IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA720/2017
[2018] NZCA 604

BETWEEN	MATTHEW JOHN YOUNG Appellant
AND	THE QUEEN Respondent

Hearing: 23 October 2018

Court: Brown, Courtney and Katz JJ

Counsel: R A A Weir for Appellant
E J Hoskin for Respondent

Judgment: 18 December 2018 at 3.30 pm

JUDGMENT OF THE COURT

A The application for an extension of time for filing a notice of appeal is granted.

B The appeal against conviction is dismissed.

C The appeal against sentence is dismissed.

REASONS OF THE COURT

(Given by Courtney J)

Introduction

[1] In April 2017, Matthew Young pleaded guilty to 13 charges of dishonesty and fraud.[1] There was a disputed facts hearing in August 2017 before Judge Cocurullo, who had case managed the proceeding since 2016. The Judge sentenced Mr Young in November 2017, imposing sentences totalling four years and 11 months' imprisonment.[2]

[2] Mr Young wishes to appeal both his convictions and sentence but filed his notice of appeal outside the required time; the time for filing the appeal expired on 1 December 2017 but the notice of appeal is dated 6 December 2017 and was accepted for filing by this Court on 18 December 2017.[3] Time for filing the appeal may be extended if it is in the interests of justice to do so.[4] The matter was not addressed by either counsel. However, in his notice of appeal, Mr Young (then resident at Spring Hill Corrections Facility) noted that he did not have counsel acting for him but proposed to instruct counsel once he obtained legal aid and later added that:

> I have attempted to have this appeal completed and filed. My current counsel have advised they cannot file as they may be required to give evidence. I filed an earlier document which was returned to me by the Registry as being on the wrong form. I filed that form based on counsel's advice. I also filed an appeal in the High Court at Hamilton as the matter started prior to the Criminal Procedure Act start date. I now file this form.

[3] We are satisfied from the notice of appeal that Mr Young was aware that he had a limited time within which to file his appeal and that he was attempting to do so but was hampered by not having access to counsel. In these circumstances, and given that the delay was short and there was no objection by the Crown we grant leave to bring the appeal.

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1 Five of dishonestly using a document (Crimes Act 1961, s 228); four of carrying on a business fraudulently (Companies Act 1993, s 380(1)); two of falsely obtaining credit while bankrupt (Insolvency Act 2006, s 424(1)(b)(i) and (iii)); one of obtaining by deception (Crimes Act, s 240(1)(b)); and one of causing loss by deception (Crimes Act, s 240(1)(d)).

2 *R v Young* [2017] NZDC 24911.

3 The proceeding commenced in February 2013 and is therefore subject to the transitional provisions in s 397 of the Criminal Procedure Act 2011 which requires this appeal to proceed under part 13 of the Crimes Act (now repealed). Section 388 of the Crimes Act required notice of an appeal against conviction and sentence to be given not later than 28 days after the date of sentence.

4 *R v Lee* [2006] 3 NZLR 42 (CA) at [95]–[97]; and *R v Knight* [1998] 1 NZLR 583 (CA) at 588–589.

[4] On the conviction appeal, Mr Young asserts a miscarriage of justice as a result of the Judge:[5]

(a) requiring him to obtain leave to bring further pre-trial applications after 25 August 2016;

(b) refusing to adjourn the (fourth) trial date so as to give his new counsel sufficient time to prepare;

(c) refusing to adjourn the disputed facts hearing for a period sufficient to properly consider documents that were disclosed by the Crown only shortly before that hearing;

(d) refusing to grant bail between the disputed facts hearing and sentencing; and

(e) declining applications filed two days before sentencing to vacate the guilty pleas and stay the proceeding.

[5] On the sentence appeal Mr Young asserts that the sentence is manifestly excessive as a result of the Judge:

(a) imposing cumulative sentences;

(b) taking too high a starting point; and

(c) not giving sufficient credit for mitigating factors.

[6] A number of the grounds of appeal called for evidence from Mr Young. In relation to the conviction appeal, this included his knowledge and understanding of his legal position and his motivation for certain actions. In relation to the sentence appeal, aspects of his health were raised which called for an evidentiary basis. However, no such evidence was provided. Nor did he provide a waiver in respect of

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5 A further ground, that the Judge applied the wrong test during the disputed facts hearing, was abandoned at the hearing.

legal advice received or instructions given to counsel. Nor is there any assertion of counsel error. As a result, Mr Weir, who said everything that could possibly be said on Mr Young's behalf, was unable to point to evidence to support some of his submissions.

