SUPREME COURT OF QUEENSLAND

CITATION:	*R v Munro* [2024] QCA 136
PARTIES:	**R** **v** **MUNRO, Roger Gareth** (appellant)
FILE NO/S:	CA No 85 of 2022 DC No 1330 of 2021
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 19 July 2021 (Smith DCJA)
DELIVERED ON:	30 July 2024
DELIVERED AT:	Brisbane
HEARING DATE:	17 October 2023
JUDGES:	Mullins P, Bond JA and Martin SJA
ORDERS:	**1. Application for leave to adduce evidence refused.** **2. Appeal dismissed.**
CATCHWORDS:	APPEAL AND NEW TRIAL – CRIMINAL LAW – PROCEDURE – PLEAS – GENERAL PLEAS – PLEA OF GUILTY – WITHDRAWAL AND RESTORATION OF PLEA – GENERALLY – where the appellant pleaded guilty to three counts of fraud on an indictment containing four counts on the day the trial of the four counts was due to commence – where the allocutus was administered and the sentence hearing listed for a later date – where the Commonwealth Director of Public Prosecutions (CDPP) undertook to enter a *nolle prosequi* in respect of count 1 after the plea of guilty – where the appellant applied to withdraw his guilty pleas – where the primary judge rejected the appellant's assertions relating to the conduct of the barrister and solicitor who represented him for the entry of his guilty pleas – where the primary judge found there was no incorrect advice to the effect that it was easy to withdraw guilty pleas given by the lawyers as alleged by the appellant before he pleaded guilty – where the primary judge found that the lawyers did not threaten to withdraw if the appellant did not plead guilty – where the appellant's choice was whether to proceed to trial or plead guilty and obtain the benefit of guilty pleas together with the discontinuance of count 1 – where the primary judge refused the application by the appellant to withdraw his guilty pleas by expressly applying the miscarriage of justice test –

where the appellant appealed against his conviction on the ground that the primary judge erred in not allowing his guilty pleas to be vacated – whether the primary judge's refusal to allow the appellant to withdraw his guilty pleas constituted a miscarriage of justice

Criminal Code (Qld), s 668E
Criminal Practice Rules 1999 (Qld), r 51

Boag v R (1994) 73 A Crim R 35, cited
Garcia-Godos v R; MH v R [2023] NSWCCA 145, considered
Meissner v The Queen (1995) 184 CLR 132; [1995] HCA 41, cited
R v Mundraby [2004] QCA 493, cited
R v Nerbas [2012] 1 Qd R 362; [2011] QCA 199, considered
R v Verrall [2013] 1 Qd R 587; [2012] QCA 310, considered
R v Wade [2012] 2 Qd R 31; [2011] QCA 289, cited
The Queen v Munro [2022] QDC 80, cited
White v R (2022) 110 NSWLR 163; [2022] NSWCCA 241, considered

COUNSEL: The appellant appeared on his own behalf
J R Hunter KC, with S E Harburg, for the respondent

SOLICITORS: The appellant appeared on his own behalf
Director of Public Prosecutions (Commonwealth) for the respondent

[1] **MULLINS P:** Dr Munro was charged with four counts of fraud and his trial was listed to commence on 19 July 2021. Count 1 alleged that Dr Munro dishonestly applied between 26 September 2011 and 27 May 2014 to his own use, or to the use of any person, money belonging to Ms Cannon. The quantum particularised for count 1 was $411,500. Dr Munro pleaded guilty to the other three counts of fraud (counts 2–4) on 19 July 2021, the allocutus was administered and the sentence hearing listed for 30 July 2021. Dr Munro applied by application filed on 11 August 2021 to withdraw his guilty pleas. The Commonwealth Director of Public Prosecutions (CDPP) applied for revocation of the bail of Dr Munro that was heard by the learned primary judge on 13 and 16 August 2021 and ultimately adjourned pending the determination of the withdrawal of guilty pleas application. The hearing of that application took place over a period of almost five months on 10November 2021 and 22 February and 30 March 2022. The primary judge dismissed the application on 8 April 2022: *The Queen v Munro* [2022] QDC 80 (the reasons). The sentencing of Dr Munro then proceeded on 3 May 2022. The CDPP entered a *nolle prosequi* in respect of count 1. Dr Munro appeals against his conviction on the sole ground that the primary judge erred in not allowing his guilty pleas to be vacated.

[2] Dr Munro was represented by a barrister and a firm of solicitors (the first lawyers) for the entry of his guilty pleas. He emailed the first lawyers on 20 July 2021 enquiring whether there was a legal mechanism to cancel the guilty pleas and request a trial again. A letter was emailed by those solicitors on 21 July 2021 advising of the steps that would be taken if Dr Munro instructed them that he wanted to withdraw his guilty pleas and also that the first lawyers would inform the court that a legal conflict

had arisen and seek leave to withdraw from his matter. Dr Munro communicated his decision to the first lawyers on 27 July 2021 that he planned to proceed to trial. The first lawyers were given leave to withdraw on 30 July 2021. Dr Munro had a different barrister and firm of solicitors appearing for him on the application to withdraw his guilty pleas (the second lawyers). (Dr Munro mistakenly asserts that the second barrister did not appear on the last day of the application. The change of barrister instructed by the second firm of solicitors did not occur until the sentence hearing.)

[3] Dr Munro represents himself on this appeal. He also applies for leave to adduce into evidence eight pages of correspondence and medical information that he asserts were unavailable when the application to withdraw his guilty pleas was heard by the primary judge.

