IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CRI-2014-004-002293
[2015] NZHC 2799

THE QUEEN

v

PAUL NEVILLE BUBLITZ
BRUCE ALEXANDER MCKAY
LANCE DAVID MORRISON
PETER LOUIS CHEVIN
RICHARD TIMOTHY BLACKWOOD

Hearing:	28 October 2015
Further evidence:	3 November 2015
Appearances:	B Dickey and B Finn for Crown P Davison QC for Mr Blackwood F Pilditch for Mr Bublitz G Bradford and H Coupe for Mr McKay No appearance for Mr Morrison No appearance for Mr Chevin
Judgment:	11 November 2015

JUDGMENT OF VENNING J
PRE-TRIAL APPLICATION FOR ADJOURNMENT OF TRIAL

This judgment was delivered by me on 11 November 2015 at 4.00 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

Solicitors:	Meredith Connell, Auckland Keegan Alexander, Auckland Cook Morris Quinn, Auckland
Copy to:	P Davison QC, Auckland F Pilditch, Auckland G N Bradford, Auckland L D Morrison, Auckland A Lloyd, Auckland

Introduction

[1] Mr Bublitz, together with four co-accused, is for trial in this Court on 9 February 2016. He faces 49 charges laid by the Financial Markets Authority (FMA): 28 under s 220 of the Crimes Act 1961; 15 under s 242 of the Crimes Act; and six charges under s 377 of the Companies Act 1993. Twelve weeks has been set aside for the Judge alone trial.

Adjourned application

[2] Mr Bublitz applies to adjourn the trial on the basis he is presently unrepresented and there are numerous defects and deficiencies in disclosure. He seeks an adjournment to enable the issues to be addressed. Although they are not expressly referred to in the application Mr Bublitz says in his affidavit that he also wishes to make other pre-trial applications.

[3] Mr Bublitz's application is formally opposed by the Crown. While the Crown opposes the adjournment application it acknowledges that, given the nature of the charges and the scope of the trial, it will be difficult for Mr Bublitz to represent himself. If Mr Bublitz was able to obtain representation the trial would likely run more smoothly for the prosecution and the other defendants.

[4] Mr Blackwood is anxious to ensure the matter is resolved as expeditiously as possible. But he considers that, given the central role Mr Bublitz will play in the case he should be afforded a final opportunity to arrange appropriate representation to enable him to not only present an effective defence but also to ensure the efficient conduct of the trial as a whole.

[5] Mr Chevin has taken no steps in response to the application.

[6] Mr McKay abides the order of the Court but without prejudice to any issue of delay that may arise.

[7] Mr Morrison faces seven charges. He has filed a memorandum confirming that he supports Mr Bublitz's application, particularly insofar as Mr Bublitz seeks time to make further pre-trial applications.

[8] At the conclusion of the hearing before me on 28 October 2015 I granted leave for Mr Bublitz to provide further and more detailed evidence to explain how the adjournment he sought would enable him to fund his representation. The Court has received further affidavit evidence from Mr Bublitz and Mr Babington. The Crown filed a brief memorandum in response to the evidence suggesting that the position remained unsatisfyingly uncertain.

[9] There are a number of preliminary issues.

Legal aid

[10] Mr Bublitz initially engaged Lee Salmon Long and Mr Gedye QC to represent him. They were granted leave to withdraw on 1 April 2015. Mr Corlett then entered an appearance on behalf of Mr Bublitz. Mr Bublitz had earlier made an application for legal aid in late January or early February 2015. Ultimately the application for legal aid was declined on 25 August 2015. Mr Bublitz explains in his first affidavit that, while he understood legal aid could be granted in principle subject to him finding a lawyer to represent him, he was not able to find a lawyer to represent him on legal aid. While he has approached a number of lawyers some do not undertake legal aid and others would not accept instructions for such a long and complex trial on legal aid. Mr Corlett is not a legal aid service provider. He was granted leave to withdraw on 30 September 2015 leaving Mr Bublitz without representation.

[11] Mr Pilditch only appears for the limited purposes of this application.