The offending

[7] Mr Young originally faced more than 40 charges. This number was ultimately reduced to 20 and he pleaded guilty to only 13. The Crown offered no evidence on the others.

[8] Mr Young was adjudicated bankrupt on 19 July 2011 and the offending occurred over the next three years, during the term of the bankruptcy. In sentencing, the Judge described the offending as falling into three groups and we adopt this convenient approach.[6] The first group of charges (Group 1) related to offending between December 2011 and January 2013, committed in Hamilton prior to Mr Young being arrested.[7] The second group (Group 2) was offending committed while on bail.[8] The third group (Group 3) ultimately comprised just one charge of falsifying documents provided to the Court in the context of the bankruptcy proceeding.[9] The specifics of the offending are summarised below.

[9] Group 1 comprised:

- Count 2: Dishonestly using a document by using a doctored screenshot, purportedly of a bank transaction, to prove payment of a bond and rent in advance of a tenancy;
- Count 5: Dishonestly using a document by providing a falsified e-banking receipt to falsely show payment of rent and bond for another property.
- Count 6: Obtaining credit upon false representation while bankrupt, by signing up for a power plan and continuing to obtain power despite never making any payment and persuading the provider to re-connect the power following disconnection on two occasions.

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6 *R v Young,* above n 2, at [3].
7 Counts 2, 5, 6, 8, 9, 10, 13, 18 and 19.
8 Counts 20, 21 and 22.
9 Count 1.

- Count 8: Knowingly being a party to carrying on a business with a fraudulent purpose by incorporating a company, leasing a property and engaging contractors to work on the property but never paying a deposit for the lease and never paying the contractors.

- Count 9: Dishonestly using a document in relation to the lease that was the subject of count 8, by providing a falsified document purporting to be a screenshot showing payment from an Australian Westpac bank account.

- Count 10: Knowingly being a party to carrying on a business with a fraudulent purpose by purporting to buy shares in a nightclub but never paying for them and nevertheless acting as though he was a shareholder, arranging renovations to be paid for by a trust, not paying the contractors and fabricating emails to maintain the fiction.

- Count 13: Knowingly being a party to carrying on a business with a fraudulent purpose by organising the refurbishment of another nightclub, purportedly to be funded by a trust but never paying the contractors.

- Count 18: Dishonestly using a document by providing a fabricated screenshot of a bank advance to begin work on the nightclub the subject of count 13 and providing falsified emails purporting to be from his trust fund manager.

- Count 19: Knowingly being a party to carrying on a business with a fraudulent purpose by agreeing in the name of a company to buy two high-end cars despite having no funds available to pay for them.

[10] Group 2 comprised:

- Count 20: Obtaining by deception by setting up a Telecom business account using the details of his business partner without consent, failing to pay bills and using the account to obtain a phone.

- Count 21: Obtaining credit through false representation by purporting to be employed by a company and signing up a landline and never paying the account.

- Count 22: Obtaining by deception by telling his partner's mother he was organising and paying for building work at her house but not paying for it (leaving her to do so) and by fraudulently incurring charges on her credit card.

[11] In Group 3 the single charge, count 1, related to an affidavit filed in the High Court in the bankruptcy proceedings in support of an application for an adjournment of the bankruptcy hearing. The affidavit falsely stated that Mr Young had a large sum of money lodged in a Westpac account in Sydney. It annexed a doctored document showing a false online summary of the account (in a different name and with a radically different balance).

Appeal conviction

Relevant principles

[12] In *R v Le Page*, this Court made it clear that only in exceptional circumstances will a conviction entered following a guilty plea be quashed on appeal.[10] It identified three broad situations that might constitute exceptional circumstances for this purpose:[11]

(a) the appellant did not appreciate the nature of, or did not intend to plead guilty to, a particular charge i.e. the plea is vitiated by genuine misunderstanding or mistake. Where an accused is represented by counsel when the plea is entered, it may be difficult to establish a vitiating element;

(b) on the admitted facts, the appellant could not in law have been convicted of the offence charged;

(c) it can be shown that the plea was induced by a ruling which embodied a wrong decision on a question of law.