The offences

[4] The draft statement of facts (exhibit 16) which comprised 121 paragraphs and was tendered before the primary judge outlined the nature of the CDPP's case against Dr Munro. The particulars of counts 1-4 (exhibit 15) were also before the primary judge. Briefly by way of background, Dr Munro had been the subject of an investigation by the Australian Securities and Investments Commission (ASIC) between December 2008 and June 2011 in relation to funds received by R G Munro Futures Pty Ltd (RGMF) and a US company, Starport Futures Trading Corporation (Starport) both of which went into liquidation but had received funds from investors for share trading activities. Dr Munro claimed that investor funds of Starport and RGMF remained held in the United States. The subject charges arose out of a subsequent request made by Dr Munro to investors to invest with him in a new share trading scheme known as TradeStation Futures Trading Fund (TradeStation).

[5] There was a different complainant for each of counts 2-4 and they were respectively Mr Armstrong, Ms Heyer and Mr Von Harten. Each count alleged that Dr Munro dishonestly applied to his own use, or to the use of any person, money belonging to the complainant contrary to s 408C(1)(a)(i) of the *Criminal Code* (Qld). The period particularised for count 2 was between 8 March and 19 April 2013 and the quantum particularised was $39,600. The period particularised for count 3 was between 4 and 22 November 2013 and the quantum particularised was $40,000. The period particularised for count 4 was between 20 January and 27 May 2014 and the quantum particularised was $220,000. Each of the investors deposited their investment funds into Dr Munro's account with the National Australia Bank (NAB). They understood that the share trading account was located in the United States and that any profits generated from the trading would be returned to them on a quarterly basis less Dr Munro's management fee. Apart from $3,950 paid to Mr Armstrong on 20 May 2015, the investors had not received any return on their investments or redemption of their capital since the end of 2014.

[6] The dishonest application of the funds by Dr Munro for each count was particularised as one or more of using the funds to pay for personal expenses, making cash withdrawals, paying some of the funds into a Halifax Trading account held in Dr Munro's wife's name and paying money to other investors. It was also particularised that none of the complainants was aware that his or her money was being used by Dr Munro in that manner and Dr Munro continued to make representations to the complainant during the period particularised for the charge that the money was being invested in TradeStation and falsely reported on profits being paid over that period.

The hearing of the application to withdraw the guilty pleas

[7] Dr Munro had affirmed an affidavit on 10 August 2021 for the purpose of the application and also gave oral evidence. Of the first lawyers, his barrister Mr Hoare and his solicitor Mr Clare also swore affidavits for the purpose of the application and gave oral evidence.

[8] The first day of the hearing of the application to withdraw the guilty pleas was largely taken up with the cross-examination of Dr Munro. The hearing resumed for the second day in the afternoon of 22 February 2022, when Dr Munro appeared by video link, but because of the poor quality of the connection, his cross-examination was deferred and Mr Hoare and Mr Clare were interposed. When the hearing resumed on 30 March 2022, Dr Munro was again present in person and the cross-examination was completed. During Dr Munro's cross-examination on the third day, Mr Hoare was interposed for further cross-examination in relation to Dr Munro's allegation that on the morning of 19 July 2021 Dr Munro was advised (in Mr Hoare's presence) that there was a mechanism that allowed Dr Munro to change his plea "with no drama".

[9] The strategy of the second lawyers was to show that the circumstances in which Dr Munro pleaded guilty were analogous with those in *R v Nerbas* [2012] 1 Qd R 362 and that a miscarriage of justice had occurred as a result. It was critical to this strategy that Dr Munro's evidence was accepted that during the conference with the first lawyers on 18 July 2021 they indicated to him that, if he did not plead guilty, the first lawyers would no longer act for him in the trial due to commence on 19 July 2021 for three weeks. The CDPP opposed the application on the basis that Dr Munro had not established a miscarriage of justice to warrant the granting of the leave to withdraw the guilty pleas and submitted that the circumstances of Dr Munro were different to those of the offender in *Nerbas*. The other critical factual issue on the application was Dr Munro's assertion in his affidavit that at the meeting on 18 July 2021 before he signed the instructions, he asked if there was a way he could withdraw his plea of guilty, if he changed his mind. He said Mr Clare said there was a way and Mr Hoare did not say anything but looked at Mr Clare and made "a funny little face twitch". Dr Munro also asserted in his affidavit that on the morning of 19 July 2021, before he pleaded guilty, that he confirmed with the first lawyers that there was a mechanism that would allow him to change his plea with "no drama" and that Mr Hoare said there was a way to change his plea, although he did not confirm the "no drama" comment.

[10] Apart from dealing with his psychiatric, psychological and physical health conditions, Dr Munro's affidavit focused on the meetings he had with Mr Hoare and Mr Clare on 18 July 2021 (after Mr Clare had sent him an email at 8.57 am on 17 July 2021 advising him that, if he pleaded guilty to counts 2-4 on the indictment, the prosecution would discontinue count 1) and on 19 July 2021 which was the day his trial was due to commence.

[11] The instructions signed by Dr Munro on 18 July 2021 that he wanted to plead guilty to counts 2-4 were in evidence. Relevantly all the boxes against the statements of understanding of Dr Munro were ticked with one matter being amended which was the striking out of the statement "I agree with the facts as presented" in relation to the "Agreed Facts" as provided by the CDPP. Relevantly the following matters were ticked:

> "I understand that a plea of guilty is in fact proof that I committed the offence.