[12] Legal aid was formally declined on 25 August 2015. Mr Bublitz has taken no steps to appeal that decision. If the matter proceeds to trial the effect of s 30(4) of the Sentencing Act 2002 is that Mr Bublitz is deemed to have refused or failed to exercise his right to legal representation.

Pre-trial applications

[13] As noted Mr Bublitz says the following pre-trial applications are yet to be made:

(a) an application to admit Mr Wevers' FMA interview transcripts as hearsay evidence. Mr Wevers committed suicide shortly after being charged by the FMA;

(b) an application seeking better particularisation of the charges; and

(c) completion of third party disclosure requests.

[14] None of those matters would prevent the trial proceeding in February 2016. No such applications have in fact been filed. If and when such applications are filed they could be dealt with sufficiently in advance of trial to enable trial preparation to be completed.

Disclosure

[15] To support his application for adjournment Mr Bublitz also filed an affidavit of Ms Payne, a forensic accountant and computer forensic analyst, who was engaged by Mr Morrison to retrieve documents provided electronically by the FMA in relation to the case. Ms Payne has annexed her report to the affidavit. The report highlights a number of difficulties that she perceives with the documents received from the FMA by way of disclosure, both physical and electronic. She concludes that the documents are the most disorganised disclosure that she has ever received; that the documents contained thousands of pages of unnecessary duplications and many more thousands of pages of "rubbish". While she has been able to establish there are numerous missing documents it is unknown what further documents should have been supplied. She considers the data about the documents contained in the indexes is inconsistent and erroneous.

[16] In response to Ms Payne's affidavit the Crown have filed two affidavits: the first by Ms Schwarz, a litigation support co-ordinator and the second by Mr

Scheepers, a senior investigator employed by the FMA, who was involved in the disclosure process. Ms Schwarz suggests that it is likely many of the issues Ms Payne described were as a result of the different software used by the parties. Ms Payne apparently used QD documents software. It is incompatible with the summation load files that were provided. Ms Schwarz notes the FMA provided disclosure to all defendants in three formats: summation, HTML and searchable PDF format.

[17] Ms Schwarz accepts that there is duplication of a large number of documents. She explains that is because the FMA's practice is to use different document numbers for different documents where, although on the face the documents are identical, they are provided from a different source. In a case of this nature the reason for doing so is obvious.

[18] Mr Scheepers has provided detail of the extensive disclosure made by the FMA during the course of the process.

[19] Ms Schwarz concludes that the majority of the issues identified by Ms Payne's report could be resolved in a month. During the course of submissions Mr Dickie advised that he understood that progress had been made in the time following Ms Schwarz's affidavit and that the period of a month she had referred to was still realistic.

[20] In light of the matters contained in Ms Schwarz's and Mr Scheepers' affidavits in response to Ms Payne's report I am satisfied that the issues regarding disclosure are not of themselves sufficient to support an adjournment of the trial. In a case of this nature it is inevitable that there will be issues with the disclosure process because of the extent of the documentation. However, all material issues should be resolved in sufficient time prior to trial to enable the trial to commence in February 2016.

Representation

[21] The real issue for the Court is whether the trial should be adjourned to enable Mr Bublitz to obtain representation or, in the alternative, to provide further time for him to prepare to represent himself at trial.

[22] Mr Pilditch referred to the decision of the Supreme Court in *R v Condon*.[1] In that case the Court referred to the High Court of Australia's decision in *Dietrich v R*.[2] In that case the Court said:[3]

> A trial judge faced with an application for an adjournment or a stay by an unrepresented accused is therefore not bound to accede to the application in order that representation can be secured; a fortiori, the judge is not required to appoint counsel. The decision whether to grant an adjournment or a stay is to be made in the exercise of the trial judge's discretion, by asking whether the trial is likely to be unfair if the accused is forced on unrepresented. For our part, the desirability of an accused charged with a serious offence being represented is so great that we consider that the trial should proceed without representation for the accused in exceptional cases only. In all other cases of serious crimes, the remedy of an adjournment should be granted in order that representation can be obtained.