[13] In *R v Merrilees*, the Court added as a further ground; where trial counsel errs in his or her advice to an accused as to the non-availability of certain defences, or outcomes, or if counsel acts so as to wrongly, and perhaps negligently, induce a

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10 *R v Le Page* [2005] 2 NZLR 845 (CA) at [16].
11 At [17]–[19].

decision on the part of a client to plead guilty under the mistaken belief or assumption that no tenable defence existed or could be advanced.[12]

[14] In *R v Merrilees*, the Court also made the following observations about the relevance of a defendant's reasons for pleading guilty, which are apt in the present case:

> [35] It is often the case that an offender pleads guilty reluctantly, but nevertheless does so, for various reasons. They may include the securing of advantages through withdrawal of other counts in an indictment, discounts on sentencing, or because a defence is seen to be futile. Later regret over the entering of a guilty plea is not the test as to whether that plea can be impugned. If a plea of guilty is made freely, after careful and proper advice from experienced counsel, where an offender knows what he or she is doing and of the likely consequences, and of the legal significance of the facts alleged by the Crown, later retraction will only be permitted in very rare circumstances.

The procedural history

[15] The procedural history of this case is relevant to the grounds of appeal.

[16] Mr Young was first arrested in February 2013, with further charges being laid in May 2013 and again in February and October 2014. Over the next three years numerous pre-trial applications by Mr Young led to ongoing delays and the vacation of four trial dates.

[17] Judge Spear heard several pre-trial applications in September 2015. In a minute dated 1 October 2015 the Judge noted that all such applications had been heard and decisions would soon be delivered. In January 2016, however, Mr Young filed six further pre-trial applications. Mr Young's counsel had first lost his file and then was too unwell to argue them on the dates set and the applications were adjourned until September 2016.

[18] On 25 August 2016, Judge Cocurullo directed that no further pre-trial applications could be made without leave. In September 2016, three of Mr Young's applications were heard and dismissed and the remaining either resolved by agreement or abandoned.

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12 *R v Merrilees* [2009] NZCA 59 at [34].

[19] In November 2016, counsel for Mr Young wrote to the Crown objecting to certain evidence being admitted. The Crown consequently filed an application requesting to admit evidence at trial, which was heard and determined in the Crown's favour on 7 December. The next day, Mr Young filed an application to stay the proceedings, which was set down for hearing on 15 February 2017, in advance of the trial then scheduled for 20 February 2017. The pre-trial hearing and trial were vacated because Mr Young was unwell and his new counsel, Mr Barron-Afeaki, required time to prepare. A new trial date was allocated for 1 May 2017. Finally, on 28 April 2017, Mr Young withdrew the stay application and entered guilty pleas to 13 charges.

[20] The disputed facts hearing was held on 30 August 2017. The decision was delivered on 8 September 2017 and sentencing set for 3 November 2017.[13] On 8 September 2017, Mr Young requested a report under the Criminal Procedure (Mentally Impaired Persons) Act 2003 which was refused. On 2 November, the day before sentencing, Mr Young filed a fresh application to stay the proceedings and an application to vacate his guilty pleas.

First ground: requiring leave to bring pre-trial applications

[21] As noted, in August 2016, with two trial dates having been vacated and six pre-trial applications still outstanding, the Judge directed that no further pre-trial applications were to be filed without leave. Mr Young complains that the Judge had no power to make this order and that it prejudiced him in relation to later pre-trial applications.

[22] We consider that the Judge did have the power to make the order as an exercise of his inherent discretion to regulate the proceedings. But, in any event, no prejudice resulted; Mr Young continued to make applications and the Judge continued to deal with them in a fair and appropriate manner. This ground fails.

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13 *R v Young* [2017] NZDC 20300.

Second ground: not allowing new counsel sufficient time to prepare for trial

[23] The third trial date was 20 February 2017. In December 2016, Mr Young filed an application to stay the proceedings. The application was to be heard the week before trial but Mr Young's then counsel, Mr Shaw, became too ill to proceed. Mr Young's new counsel, Mr Barron-Afeaki, indicated to the Judge that he would require at least eight weeks to prepare for trial. On 24 February 2017, the Judge vacated the trial date and set a fresh date of 1 May 2017 (a nine-week adjournment). At a pre-trial conference on 13 April 2017, Mr Barron-Afeaki confirmed that he would be ready to proceed on 1 May 2017. Mr Young is unable to point to any evidence suggesting that the period of adjournment was inadequate or led to him being prejudiced in the preparation for trial. There is no evidence from Mr Barron-Afeaki and no waiver from Mr Young regarding Mr Barron-Afeaki's advice. This ground fails.