> I acknowledge that I have received legal advice from my lawyer about the nature of these charges including their seriousness, the evidence against me that the prosecution will place before the court, the processes of trials and sentencing, and also the potential penalties I will face for conviction of these offences.
>
> I acknowledge that I am pleading guilty entirely voluntarily and of my own free will. I have not [been] told that I must plead guilty and nor has any pressure, threat or inducement been applied to persuade me to plead guilty.
>
> I understand that I have the right to plead not guilty to any charge at this stage and have the prosecution attempt to prove its case at trial.
>
> ...
>
> I understand that as a consequence of pleading guilty, the court will deal with me as if I were in fact guilty to the allegations against me and I cannot later change my plea or official records to not guilty."

[12] The primary judge summarised (at [93] of the reasons) Dr Munro's recollection of the meetings he had with the first lawyers on 18 July 2021. The primary judge recorded (at [94]-[95]) Dr Munro's subjective reasons for entering the guilty pleas, including the following. Dr Munro stated that he felt under pressure to plead guilty because of the constant urging by the first lawyers to accept the deal and their advice he could rescind it after the event. He felt he would not receive a fair trial, if he were not represented, and was worried Legal Aid Queensland would review funding and his bail would be revoked. Although Dr Munro met with the first lawyers on the morning of 19 July 2021, he did not raise with them that he did not want to plead guilty. He said that Mr Hoare indicated that, if he changed his mind about pleading guilty, the first lawyers would withdraw from acting on his behalf.

[13] The primary judge summarised in extensive detail (at [97]-[136] of the reasons) the oral evidence given at the hearing given by Dr Munro.

[14] The primary judge summarised (at [137]-[170] of the reasons) Mr Clare's evidence and summarised (at [171]-[189]) Mr Hoare's evidence.

The reasons

[15] The primary judge noted (at [3]-[4]) that Dr Munro's trial that was due to commence on 19 July 2021 was the fifth trial listing of the matter since the original indictment was presented on 12 March 2018 and there had been a considerable delay in the proceeding.

[16] As there was no issue between the parties before the primary judge that it was for Dr Munro to establish a miscarriage of justice to obtain the leave to withdraw his guilty pleas, the focus of the reasons was on the assessment of the evidence to make the factual findings that were relevant to whether there would be a miscarriage of justice if the guilty pleas were not set aside.

[17] The primary judge summarised (at [21]-[74] of the reasons) the CDPP draft statement of facts, noting that it was not accepted by Dr Munro and that it was "the Crown case at its highest" and considered evidence adduced in cross-examination of Dr Munro

relevant to his defence of the charges, if the matter had proceeded to trial. The primary judge relied (at [230]) on the principles for setting aside a plea of guilty discerned in *R v EP* [2020] QCA 109 at [7] which included that it would not normally be possible to show a miscarriage of justice unless an arguable case or triable issue was established.

[18] The primary judge rejected (at [202] of the reasons) Dr Munro's evidence that the money paid by the complainants to the NAB account was primarily used to conduct trading. The primary judge gave examples (at [203]) that identified the withdrawals that were made after Mr Armstrong had deposited $19,600 into the NAB account on 15 April 2013 where the majority of those funds was not spent on trading but returned to other investors. The other example (given at [203]) was of the disbursement of $200,000 paid into the NAB account on 15 January 2014 by Mr Von Harten where the majority of the money was spent on paying existing investors. The primary judge noted (at [205]) that, contrary to Dr Munro's evidence, there was no evidence that overseas traders paid money into the NAB account and it was also clear that some of the money was used for Dr Munro's personal benefit and 20 examples were then listed. The primary judge did not accept (at [206]) Dr Munro's evidence that he was conducting a legitimate trading scheme.

[19] The primary judge preferred (at [207] of the reasons) the evidence of the first lawyers over that of Dr Munro. In particular, the primary judge found (at [208]) that Dr Munro was evasive at times and gave non-responsive answers on many occasions and his evidence generally was not supported by the available documentary evidence. The primary judge noted (at [211]) that the evidence of Mr Clare was supported by Mr Hoare and was far more consistent with the available documents. The primary judge was also impressed by their evidence (at [212]). The primary judge expressly rejected (at [217]) Dr Munro's claims that the first lawyers threatened him before he agreed to plead guilty and said they would not act if he did not plead guilty. The primary judge also noted (at [219]) that Dr Munro's allegation that Mr Clare told him he could easily change his plea was unlikely and inconsistent with the signed instructions. The primary judge also did not accept (at [220]) Dr Munro's evidence that he did not tick every box on the instruction sheet prior to signing the instruction sheet. The primary judge accepted (at [222]) that Dr Munro complained to Mr Hoare at one point as to how he had been spoken to by Mr Clare but the primary judge assessed that, at most, that there may have been "firm talk within the permissible bounds".

[20] The primary judge summarised his Honour's findings on the evidence (at [223]):

> "(a) At all times [Dr Munro] was given appropriate advice by his lawyers.
>
> (b) He was told he could run a trial if he wanted but his prospects of success were not good. That was reasonable advice in the circumstances. The statement of facts, assuming the underlying facts could be proved, made the case a strong one.
>
> (c) At no stage was he told that the lawyers would withdraw if he did not plead guilty. In fact, the reverse is true.
>
> (d) [Dr Munro] made a considered decision to plead guilty. Count one was to be discontinued which significantly reduced the

quantum. He knew it would have an impact at sentence. He signed instructions that the pleas were of his own free will.

(e) [Dr Munro] had at least overnight to think about things and to change his mind- he did not. Indeed he had three days.

(f) The lawyers acted entirely appropriately in their conduct of the case

(g) [Dr Munro] has simply regretted his decision and has changed his mind."