[23] Dealing with the issue of fair trial rights where an accused is deemed to have waived the right to representation by operation of s 30 of the Sentencing Act the Supreme Court said in *Condon*:

> [80] In contrast, if the accused makes an informed choice to go to trial without a lawyer, or is rightly refused legal aid, or by conduct creates a situation in which, on a proper balancing of the various interests, further delay in the holding of the trial is not to be tolerated, there will have been no breach of the s 24 rights. But even in such circumstances an appeal Court must still examine the overall fairness of the trial, as was done in the New Zealand cases cited earlier, because the right to a fair trial cannot be compromised – an accused is not validly convicted if the trial is for any reason unfair. If there has been no breach of the appellant's right to representation, because the trial Court was properly "satisfied" in terms of s 30(2) of the Sentencing Act, the conviction will not be set aside unless the appellant can persuade the Court that the trial was unfair because the defence could not, in the particular case, have been adequately conducted without the assistance of counsel. In some circumstances the manner in which the accused through his or her own choice or conduct came to be unrepresented may be relevant to the assessment of fairness. It is unnecessary to say more about that in the present case.

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1 *R v Condon* [2006] NZSC 62, [2007] 1 NZLR 300.
2 *Dietrich v R* (1992) 177 CLR 292; 109 ALR 385.
3 *R v Condon*, above n 1, at [55], citing from *Dietrich v R*.

[24] It is apparent from that passage that, whatever the reason the defendant is unrepresented, the Court must still ultimately be concerned with the overall fairness of the trial.

[25] Mr Bublitz's case for adjournment is advanced on the basis that, given time, he will be able to access funds to engage a lawyer to represent him at trial. Mr Pilditch acknowledged however, that if, even given time, Mr Bublitz was unable to obtain representation, the realistic prospect was that he may ultimately be required to represent himself. While Mr Pilditch noted the issue would still be whether, in those circumstances, Mr Bublitz could have a fair trial he argued the adjournment should be granted in any event as further time itself would go some way towards addressing the prejudice that Mr Bublitz would face in representing himself.

[26] Mr Bublitz's first affidavit in support of his submission that given time he would be able to obtain sufficient funds to procure representation was in very general terms. Mr Bublitz says nothing about his personal financial position other than that the failure of a property transaction in early 2015 led him to serious financial difficulty. While he went on to provide some detail of a transaction involving GEP Trust (GEP), and the inability of that trust to access funds, he did not explain his relationship with GEP other than to say he was contracted to work for it.

[27] Mr Bublitz then went on to explain the likely source of funds for his representation as follows:

> 78. While I cannot presently fund my defence, since the time I was charged I have been working on property developments for GEP which are approaching completion in early 2016. When the Albany property/Kingston settlement fell through, GEP had to work to rebuild itself.
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> 79. It did so by focusing on the development of 10 sections the Trust owns in Queenstown. I am managing the development of these sections and the subsequent sales of the newly built homes and sections. They are high end houses and in the current Queenstown market I have confidence that they will sell and settle quickly on completion.
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> 80. Four are due for completion by Christmas this year. There is a building programme for the remaining six properties that I expect to complete during the first six months of 2016. Of these six, two already have plans submitted for consenting.

> 81. I am also working for another developer which is independent of the GEP Trust, again developing properties in Queenstown. I am managing the build of a minimum of 25 houses. Six are under construction and due for completion in February 2016. Again I expect to be able to access funds once these properties settle.
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> 82. It was on the basis of these projects that I have tried to secure a lawyer privately. However they were not prepared to accept my instructions on the basis of funds that would not begin to be available until after the trial started. There is a large amount of preparation that must be completed now and this has caused the problem.
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> 83. I have been working on these developments on the basis that I would be remunerated for my contribution of expertise and experience, and would receive payment on settlement as the properties were completed. However due the current trial I have sought loans from these parties, which are they prepared to offer me, but which is predicated on the settlement of the purchase of these properties in the first half of 2016. The loan is structured so that I can draw down on these funds as soon as the property settles, *all* creditors are paid, and *net* proceeds are available.