Third ground: late disclosure prior to disputed facts hearing

[24] On Friday, 25 August 2017, with the disputed facts hearing scheduled for hearing on Monday, 28 August 2017, the Crown received further documents from two of the complainants. There were, in total, some 500 documents disclosed, mainly invoices. The Crown immediately provided copies to Mr Barron-Afeaki. Mr Barron-Afeaki sought an adjournment of the hearing to allow him time to consider the documents. The Judge refused to adjourn the hearing but deferred it for two days. Mr Young has not identified any specific prejudice resulting from the disputed facts hearing proceeding. There is no evidence from Mr Barron-Afeaki that he was hampered in his preparation for the disputed facts hearing. The Judge himself did not consider that the additional documents altered the case against Mr Young. This ground fails.

Fourth ground: refusal to grant bail pending sentence

[25] Mr Weir indicated that, without wishing to detract from any of the other grounds of appeal, this was the central ground of appeal. The argument was essentially that Mr Young had entered his guilty pleas in reliance on the Crown's agreement not

to oppose bail and because the Crown later resiled from that agreement, the convictions should be quashed.

[26] At the hearing, Mr Weir handed up a joint memorandum of counsel dated 27 April 2017, the day before Mr Young was arraigned and pleaded guilty to the 13 charges of which he was convicted. The memorandum recorded that:

> The Crown will not oppose the defendant, Matthew Young, having bail prior to sentence.

[27] Initially, as agreed, the Crown did not oppose bail. Mr Young was bailed immediately after the convictions were entered, pending the disputed facts hearing. However, it is clear from the Judge's minute of 28 April 2017 that he had reservations about granting bail, notwithstanding the Crown's lack of opposition. The delay to that point had been far longer than expected and sentencing was still some way off; the Judge expressed real concern about the time required to resolve the disputed facts but was unable to deal with a formal bail application that day. The Judge said:[14]

> [10] *As unusual as it is, I say that there is every reason why for now I should do further, a proper consideration of a s 13 bail application notwithstanding the Crown's lack of opposition to bail continuing*. I raise the issue of whether the Crown ought to in short compass re-visit that matter. Had I been able to be seized of all of the facts relevant to s 13 today I would have embarked upon the inquiry today. I am not able for the reasons expressed but also because we have innovatively linked up two AVL Courts in order that we could respond to the request for Mr Young to be arraigned.
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> [11] I accordingly leave at issue the determination under s 13 because I say this Court is entitled to have consideration of two aspects, the steps upon which Mr Young will take to within a reasonable time frame endeavour to resolve the proceedings, the outstanding focus being the aspect of loss and also as to the loss itself mindful of the aspect under s 13(3) as to whether Mr Young is likely to receive a prison sentence or not.
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> …
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> [13] I intend now to continue Mr Young's bail on the present terms with the rider that his bail pursuant to a consideration under s 13 is still to be dealt with as indicated. Had I had all of the information I would deal with that today. I do not. *Remanding him with a continuation of bail is no indication as to what I am likely to do or otherwise on 12 May*.
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> (Emphasis added).

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[14] *R v Young* DC Hamilton CRI-2013-019-945, 28 April 2017 (Minute of Judge Cocurullo).

[28] The disputed facts hearing took place in August 2017 with the issues being determined largely in the Crown's favour. On 8 September 2017, the Judge heard an application by Mr Young for bail pending sentence.[15] Under s 13 of the Bail Act 2000, the onus was on Mr Young to show cause why bail should be granted. The Crown opposed re-admittance to bail, concerned at the fact that four months had passed since arraignment and no sentencing date had yet been set.

[29] The Judge identified the law relating to s 13 and the considerations he saw as relevant. He recorded the submissions made by Mr Young's counsel, specifically that there had been no re-offending since 2014, that Mr Young's previous convictions related to offending some years previously, that Mr Young had been on bail throughout the proceeding with no breach of conditions, that he was not a flight risk and that bail was necessary to allow Mr Young to properly prepare for sentencing.[16] In addition, counsel signalled an intention to invite the Judge to consider a non-custodial sentence on sentencing.

[30] In recording the Crown's submissions, the Judge noted that its earlier lack of opposition to bail had been on the basis that progress would be swifter than it had turned out to be. The Crown also indicated that imprisonment was inevitable.

[31] It is clear from the Judge's decision that the Crown's position was not influential:

> [7] As all will know, I specifically reserved the aspect of s 13 bail considerations. Regardless of the Crown position, most of it I am aware of because of my case management of the matter for well over a year. I would have wanted now that loss is fully known, full and proper argument as to whether it is in the interests of justice to grant bail.

[32] In declining bail, the Judge commented on the fact that sentencing was still some months away and said:

> [34] Referring to s 13(3)(d) there are limited other relevant matters. I have already touched upon the aspect of delays that have been occasioned in this case. I have already referring to s 13(3)(c) dealt with Mr Young's personal circumstances including both the matters raised by defence and the Crown.