[21] The primary judge expressly found (at [231] of the reasons) that no miscarriage of justice had occurred or was likely to occur in the matter. The primary judge explained (at[232]) that his Honour thought it was a case "where [Dr Munro] has regretted his decision to plead guilty, but it was his decision" and noted that there was "a reasonably strong case" against Dr Munro, he was appropriately advised and no improper pressure was placed upon him. The primary judge distinguished *Nerbas* on the basis in that case there had been an unjustified threat by the lawyers to withdraw, whereas the primary judge found that no such threat was made to Dr Munro and, in fact, he was told the prosecution could be put to proof of the charges at the trial.

[22] The primary judge concluded (at [234] of the reasons):

> "[Dr Munro] pleaded on the basis of legitimate considerations which had the real potential to advance his interests; namely the significant reduction in quantum and the effect on the ultimate sentence. The negotiated outcome will lead to a significant reduction in the sentence [Dr Munro] was facing if convicted after a trial."

Application for leave to adduce evidence

[23] Dr Munro seeks to adduce eight pages of evidence which he asserts were unavailable when his application to withdraw his guilty pleas was before the primary judge.

[24] Four of the pages relate to his admission to hospital after he was sentenced. On 4 May 2022, he was referred for an urgent procedure for unstable angina and had the procedures of coronary angiography, a left ventriculogram and left heart catheterisation. The echocardiography report dated 6 May 2022 showed that the left ventricle was of normal size and systolic function, the ejection function was 55 to 60 per cent by visual estimation, and his left atrium was severely dilated. One of the pages is the report from the interventional cardiologist dated 4 May 2022 that concluded that Dr Munro had severe left main coronary arteriostenosis but normal ventricular systolic function. Recommendations were made as to medication and that he be referred for a coronary artery bypass graft while an inpatient. The appellant seeks to adduce this fresh evidence of the results of the procedures he underwent after he was sentenced to assert that, when he pleaded guilty he was suffering from "a serious, undiagnosed disease of the coronary arteries", that he only had 30 per cent cardiac capacity and that should be extrapolated back to July 2021 to assert that his capacity to give instructions to plead guilty must have been affected. The mere receipt into evidence of the reports of procedures performed on Dr Munro in early May 2022 and the results of the tests administered to him during that hospital admission is evidence of his heart condition at that time. It can be inferred that he had a heart condition in July 2021. Without the assistance of expert medical opinion

to interpret how Dr Munro may have been affected by his heart condition in July 2021, no conclusion could be drawn by the Court merely from the four pages of reports which Dr Munro seeks to adduce on the appeal. In the absence of such medical opinion, there is no point in leave being given to Dr Munro to adduce that evidence.

[25] Two of the pages are dated 16 August 2023 and entitled "Community Care Plan" and list his various medical issues and the assessment of his needs at that time. That is too remote from the events in July 2021 that were the subject of the application to withdraw his pleas to be of any relevance. Similarly, Dr Munro wants to adduce the two page letter dated 10 May 2022 in relation to his legal aid application received on 11 April 2022 which had been unsuccessful on the basis that he did not meet the merits test. This application was for legal aid after his application to withdraw his guilty pleas had been refused. It therefore must have related to his appeal and is irrelevant to the events of July 2021.

[26] The application for leave to adduce evidence is refused.

Appellant's arguments on the appeal

[27] To the extent that the appellant's arguments relied on the additional evidence for which leave to adduce has been refused, it is not necessary to refer to those arguments.

[28] Dr Munro's evidence of the events in July 2021 and elicited from him in cross-examination on the application to withdraw his guilty pleas was the subject of findings by the primary judge some of which the appellant seeks to challenge on the appeal. The problem with the appellant's submissions, both written and oral, is that he does not endeavour to show how specific findings were in error by reference to other evidence that was before the primary judge.

[29] To the extent that Dr Munro's submissions purport to assert matters of evidence that were not before the primary judge, those evidentiary matters will not be considered on this appeal. Examples can be given. Dr Munro identifies matters affecting his decision to plead guilty at paragraph 21(e) of his written submissions as "the prescribed medication load of the Appellant, his diagnosed mental disabilities (see previously mentioned report of Dr. Manik Gudiri) and his latent medical issues including a serious, undiagnosed disease of the coronary arteries". There was no evidence adduced on the application to withdraw his guilty pleas as to the medication he was taking on 18 and 19 July 2021 and the effect of the medication on him. Dr Gudiri's report had been used on an earlier application to adjourn the trial and was not adduced into evidence on the application to withdraw his guilty pleas. Dr Munro's affidavit dealt with his bipolar disorder, major depressive disorder and dissociative disorder and the medication with which all three conditions were being treated. That means that, in the absence of the identified evidence to support the assertion in paragraph 21(e) of the submissions, that paragraph should be read as if it were confined to those aspects of his health that were the subject of evidence before the primary judge. That was only his mental disabilities.

[30] Dr Munro's submission as to the findings that should have been made by the primary judge as to the circumstances that resulted in his entering guilty pleas on 19 July 2021 can be summarised as:

(a) the flawed and misleading advice from the first lawyers in relation to the plea bargaining process and the legal processes required to vacate a guilty plea;

(b) the level of physical and intellectual duress applied by the first lawyers to the appellant to induce him to accept the CDPP offer on 18 July 2021;

(c) the stress and emotion felt by the appellant as a result of his concern for his wife's hysterical reaction to the death of her canine companion of 16 years on the night of 17 July 2021;

(d) the appellant's "enduring commitment to caring for his wife's failing health" and his likely absence for the length of the trial and possible incarceration;

(e) his diagnosed mental disabilities; and

(f) the exhaustion affecting the body and mind of the appellant, compounded by an overriding imperative to maintain some form of legal representation in the face of the implied threats of abandonment by the first lawyers.

