms that restorative justice did not take place and that Mr Goodwin contacted him about that. He deposes:

> 13. Mr Goodwin contacted me after being informed that restorative justice was not able to proceed. I explained that even if restorative justice did not take place it was important that he arranged to borrow and pay the $50,000 reparation sum, as that was the only basis upon which I could see him getting a discharge without conviction.
>
> 14. Mr Goodwin understood that, and I believed that he was going to explore options to borrow the money so that this payment could be made prior to the sentencing. I explained that even if he were not able to pay the full sum, if he could commit to a repayment arrangement over a reasonably short period of time that might achieve the same end.

[41] Mr Bamford also confirms that a few days before the sentencing hearing Mr Goodwin told him that he wanted to revert to a plea of not guilty and that he emailed Mr Bamford the application we reproduce at [2]. Mr Bamford met with Mr Goodwin the next morning and advised him to think carefully about proceeding with the application. He told Mr Goodwin that if the application was proceeded with, he would be unable to continue to act for him.

[42] In cross-examination Mr Bamford said that he met with Mr Goodwin prior to trial probably eight or nine times. He also had telephone calls with him.

[43] It was put to Mr Bamford that Mr Goodwin was prepared to pay up to $50,000. Mr Bamford did not accept that was a fair assessment because the Crown had made it very clear that $50,000 would have to be paid.

[44] As to the process of restorative justice, Mr Bamford said he would never have given any suggestion, or implied, that the facilitator was there to make a decision. Indeed, he indicated to Mr Goodwin that victims, such as VANZ, might not wish to participate.

[45] Mr Bamford accepted that participating in restorative justice was important for Mr Goodwin. While he understood that being paid $50,000 was critical to their position, there were other issues relating to the inadequacies of VANZ's record-keeping. Mr Goodwin wanted to get an acknowledgement that VANZ had not been as careful as it might have been.

[46] Mr Williams cross-examined Mr Bamford on Mr Goodwin's reaction to being told the restorative justice meeting would not proceed:

> Q. He expressed to you concern that this was the prosecution reneging on the deal, didn't he?
>
> A. No, he didn't put it in those terms.
>
> Q. In what terms did he put it in?
>
> A. Well, he was concerned that it didn't proceed, and I said to him, look, it's not going to derail our potential s 106 application. What you need to do still is to borrow the $50,000 and make sure it's paid, and then I had a further discussion about the possibility of a time payment arrangement.

[47] On the issue of what Mr Goodwin was told about obtaining a discharge without conviction there was this exchange:

> Q. As another part of the proposal or the resolution agreement, the Crown will take a neutral position on any s 106 application or application for a discharge without conviction. Did you explain to Mr Goodwin that there was a legal test that needed to be met and it would be a matter for the Judge, or did you explain to him that if the money was paid, given the approach that the Crown were taking, he would likely be discharged without a conviction?
>
> A. I indicated to him that it was going to be a matter for the Judge ultimately. But there was the hope, and I didn't give him any sort of percentage assessment of the chances of getting a discharge without conviction, but we discussed the fact that at his age, with no prior history at all, a conviction for a charge like this might have some implications long-term and we'd need to look at that because that was the test. That's probably as much as I said about it.

Discussion

Conviction appeal

[48] We must allow Mr Goodwin's appeal against conviction if we are satisfied that a miscarriage of justice has occurred for any reason.[6] In this case, that means being satisfied that Mr Goodwin's plea of guilty, which constitutes a "trial" under the Criminal Procedure Act, was an error, irregularity, or occurrence that created a real risk that the outcome of his trial was affected, or it resulted in an unfair trial.[7]

[49] Mr Goodwin argues that the error resulting in a miscarriage in his case was the refusal of the Judge to allow his application to withdraw his plea. Applications to withdraw pleas of guilty in the first instance court (pre-sentence withdrawals) are governed by s 115 of the Criminal Procedure Act 2011, which provides:

> (1) A plea of guilty may, by leave of the court, be withdrawn at any time before the defendant has been sentenced or otherwise dealt with.