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15 *R v Young* [2017] NZDC 20375.
16 At [21]–[22].

> [35] For the avoidance of doubt that I have appreciated of the relevant matters in s 8 and in particular such matters as to offending whilst on bail, the length of time [etc] and the seriousness of the charges that Mr Young faces.
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> [36] One cannot be definitive upon this but there is an important consideration the primary consideration I suggest and that is an appreciation of whether it is likely that Mr Young will receive a sentence of imprisonment. Both Counsel submit that the starting point will be one of imprisonment. In my view given the magnitude of the offending, the multitude of the charges, the way the offending has occurred and the aggravating features that have been set out, the starting point without final determination is likely to be a prison sentence of some years.
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> [37] I have fully appreciated the interests of justice issues raised by the defence. In my view those are important matters to consider and I note that if Mr Young was in custody, he can still be available to Mr Barron-Afeaki and second counsel for preparation of the case but I am well aware that there will be some restrictions in respect of that.
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> [38] In summary having considered all relevant matters I consider that it is highly likely that Mr Young will receive a sentence of imprisonment. I have already set out a large number of factors in and of the offending in totality. None of that is a final determination.
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> [39] When I consider the aspect of interests of justice, I conclude clearly that Mr Young has not satisfied me on the balance of probabilities that it would be in the interests of justice to grant bail and for the reasons as expressed, the bail application is refused and the remand will be in custody.

[33] Although Mr Weir argued that Mr Young had relied on the Crown not objecting to bail pending sentence, he could not point to any evidence of such reliance. Nor was there anything to suggest that the remand in custody between September 2017 and the sentencing in November 2017 adversely affected Mr Young's preparation for sentencing or caused any other prejudice. There is no basis on which to conclude that any miscarriage of justice resulted from the Crown changing its position. As Mr Young was well aware, bail was a matter for the Judge and, even at the arraignment, the Judge plainly had reservations. We are satisfied from the extensive reasons given in the Judge's decision refusing bail that this would have been the outcome regardless of the Crown's position. This ground fails.

Fifth ground: the declining of the applications to vacate guilty pleas and stay proceedings

[34] This ground relates to the applications to stay the proceedings and vacate the guilty pleas that Mr Young filed on 2 November 2017.

[35] The application to vacate the guilty pleas was brought on the grounds that: the pleas were induced by the Judge's requirement that Mr Young obtain leave for any pre-trial application, which was wrong in law; the Crown had resiled from its agreement not to oppose bail pending sentence; late disclosure of exculpatory material; and the Court had failed to deal with a previous stay application pre-trial.

[36] The grounds advanced for the stay application were: prosecutorial misconduct (also raised in the previous stay application); new counsel not being given sufficient time to prepare for trial; and late disclosure of exculpatory material. In his affidavit in support of the applications, Mr Young particularly addressed allegations against the Officer in charge of the police investigation as a significant aspect of the alleged prosecutorial misconduct.

[37] On 3 November 2017, Mr Young appeared in court with Mr Barron-Afeaki, who was representing him on the sentencing. Mr Barron-Afeaki advised that Mr Young was unrepresented in respect of the applications, but was in a position to argue them. The Judge allowed Mr Young to do so. The Judge's decision dismissing the applications (delivered orally before commencing the sentencing) is relatively brief and Mr Weir points out that some matters raised during argument were not specifically considered in the Judge's reasons. However, there was extensive oral argument; the transcript runs for 42 pages and indicates that the hearing concluded at 11.24 am (presumably having started shortly after 10 am). It is clear that the Judge gave Mr Young every opportunity to explain the grounds for his applications and that he engaged with Mr Young in respect of them. We have had regard to this in considering the appeal in relation to the Judge's decision to decline both applications.