[31] These circumstances will be referred to respectively by the lettered paragraphs as "alternative findings".

[32] Dr Munro also impugns the probative value of the evidence relied on by the CDPP for the case against him summarised in the draft statement of facts. The problem with the assertions made by Dr Munro against the CDPP case is that they are made in general terms and he did not refer to the actual contents of documents to illustrate the alleged errors. Examples of these broad assertions in paragraph 25 of the written submissions are:

(a) "The certain knowledge of the Appellant that flawed financial data was used to compile the selective forensic audit and fake financial evidence was used by ASIC staff to compose the financial briefing materials for the CDPP."

(b) "The forensic audit prepared by ASIC and submitted into evidence by the CDPP was compromised by errors of fact and the omission of critical data ..."

(c) "The Appellant's inability over the past eight years to obtain organisational and/or financial assistance from the three appointed Legal Aid funded Defence Teams and the CDPP/ASIC to assist with the issue of relevant subpoenas to recover approximately 600 GBs of trading data from three nominated offshore Broking (i.e. trading) accounts."

(d) "[The existing ASIC audit] is unreliable as evidence of any malfeasance, was compiled in-house by ASIC using non-expert staff and therefore does not reflect the professional Accountancy standards governing the production of independent forensic audits by qualified Accountancy Industry experts."

[33] Dr Munro complains that he was cross-examined by counsel for the CDPP on the substantive fraud matters on the application to withdraw his guilty pleas, could not seek advice from the second lawyers while he was under cross-examination, and was not warned by the primary judge about self-incrimination. As to the first complaint, it was appropriate for Mr Hunter of King's Counsel who appeared with Ms Freeman of counsel on behalf of the CDPP to cross-examine Dr Munro on the substantive fraud case, as it was relevant for the primary judge to consider whether there was an arguable defence to, or triable issue in respect of, the charges: see *R v Wade* [2012] 2 Qd R 31 at [51].

[34] The second complaint is not reflected in the transcript of the hearing before the primary judge. After Mr Hunter had embarked on the cross-examination of Dr Munro on matters relating to the fraud charges and immediately before the adjournment for lunch on the first day of the hearing, the primary judge confirmed that Mr Hunter had no objection to Dr Munro's counsel speaking to Dr Munro on the topics raised in cross-examination about the defence to the charges, as the primary judge noted that otherwise there was no material before him, as to whether Dr Munro had a defence. It emerged when the hearing resumed after lunch that Dr Munro had conferred with his counsel and produced 84 pages of information during the lunch break.

[35] It is also relevant to the second complaint that when Dr Munro was being cross-examined on the third day of the hearing, his counsel interrupted to advise the Court that he had located a document comprising 25 pages of scanned handwritten notes that may have been the document to which Dr Munro was then referring in his cross-examination. That document was provided to Mr Hunter KC and the matter stood down for 90 minutes and Dr Munro was permitted by the primary judge to speak to his counsel about the document that became exhibit 36. When the cross-examination resumed after about 10 minutes, there was then a further adjournment for an hour to allow Dr Munro to read the document and give further instructions to his counsel. The cross-examination was completed in another hour and Dr Munro was re-examined by his counsel for about 20 minutes on two emails that he had provided to his lawyers (which became exhibit 37). It is of note that the two emails came from the 84 pages of information produced by Dr Munro to the second lawyers on the first day of the hearing. The emails were respectively dated 16 and 17 February 2011 and each attached a trading statement relevant to the Starport scheme. No other documents were tendered from that bundle of 84 pages of information. There was an adjournment of about 20 minutes to enable Dr Munro to confer with his counsel before counsel then addressed the primary judge.

[36] As to the third complaint, the submissions of Dr Munro do not identify when he should have been warned by the primary judge about self-incrimination. Dr Munro was represented by the second lawyers and it was for them to raise with the primary judge, if they considered it appropriate, that the warning be given to Dr Munro. In any case, as the application to withdraw the guilty pleas put in issue whether there was a real issue to be tried, the complaint now raised by Dr Munro about the failure to be warned against self-incrimination is of little significance.

[37] Dr Munro complains about the extent of the material that was disclosed by the first lawyers as a result of the document Dr Munro signed on 11 August 2021 waiving legal professional privilege to enable Mr Hoare and Mr Clare to forward documents and provide affidavits to the second lawyers and to the CDPP with respect to Dr Munro's plea of guilty and "any other directly associated matters relevant to the decision to enter pleas of guilty". There is no ground of appeal based on the incompetence of the second lawyers. These complaints by Dr Munro about the extent of the waiver of legal professional privilege are therefore irrelevant. In any case, because of the nature of Dr Munro's allegations made against the first lawyers, the express waiver of legal professional privilege reflected the implicit waiver that arose from the contents of Dr Munro's affidavit. Even though Dr Munro had focused on the advice given by the first lawyers on 18 and 19 July 2021, that advice had to be put into context by reference to the conferences between Dr Munro and the first lawyers and the correspondence that had passed between Dr Munro and Mr Clare's

firm that immediately preceded the conference on 18 July 2021. It is therefore not necessary on this appeal to deal further with Dr Munro's complaints against the second lawyers in relation to advising him on the waiver of legal professional privilege.

[38] Dr Munro makes serious allegations in his submissions on the appeal about the conduct of the first lawyers on which they were not cross-examined on the hearing of the application before the primary judge. To the extent that those allegations were not tested in that hearing, they are irrelevant to this appeal. Dr Munro is also critical of other aspects of the conduct of the second lawyers. Some of the criticism is due to Dr Munro's misunderstanding of the nature of the constraints that apply to cross-examination conducted by lawyers. The criticisms in his submissions of his second lawyers are largely irrelevant to the appeal where the focus must be on whether the primary judge erred in making the findings that underpinned the refusal of Dr Munro's application to withdraw his guilty pleas.