[50] The touchstone for pre-sentence withdrawal is that it must be in "the interests of justice" to grant the application.[8] In *R v Kihi,* the following test was adopted:[9]

> [17] Where application is made in the High Court to withdraw a guilty plea before sentence, the touchstone is whether the interests of justice require leave to be granted… . Although the discretion is not lightly exercised, several particular grounds (not intended to be exhaustive) have been recognised at least … as justifying the grant of leave:
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> a) Where the accused has "not really" pleaded guilty;
>
> b) Where in entering the plea the accused acted upon a material mistake;
>
> c) Where the proceedings were defective or irregular;
>
> d) Where there is a clear defence to the charge.
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> [18] The onus of making out the relevant grounds rests upon the accused but where the accused has merely repented of the plea, without more, the application will not be granted.

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6 Criminal Procedure Act, s 232(2)(c).
7 Section 232(4)–(5).
8 *R v Ripia* [1985] 1 NZLR 122 (CA) at 127.
9 *R v Kihi* CA395/03, 19 April 2004 (citations omitted).

[51] This Court has said previously that where a defendant fully appreciated the merits of his position, and made an informed decision to plead guilty, the resulting conviction will stand.[10]

Did the Judge err?

[52] We are satisfied that Mr Goodwin understood the bargain he reached with the Crown. He was advised by experienced counsel and he authorised Mr Bamford, on the Friday before the trial, to make the proposal quoted at [33]. If the Crown had accepted the proposal then, upon payment of $50,000 reparation, the charges against both him and his wife would have been withdrawn. But the Crown did not accept the proposal and made a counter-proposal.

[53] The counter-proposal, quoted at [34], was simple and clear. The requirement that $50,000 be paid was explicit. Mr Bamford met with Mr Goodwin and discussed it. We accept Mr Bamford's evidence as clear, logical and entirely as would be expected of counsel of his experience.

[54] We find that Mr Goodwin instructed Mr Bamford to accept the Crown's counter-proposal — having received clear advice about the nature of restorative justice, and that paying $50,000 would be a key factor in persuading the Judge to discharge him without conviction.

[55] Mr Goodwin gave us the impression of a man who holds strong views and is able to justify them to himself. It might be that he did think the restorative justice process would give him a chance to talk VANZ into accepting reparation of less than $50,000. But the fact that he was not given that chance is not a ground for holding that his entering of the guilty plea caused a miscarriage of justice. In cross-examination he said more than once that he would have paid $50,000 if that was the outcome of the restorative justice meeting with VANZ.

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10 *R v Le Page* [2005] 2 NZLR 845 (CA) at [16].

[56] We do not accept that Mr Goodwin, despite Mr Bamford's advice, thought that the restorative justice process would be a quasi-judicial one. Even if he did, he was also of the understanding that he would have to pay $50,000 if that was necessary.

[57] We accept Mr Bamford's evidence that when Mr Goodwin contacted him after finding out that restorative justice would not proceed he did express concern. But Mr Bamford reassured him that this would not "derail" the application for discharge without conviction. However, Mr Bamford stressed the need for Mr Goodwin to borrow and pay the $50,000. In the passage of cross-examination we quote at [27], Mr Goodwin in effect accepts Mr Bamford's evidence on this point.

[58] There is no evidence, however, that Mr Goodwin took any steps to obtain $50,000.

[59] Mr Goodwin's application to withdraw his guilty plea, reproduced at [2], is indicative of Mr Goodwin's approach to the case. First, he puts the reason for instructing Mr Bamford to make the settlement proposal to the Crown as the need "to rescue my highly distressed wife from the unlawfully obtained Jury Trial looming…".

[60] Mr Goodwin describes the Crown's counter-proposal as a form of blackmail which he reluctantly accepted to protect his wife. However, the withdrawal of the restorative justice process left nothing "but a Sentencing Hearing obtained by blackmail and fraud".

[61] Mr Goodwin's bitterness about the process that led to him and his wife being charged is clear. His concern at the loss of the chance to put his views to VANZ at restorative justice is also clear. But equally, his clear motive in making his proposal and accepting the Crown's counter-proposal was to end the case against his wife. He achieved that.

[62] Nowhere in the application does Mr Goodwin allege that part of the agreement was that he would also be discharged without conviction upon payment of reparation.