[38] In relation to the application for leave to vacate the guilty pleas the Judge identified *R v Le Page* as the relevant authority.[17] He specifically noted that leave will seldom be granted where the defendant had competent and correct legal advice, and that Mr Young was represented at the relevant time and had not given a waiver of privilege.[18] He rejected outright any connection between Mr Young's decision to enter

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17 *R v Le Page*, above n 10.
18 *R v Young,* [2017] NZDC 25029 at [10].

guilty pleas and the requirement for him to obtain leave for pre-trial applications.[19] He rejected the Crown's changed position on bail as having any effect on the decision to plead guilty, noting that he was not bound by the Crown's position on bail.[20] He rejected the complaint about late disclosure prior to the disputed facts hearing; the Crown was not guilty of any late disclosure because it only received the documents itself shortly before the hearing and, in any event, there was nothing "revelatory" about the late disclosed documents. He rejected the assertion that the Court had failed to deal with the December 2016 stay application, with detrimental effect on the defence; Mr Young had competent and experienced counsel acting by the time he came to plead and the application for a stay was withdrawn at that time.[21]

[39] Turning to the application for stay, the Judge rejected Mr Young's complaint of prosecutorial misconduct in relation to assertions by the Crown that Mr Young had been responsible for most of the delay in the case; that was the Judge's own view, formed from his management of the case. He referred to but did not comment specifically on the alleged impropriety of the Officer in charge but noted that it had been raised in the previous application for a stay that had been withdrawn.

[40] The Judge concluded that, in these circumstances the application for stay was an abuse of process:

> [38] In total, the application for stay here comes at a very late stage and again Mr Young well knows of the process of a stay application having put the Court on notice for that many years, many months, if not a year or so prior to his first application for stay in December of 2016 … It was not resurrected by new counsel and gave way to the arraignment and resolution of the matter through the guilty pleas.
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> [39] To both of these applications I am yet again vitally concerned at the lack of timeliness and meaning no disrespect to him, "ambush type way", Mr Young seeks to place matters before the Court. It is repetitive, ongoing and in my view a complete abuse of this Court's process.
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> …
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> [43] What these applications are designed to do is to take up the valuable time in sentencing as to give the best possible opportunity that sentencing may not proceed. The way that these have been filed, the lack of merit of them, leads me clearly to the position where there is little if any merit in the

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19 At [13].
20 At [15].
21 At [25].

> substance of these applications and that they ought to be refused on that basis. If I am wrong about that stand point, I move to the inherent power that I have to regulate this process. If I allow these applications to proceed – effectively to usurp the sentencing process scheduled – such would be in my view an abuse of the process of this Court and I am not prepared to countenance that.
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> …
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> [45] For the avoidance of any doubt, substantively the proceedings have little if any merit but I clearly indicate that under the inherent power of the Court, these applications are dismissed as an abuse of process.

[41] We see no error in the Judge's decision to decline these applications. It is quite clear that no grounds existed on which leave could have been granted to vacate the guilty pleas. The circumstances in which the application for stay was brought, only days before sentencing and following the withdrawal of the previous stay application, justified the Judge treating the application as an abuse of process, brought solely to avoid the impending sentencing. This ground also fails.

Appeal against sentence

[42] The accepted approach to sentencing of this kind is described by this Court in *R v Varjan*:[22]

> [22] Culpability is to be assessed by reference to the circumstances and such factors as the nature of the offending, its magnitude and sophistication; the type, circumstances and number of the victims; the motivation for the offending; the amounts involved; the losses; the period over which the offending occurred; the seriousness of breaches of trust involved; and the impact on victims.

[43] The Judge was mindful of this approach,[23] and the factors that he identified as relevant in finding the appropriate starting point reflected it.

[44] The Judge rejected any argument that Mr Young had not thought about the consequences of his offending, and that he had not personally gained from the offending, though he noted the personal gain to Mr Young was far less than the cost and loss caused to the victims. The total losses resulting from Mr Young's offending had been found to be $269,076.69. The Judge identified as aggravating features that the offending was deliberate, involved planned and persistent deceit, repetition of

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22 *R v Varjan* CA97/03, 26 June 2003.
23 Specifically referred to in *R v Young*, above n 2, at [168].

offending, substantial loss, abuse of trust, some personal financial gain and blatant dishonesty.[24] He emphasised the "serious and profound impact and effect" that Mr Young's conduct had had on his victims, causing "significant grief, inconvenience and financial hardship".[25] He characterised the offending as "planned, premeditated and enshrined in a deceitful strategy" and said that Mr Young "knew exactly what [he was] doing and the loss caused together with the harm and hurt that would be occasioned to a number of persons with little empathy to the plight [he was] leaving them".[26]

[45] The Judge approached the sentencing exercise as follows. He identified a lead charge within each of Groups 1 and 2 with the sentences for the charges within each group imposed concurrently, but with the sentences for the lead charge of Group 2 cumulative on the lead charge of Group 1, and the only charge in Group 3 cumulative on the Group 2 lead charge. He identified the need for consideration of totality at each step and at the end point.[27]

[46] Within Group 1, he took count 13 (the offending against the second nightclub) as the lead charge with a starting point of 24 months' imprisonment, and uplifted that by 12 months to reflect the totality of the other charges within that group. This brought the provisional starting point for the Group 1 offending to 36 months. A further three-month uplift was imposed for the aggravating feature of Mr Young's prolonging of the proceeding, notwithstanding repeated notices from the courts about concerns with delay.