Alternative findings (a), (b) and (f)

[39] Alternative finding (a) which overlaps with alternative finding (f) is contrary to the primary judge's findings at subparagraphs (a) and (c) of [223] of the reasons. It was apparent from the primary judge's reasons that his Honour was unimpressed with Dr Munro as a witness. That is reflected in the transcript of Dr Munro's cross-examination where he was argumentative with counsel, tended to act as his own advocate, and on occasions refashioned the question to respond with an answer that was not responsive to the question that was actually asked. Critically, the evidence of Mr Hoare and Mr Clare was supported by the available documentary evidence. Dr Munro had deposed in his affidavit to the email received from Mr Clare on 17 July 2021 and his recollections of the meetings on 18 and 19 July 2021, but did not deal in his affidavit with the meetings with the first lawyers on 9, 13 and 15 July 2021 that put the events of 17 to 19 July 2021 into context.

[40] Mr Clare had deposed to Zoom conferences with Dr Munro and Mr Hoare on 9, 13 and 15 July 2021. There was a recording of the conference on 15 July 2021 that was in evidence. The file notes of all these meetings were also tendered. The transcript for the meeting on 15 July 2021 shows that Dr Munro had confirmed his previous advice that the quarterly statements he provided to investors were bolstered by the injection of his personal funds which he conceded happened "occasionally ... not always". That previous advice of Dr Munro was recorded in Mr Clare's file note of the conference on 13 July 2021 where the discussion was about the quarterly reports in relation to the subject charges and it was noted:

> "client states he used his funds from an off shore account to supplement the Trade Station account, with the aim of keeping it profitable so investors would remain in Trade Station.
>
> client intimates the quarterly reports were prepared on this basis – without the knowledge of investors."

[41] Dr Munro also conceded to the first lawyers at the meeting on 15 July 2021 that no dividend was payable unless the fund was recording a profit but when the fund was making a very small profit, he inflated the returns. He was advised by Mr Hoare on 15 July 2021 that "that very small profit does not reflect the information you provided those investors" which was to the effect that the dividend would be based on the

interest earned on their loan for that quarter. Even though that was a different fraud to that particularised by the prosecution, Dr Munro was advised that an admission by him to fraudulent conduct "would have a deleterious effect before the jury".

[42] A perusal of the evidence of Dr Munro, Mr Hoare and Mr Clare, including the supporting documentary evidence of the first lawyers, does not impugn the primary judge's findings at subparagraphs (a) and (c) of [223] of the reasons which depended on the primary judge's credibility findings.

[43] Alternative finding (b) which also overlaps with alternative finding (f) is inconsistent with all the findings made by the primary judge at [223] of the reasons which also depended on the primary judge's credibility findings.

Alternative findings (c), (d) and (e)

[44] Alternative findings (c), (d) and (e) are personal factors to Dr Munro that no doubt contributed to the strain and stress that he was under, when deciding on 18 July 2021 whether he would plead guilty or not guilty to the charges. The three week trial of counts 1-4 was due to start the next day. The advice of the first lawyers that Dr Munro could not succeed in obtaining a further adjournment of the trial was apt in the circumstances. The imminence of a trial of serious fraud charges would have been stressful for any defendant faced with either proceeding to trial or accepting the offer of the CDPP to discontinue count 1 (which would significantly reduce the overall quantum of the frauds), if there were guilty pleas to counts 2-4. Dr Munro's choice had to be finalised before the trial was due to start. The evidence adduced on the hearing before the primary judge was not sufficient to show that the primary judge erred by not finding those personal factors precluded Dr Munro from making a free choice to plead guilty in all the circumstances.

[45] Dr Munro has failed to show by reference to the evidence before the primary judge that the primary judge erred in making the findings at [223] of the reasons.

The test to be applied on an application to withdraw guilty pleas

[46] McMurdo J (with whom de Jersey CJ and Dalton J agreed) noted in *Nerbas* (at [12]-[13]) that the applicant seeking leave to withdraw pleas of guilty had to show that a miscarriage of justice had occurred or would occur, if leave were refused, relying on *R v Mundraby* [2004] QCA 493 at [11] and *Boag v R* (1994) 73 A Crim R 35 at 36-37. *Boag* was also applied in *Mundraby* at [11] as authority for the proposition that a defendant who applied to the Court for leave to withdraw his plea had to show that a miscarriage of justice has occurred or would occur, if he were not allowed to withdraw his plea. The variety of circumstances which could amount to a miscarriage of justice was explained in *Boag* at 37:

> "A miscarriage of justice may occur in many different situations if a prisoner is not permitted to withdraw his plea of guilty. Such a miscarriage will be established not only where the applicant did not appreciate the nature of the plea which he had entered but also, for example, if there was no evidence upon which he could have been convicted, or if he had not intended to admit that he was guilty or if his plea had been induced by fraud or threats or other impropriety, when he would not otherwise have pleaded guilty... there must be shown to be some circumstance which indicates that the plea of guilty was not really attributable to a genuine consciousness of guilt."

[47] McPherson JA (with whom Jerrard JA and Mackenzie J agreed) stated in *Mundraby* at [11] in relation to such an application at first instance:

> "No doubt the circumstances capable of amounting to a miscarriage of justice in this context are not to be restricted or circumscribed; but it has been held that there must be such as to indicate that the plea of guilty was 'not really attributable to a genuine consciousness of guilt'..."