[28] In his further affidavit filed with leave Mr Bublitz has provided more detail of his financial position. He has deposed that he has no personal or real property. He lives in rented accommodation and lives on "service" or consultant's fees. While he is a beneficiary of the Brunswick Trust, the trust has no assets apart from a loan to another trust, the Nicholson Trust. The discretionary beneficiaries of GEP represent the interests of Mr Bublitz, John Babington and Chris Cook. In Mr Bublitz's case this is through the Nicholson and Hobson Investment Trusts. Mr Bublitz's family (but not him personally) are beneficiaries of the Nicholson and Hobson Investment Trusts. The trusts do not hold real assets.

[29] GEP is carrying out a development in Queenstown. Mr Bublitz has provided further details of that development in his latest affidavit. Some of the information is commercially sensitive.

[30] Mr Bublitz has also disclosed his family has interests in a joint venture. LF Services Limited is a nominee for the joint venture in which the Nicholson and Hobson Investment Trusts are partners. Mr Bublitz contracts his services to LF Services Limited. GEP has agreed to advance to LF Services Limited (guaranteed by Mr Bublitz) up to $500,000 to meet litigation services to LF Services Limited.

[31] Mr Babington has also sworn an affidavit confirming the existence of a further agreement between LF Services Limited (which he is a director and sole shareholder of) and a further developer involving projects that are expected to be completed towards the end of 2016. Mr Bublitz expects to derive further funding from the advice and assistance provided to the developer.

[32] There is some force in the submission made for the Crown that despite the further information the position of whether Mr Bublitz will be able to fund representation is still far from certain. The inter-relationship with the various parties, the fact that the funding is contingent on the successful completion of certain developments and is also dependent on the action of entities such as LF Services which Mr Bublitz has no direct control over remains of some concern.

[33] However, the further evidence does disclose that the developments referred to are at an advanced state. There are loan and other documents exhibited before the Court including copies of trust deeds, bank statements and the like sufficient to satisfy the Court that the arrangements referred to by Mr Bublitz and Mr Babington exist. There is a reasonable prospect that Mr Bublitz will receive funding from those sources. Whether it is sufficient to fund his defence entirely or whether it will only assist him on a limited basis it is impossible to say at this stage.

[34] On balance, given the further information now before the Court I am satisfied that the interests of justice support the vacation of the fixture currently scheduled for February 2016. I have come to that conclusion for the following reasons:

(a) Although the alleged offending in issue goes back to 2009, the charges were only initially lodged in the District Court in September 2014. Since that date disclosure has, as noted, been extensive;

(b) It will be possible to reschedule the fixture to 8 August 2016, a delay of only six months.

(c) Mr Bublitz faces an extensive number of charges. Unlike Mr Petricevic in the Bridgecorp trial who faced a limited and focused

number of charges, Mr Bublitz faces 49 charges. He should be given further time to prepare to face those charges if he has to represent himself.

(d) Mr Bublitz is a principal participant in the failure of Ex-MFL Limited, previously known as Mutual Finance Limited (MFL). He is the central defendant in the trial.

(e) The fair trial rights of not only Mr Bublitz but also of other defendants will be affected by Mr Bublitz's role in the proceeding. That is reflected by the support of the adjournment by Mr Blackwood and Mr Morrison in particular.

(f) I accept that Mr Bublitz has not sat on his hands. He would prefer to be represented and has taken some steps to achieve representation in these proceedings.

[35] For those reasons Mr Bublitz should be given time to pursue further opportunities to obtain legal representation. The adjournment for a further six months will enable him to do that and also, will give him further time to prepare for trial in the event that, for whatever reason, he is not able to be represented (or fully represented) throughout the trial process.

[36] The application for adjournment is granted. The trial will now commence on 8 August 2016 (12 weeks allocated).

[37] To ensure that matters remain on track this case will be returned to a pre-trial callover at 9.00 am on 17 February 2016. The accused are remanded on existing terms of bail to that date. Mr Bublitz is to prepare an updating memorandum for that call.

[38] The recent affidavits of Mr Bublitz and Mr Babington dated 3 November 2015 contain sensitive commercial information. There will be an order sealing those

affidavits. They are not to be read except by a High Court Judge or order of a High Court Judge.

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Venning J