[47] In Group 2, the lead charge was count 22 (offending against the mother of Mr Young's partner at the time) for which the Judge took a starting point of 24 months, uplifting it by three months to 27 months to reflect the totality of the other charges within that group. He imposed a further uplift of six months to 33 months to reflect the aggravating feature of these offences being committed while on bail. However, taking into consideration the issue of totality as between Groups 1 and 2, the Judge reduced the sentence on count 22 to 14 months' imprisonment.

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24 At [163], [169], and [171]–[172].
25 At [120].
26 At [163].
27 At [109].

[48] The single charge in Group 3 of count 1 (of falsifying documents provided to the Court) attracted a starting point of twenty seven months' imprisonment, reduced for totality when considering that it would be cumulative upon count 22 to 15 months.

[49] This meant that the provisional sentence before discounts was five years and eight months' imprisonment. The Judge then turned to the mitigating factors, allowing discounts of six months (just under 10 per cent of the total provisional sentence) for both health reasons and a further three months (just under five per cent) for the guilty pleas.[28] Both discounts were deducted from the sentence imposed on the Group 3 offence. The result was an end sentence of four years and eleven months' imprisonment broken down as:

(a) three years and three months' imprisonment on count 13, with concurrent terms of imprisonment ranging between six and 15 months on the other counts in Group 1;

(b) 14 months' imprisonment on count 22, cumulative on the sentence imposed for count 13, with concurrent sentences of nine and six months respectively on the two other counts (20 and 21) in Group 2; and

(c) six months' imprisonment on count 1 in Group 3, cumulative on count 22.

[50] Mr Weir argued, first, that the Judge was wrong to impose cumulative sentences given the connection between the various matters. He pointed out that the Crown had, at an earlier stage, argued that all matters were sufficiently connected to justify a single trial. In our view, the Judge took an entirely orthodox approach to the imposition of concurrent and cumulative sentences. The charges fell naturally into different categories, particularly because of differences between offending before and after being bailed and, of course, the Group 3 charge was distinct because it involved misleading the Court. In any event, given the Judge's assiduous attention to totality at each stage, the outcome would inevitably have been the same if the charges had been imposed concurrently with a single uplift.

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[28] At [191]–[196].

[51] The second ground of appeal related to the starting points taken. Mr Weir submitted that the overall starting point prior to allowance for mitigating factors, which was five years and eight months' imprisonment, was excessive. By reference to other similar cases, it was submitted the appropriate starting point would have been four years' imprisonment. Mr Weir relied on the following four cases.

[52] In *R v Jarvis* the defendant pleaded guilty to five charges relating to the use of forged documents to obtain loans for customers buying property through the Blue Chip Group.[29] She benefited to a relatively modest level from commissions. The effect on her victims was devastating. The Judge took a starting point of three years' imprisonment. We see the nature of the offending in this case as comparable to the Group 1 and 2 offending, though the number of charges in *Jarvis* was fewer.

[53] In *R v Simpson*, the defendant pleaded guilty to nine charges: five of theft by a person in a special relationship, two of making misleading statements in a prospectus, one of obtaining by deception and one of false accounting, all arising from the operation of a finance company.[30] The sentencing notes refer to the collapse of the business causing a loss of $3.8 million. The sentencing Judge considered that an appropriate starting point would have been four to four-and-a-half years' imprisonment, though ultimately a non-custodial sentence was imposed. This offending seems more serious than the present case on the basis of the amount of loss involved.

[54] *Klair v Commerce Commission* involved convictions for 17 charges of causing a document to be made with intent to obtain pecuniary advantage and 47 charges of dishonestly using a document to obtain a pecuniary advantage.[31] The offending arose in the context of a "pro forma invoicing scam". In the District Court, the Judge had sentenced on the basis of the turnover of the business during the relevant time of more than $700,000, having rejected the argument that losses of only approximately $1,700 should form the basis for the sentence. He adopted a starting point of two-and-a-half years' imprisonment. On appeal, however, Duffy J held that sentencing ought to have

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29 *R v Jarvis* DC Invercargill CRI-2011-025-1844, 5 April 2012.
30 *R v Simpson* [2013] NZHC 2524.
31 *Klair v Commerce Commission* [2014] NZHC 1811.

proceeded on the basis of losses of only $1,747.63 with the result that the appropriate starting point was 12–18 months' imprisonment.[32] This offending is of limited assistance because of the apparent lack of significant effect on those affected and the modest amount involved.