[48] Mr Hunter of King's Counsel (who appeared with Ms Harburg of Counsel) for the respondent drew the Court's attention to *White v R* (2022) 110 NSWLR 163 where the New South Wales Court of Appeal held that where an accused seeks to withdraw a plea of guilty prior to conviction, the proper test to be applied (of which the accused bears the onus) is whether the interests of justice require that course to be taken. That appears to be inconsistent with the miscarriage of justice test applied *Nerbas*. The decision in *White* was handed down after the primary judge had refused Dr Munro's application to withdraw his guilty pleas. The respondent submitted that, regardless of whether the primary judge should have applied the test approved in *White* rather than the test applied in *Nerbas*, the appellant could not have succeeded before the primary judge on the basis of the primary judge's factual findings.

[49] The offender in *White* who was cognitively impaired had been charged with murder. He instructed his lawyers he intended to plead not guilty. He was arraigned and pleaded guilty. There was an immediate adjournment to enable his lawyers to confer with him. He explained he was confused, stressed and worried that his former wife would come after him. He had seen the deceased's brother in court and police pointing at him. He confirmed that he did not cause the deceased's death and wanted to plead not guilty and go ahead with the trial. The offender's counsel informed the primary judge that the offender did not want to maintain the plea of guilty from which the primary judge inferred that the plea had not been in error. An application for leave to vacate the guilty plea was then pursued. It was opposed by the prosecution. The primary judge considered whether permitting the guilty plea to stand would constitute a miscarriage of justice. On the appeal, the Court (at [23]) differentiated between two scenarios. The first scenario applied to an application to withdraw a guilty plea prior to conviction (and sentence) and the second scenario applied to circumstances where the Court was asked to go behind the guilty plea and permit it to be withdrawn for some good reason after conviction (and sentence). The Court noted (at [24]) that the second scenario could only result in the plea being set aside on appeal on the permitted grounds for an appeal against conviction, including that there had been a miscarriage of justice.

[50] The Court in *White* analysed many authorities on withdrawal of guilty pleas. One of those was *Boag* which was described in *White* at [56] as a first scenario case involving an appeal where Hunt CJ at CL (with whom the other members of the Court agreed) approved the statement of the test applied by the judge at first instance that withdrawal of the guilty plea should be allowed where it has been shown that a miscarriage of justice has occurred. It was noted in *White* at [56] that all cases referred to in *Boag* for that proposition were second scenario cases. The Court in *White* concluded (at [60]) that there had been a conflation of tests in some cases (including *Boag*) and in some summaries of the authorities but the proper test to be applied where an accused seeks to withdraw a plea of guilty prior to conviction in a first scenario case at first instance is whether the interests of justice require that course to be taken. The

Court in *White* expressly held (at [61]) that *Boag* was wrongly decided and should not be followed in a first scenario case.

[51] It had been argued by the prosecution in *White* that there was no real or material difference between the interests of justice test and the miscarriage of justice test but that was rejected by the Court (at [64]) where it was stated:

> "A positive conclusion on the balance of probabilities that there *would be* a miscarriage of justice if a plea was not permitted to be withdrawn is, no doubt, the paradigm case where it will be in the interests of justice to permit withdrawal of a plea. But equally, it may also be in the interests of justice to permit a plea to be withdrawn if there is a *risk* of a miscarriage of justice, provided that the *risk* is a real and not fanciful one." (*footnote omitted*)

[52] The Court in *White* noted (at [65]) that "[t]he interests of justice test is broader and may focus on matters going beyond the integrity of the plea, although that will very often be the focal point of the inquiry". The Court then listed a non-exhaustive list of factors affecting the interests of justice:

> "• the circumstances in which the plea was given;
>
> • the nature and formality of the plea, involving as it does the admission of all the formal elements of the offence;
>
> • the importance of the role of trial by jury in the criminal justice system;
>
> • the time between the entry of the plea and the application for its withdrawal;
>
> • any prejudice to the Crown that might arise from the withdrawal of the plea;
>
> • the complexity of the elements of the charged offence;
>
> • whether all of the relevant facts upon which the Crown intended to rely were fully known to the accused;
>
> • the nature and extent of legal advice received by the accused before entering the plea;
>
> • the seriousness of the alleged offending and thus the likely consequences in terms of penalty;
>
> • the subjective circumstances of the accused;
>
> • any intellectual or cognitive impairment suffered by the accused, notwithstanding their fitness to plead;
>
> • any reason to suppose that the accused [was] not thoroughly aware of what he [or she was] doing;
>
> • any extraneous factors that bore upon the making of the plea at the time it was made, including inducement by threats, fraud or other impropriety;

- whether the accused has been persuaded to enter a plea by reason of imprudent and inappropriate advice tendered by his or her legal representatives;
- any explanation that has been proffered by the accused for the application to withdraw their guilty plea;
- any consequences to victims, witnesses or third parties that might arise from the withdrawal of the plea; and
- whether, on the material before the court, there is a real question about the accused's guilt to the charge in respect of which the plea has been entered." (*footnotes omitted*)

[53] The Court also noted in *White* at [69] that:

> "While the onus of proof is certainly borne by the accused in an application for leave to withdraw a guilty plea, there is no principled basis for this court to treat that onus as any 'heavier' than in other circumstances where a party seeks to persuade a court to exercise a discretion in the interests of justice."

[54] It was noted (at [72]) in *White* that the prosecution had conceded that where the wrong legal test had been applied on the application to withdraw the guilty plea that amounted to a miscarriage of justice, subject to the application of the proviso. The Court in *White* (at [74]) was not persuaded that the result would have been the same had the interests of justice test been applied to the offender's application for leave to withdraw his plea of guilty.