[63] We conclude that having obtained his wife's discharge, having lost the opportunity to engage with VANZ at restorative justice, and having taken no steps to obtain the reparation sum, Mr Goodwin decided he did not want to be sentenced. He knew from Mr Bamford's advice that without the payment of reparation he would not be discharged without conviction.

[64] Further, Mr Goodwin has not been able to point to a defence to the charge. Mr Bamford had advised him that the likelihood of a claim of right defence succeeding was not strong. And that was proper advice. Mr Goodwin was unable, before us, to do more than assert an entitlement to the overpayment.

[65] We conclude that the Judge did not err in refusing Mr Goodwin's application to withdraw his guilty plea. Mr Goodwin did not enter the plea acting upon a material mistake. He has no clear defence to the charge. The interests of justice did not require the Judge to grant leave. Accordingly, we are satisfied there has not been a miscarriage of justice.

[66] The appeal against conviction cannot succeed.

Conviction and sentence appeal

[67] Mr Goodwin's alternative ground of appeal, namely that he was effectively deprived of the opportunity to make an application for a discharge without conviction, is both an appeal against conviction and an appeal against sentence.

[68] A court considering a discharge without conviction under s 106 of the Sentencing Act 2002 should follow a three-step process which addresses the guidance given in s 107. The steps are:[11]

(a) an examination of the gravity of the particular offence, taking into account all aggravating and mitigating factors of the offending and the offender;

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11 *A v R* [2011] NZCA 328 at [22].

(b) identification of the direct and indirect consequences of convictions being entered; and

(c) a determination of whether those consequences are "out of all proportion" to the gravity of the offence.

Only then, if that threshold is met, does the Court move to consider the residual discretion under s 106.[12]

[69] The Judge considered whether a discharge without conviction was warranted:[13]

> [13] There could be no justification for anything like a s 106, because this is serious offending, and there are no particular consequences for you, whilst the gravity of the offending is serious as well.
>
> [14] So, a conviction is entirely warranted. You are ordered to pay reparation of $52,010.29 at a rate agreed with the registrar, and you are ordered to do 350 hours of community work. As I say, one could justify a prison sentence, but it does not make sense in terms of sentencing you to prison, given your age and stage, and circumstances. So, notwithstanding your gross dishonesty, I think it is appropriate to deal with you in a merciful fashion.

[70] However, in his affidavit, Mr Goodwin deposes that he did not actually make an application for a discharge without conviction. That was because he did not have a lawyer and did not know the legal test for a discharge. If Mr Goodwin did not make an application for discharge, then the Judge, as part of his sentencing process, turned his mind to the possibility anyway.

[71] Mr Bamford's affidavit and evidence make it clear that he repeatedly advised Mr Goodwin that payment of $50,000 in reparation was essential if an application for discharge was to be made. The other factors he identified as being favourable to Mr Goodwin were Mr Goodwin's age and lack of a criminal record. The pre-sentence report did not disclose any other factors. None were identified by Mr Williams in furtherance of the appeal.

[72] An appellate Court is required to reach its own view as to whether the direct and indirect consequences of convictions are out of all proportion to the gravity of the

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12 *Z (CA 447/2012) v R* [2012] NZCA 599, [2013] NZAR 142 at [27].
13 Sentencing decision, above n 1.

offending. If it accepts the statutory threshold has been met, the Court must determine whether the Court at first instance erred in principle when exercising its discretion to grant or refuse to grant a discharge.[14]

[73] First, we consider the Judge's sentence to be well within the available range. The offending took place over three years, the amount taken was significant, there was no reparation paid and there was certainly no remorse.

[74] Second, in these circumstances there is no prospect of a discharge without conviction. The factors of age and clean record are insufficient. The exercise prescribed by s 107 of the Sentencing Act prohibits a discharge without conviction unless the Court is satisfied that the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence. There is nothing advanced in the appeal which points to a reasonable possibility of that test being satisfied.

[75] We see no error on the part of the Judge.

Decision

[76] The appeals against conviction and sentence are dismissed.

Solicitors:
Crown Solicitor, Nelson for Respondent.

[14] *Edwards v R* [2015] NZCA 583 at [6].