[55] Finally, in *Visser v Police*, Thomas J held that the starting point of three years and six months' imprisonment taken in the District Court was within the available range for 18 charges of obtaining by deception by a self-employed financial adviser.[33] He submitted 18 fraudulent insurance policies on behalf of fictitious applicants, obtaining commissions totalling $270,063.21. This offending is comparable, though less serious because it lacks the serious effect on victims which was a feature of the present case.

[56] On the other hand, the Crown relied on cases in which starting points of four to five and a half years' imprisonment had been taken for similar offending. In *R v Clark*, this Court regarded a starting point of four to five years as appropriate for offending that involved 19 charges of obtaining money by false pretences, two charges of inducing by false pretences and one charge of using a reproduced document with intent to defraud.[34] The defendant had not benefited personally from the transactions but defrauded the victims of a total of $386,081 and the effect on them was described as devastating. It is evident from our description of that case that the offending was very similar to the present case.

[57] In *McGregor v R* an employee of a trust company defrauded 12 clients of the company and pleaded guilty to ten charges of theft by a person in a special relationship.[35] The total amount taken was $472,917.20. The offending was characterised by the sentencing Judge as calculated and deliberate, involving an abuse of her position of trust and responsibility. The clients she targeted were elderly and vulnerable. The Judge took a starting point of five years' imprisonment, which this Court was satisfied was appropriate. We see the offending in *McGregor* as more serious than the offending in this case.

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32 At [59].
33 *Visser v Police* [2015] NZHC 3275.
34 *R v Clark* CA364/99, 23 November 1999.
35 *McGregor v R* [2015] NZCA 565.

[58] The third case relied on by the Crown is *Kiro v R*.[36] In this case, the defendant had pleaded guilty to 22 charges for dishonesty offences, including theft by a person in a special relationship, using a forged document, dishonestly using a document to obtain a pecuniary advantage, and making a false document with intent to obtain a pecuniary advantage. The defendant had defrauded victims by inviting them to take up fake investment opportunities. The total amount defrauded was $249,765, of which $62,000 had been repaid. The sentencing Judge had taken a starting point of four years for the lead charges of theft by a person in a special relationship and uplifted that by 18 months for the remaining charges, resulting in an overall starting point of five-and-a-half years' imprisonment, which Wylie J described on appeal as "stern but not beyond the pale".[37]

[59] On the basis of these cases, the starting point taken by the Judge in respect of each group was within range for the offending within that group i.e. three years' imprisonment for Group 1, two years and three months for Group 2 and two years and three months for Group 3. There is nothing objectionable in the uplifts for the aggravating features. The only question is whether the reductions for totality in the Group 2 and Group 3 offending were sufficient. In our view, they were. The adjusted starting point before discounts, of five years and eight months' imprisonment, was within the range available for the totality of this offending, albeit at the upper end of that range.

[60] Nor do we consider that there is any merit in the challenge to the discounts allowed. Mr Weir argued that insufficient credit was given to reflect Mr Young's health condition and the fact that only 13 charges were ultimately proceeded with. The Judge did not refer in any detail to Mr Young's health condition but allowed a discount of six months.[38] There was no evidence before us as to the basis on which a greater discount might have been allowed on that ground.

[61] We do not see any reason for the Judge to have allowed a specific discount to reflect the fact that the number of charges against Mr Young substantially fell away;

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36 *Kiro v R* [2016] NZHC 1550.
37 At [47].
38 *R v Young,* above n 2, at [191].

that was a matter that might justifiably have been included in the discount for the guilty plea, which was allowed at 15 per cent, notwithstanding the late stage at which it came. In considering the appropriate level of a discount for the guilty pleas, the Judge took into account the fact that there had been delays in the proceeding caused by Mr Young's own conduct and that the evidence in respect of the charges to which he pleaded guilty was strong.[39] Moreover, the Judge recorded the fact that he had put Mr Young on notice prior to the disputed facts hearing (in which complainants were required to give evidence) about the implications of his having the complainants give evidence.[40]

[62] We come to the conclusion that the end sentence imposed, whilst stern, was not manifestly excessive.

Result

[63] The application for an extension of time for filing a notice of appeal is granted.

[64] The appeal against conviction is dismissed.

[65] The appeal against sentence is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

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39 At [192]–[193].
40 At [194].