[55] The decision in *White* was considered in *Garcia-Godos v R; MH v R* [2023] NSWCCA 145. There were two appeals disposed of in *Garcia-Godos*. Both involved offenders who unsuccessfully sought to withdraw guilty pleas before they were sentenced. They were unsuccessful in their original appeals in showing that the refusal to set aside the guilty pleas constituted a miscarriage of justice: *Garcia-Godos v R (Cth)* [2015] NSWCCA 144 and *MH v R* [2022] NSWCCA 287. After the decision in *White*, each offender sought an extension of time to apply for leave to appeal against the refusal of the application to withdraw guilty pleas on the ground that the relevant primary judge had applied the wrong test in determining whether to permit the offender to withdraw his guilty pleas. It did not appear to the Court in *Garcia-Godos* (at [58]) that on an analysis of the cases referred to in *White* that the division between first scenario and second scenario cases had been made prior to that decision. The Court then noted (at [58]) that this "bifurcation" was made more difficult because in many of the cases the expressions "miscarriage of justice" and "interests of justice" were used together or interchangeably. One example referred to in *Garcia-Godos* (at [59] and [70]) was the reliance by Gaudron and Gummow JJ in *Maxwell v The Queen* (1996) 184 CLR 501 at 531 where the term used was "interests of justice" but it was footnoted to three cases, one of which was *Boag*. The Court in *Garcia-Godos* held (at [72]) that no firm conclusion could be reached that the Court in *White* was incorrect in making the distinction between the two scenarios in the test to be applied. The Court also accepted (at [76]) the relevance of the factors contained in *White* (at [65]) and applied them to the facts involved in the two appeals.

[56] The Court in *Garcia-Godos* proceeded to consider the matters relied on by the offender Garcia-Godos to show that a different result could have been reached by the

primary judge if the interests of justice test had been applied. The offender was a Spanish speaker from Peru who claimed to have limited ability to speak and understand English. He complained the brief of evidence was never translated into Spanish and an interpreter was not always present when he met with his lawyers. The offender stated he was pressured by his lawyers to plead guilty. There had also been a contest between that offender and the lawyers who represented him when he pleaded guilty as to whether he had maintained to them he was not involved in the offending conduct. The primary judge made adverse credibility findings against the offender, preferred the lawyers' evidence and found their notes accurately reflected the instructions given by the offender. In respect of the offender Garcia-Godos, the Court found (at [122]) for the reasons set out at [123]-[129] that the result before the primary judge would not have been any different had the interests of justice test been applied. The Court therefore concluded (at [131]) that the application of the wrong test by the primary judge amounted to a miscarriage of justice, subject to the question of whether or not the proviso should be applied. The Court applied the proviso and concluded (at [131]) that no substantial miscarriage of justice had occurred in Garcia-Godos' case.

[57] The second appeal in *Garcia-Godos* was by the offender MH. That offender had sought to withdraw his guilty pleas as a direct consequence of threats which he alleged had been made against him and caused him to act under duress in pleading guilty. The primary judge had rejected MH's evidence that he succumbed to pressure after being threatened and had entered guilty pleas as a result and also rejected the evidence of the witness who asserted he had delivered the threats to MH. The Court concluded (at [170]) that had the primary judge applied the interests of justice test, his findings and determination would still have been based on his factual findings and rejection of the offender's evidence. The Court noted (at [171]) that the application by the primary judge of the wrong legal test amounted to a miscarriage of justice, subject to the question of whether the proviso should be applied but considered that the primary judge's assessment of the credibility of the witnesses' evidence could or would have been different had the interests of justice test been applied. The Court concluded (at [171]) that no substantial miscarriage of justice actually occurred in MH's case.

[58] The observations in *Garcia-Godos* (at [58]-[67]) about the hindsight analysis undertaken in *White* in respect of first and second scenario cases being complicated by the use in some authorities of the expressions "miscarriage of justice" and "interests of justice" interchangeably is reinforced by the approach of McPherson JA in *Mundraby* at [11]. Even though McPherson JA described the test to be applied by the judge hearing the application to withdraw a guilty plea as whether a miscarriage of justice had occurred or would occur if the applicant were not allowed to withdraw the plea, McPherson JA added that the circumstances amounting to a miscarriage of justice in that context were "not to be restricted or circumscribed".

The question on this appeal

[59] As the primary judge refused the application by Dr Munro to withdraw his guilty pleas and the matter proceeded to sentence, the question on this appeal is whether the refusal to allow Dr Munro to withdraw his guilty pleas constituted a miscarriage of justice that enlivens the jurisdiction of this Court on the appeal pursuant to s 668E(1) of the *Code*.

[60] In *R v Verrall* [2013] 1 Qd R 587, Holmes JA (with whom Philippides and Douglas JJ agreed) considered (at [16]) the appropriate procedure to be followed was an appeal

against conviction on the ground of a miscarriage of justice, where the offender pleaded guilty, unsuccessfully sought to have those pleas set aside and then lodged an appeal against conviction. It was noted (at [4]) that the position in Queensland was unarguable that the administering of the allocutus is the Court's acceptance that guilt has been established, whether by verdict or plea and (at [5]) that s 649(1) of the *Code*, taken in context with s 648, "provide a strong indication that conviction occurs, at the latest, once the defendant has been called upon as s 648 prescribes". Holmes JA noted that indication of when conviction occurs was reinforced by the terms of r 51 of the *Criminal Practice Rules 1999* (Qld) (*CPR*) which require the "proper officer" which is usually the judge's associate to use a statement in the following terms for the purposes of s 648 in addressing a defendant who has pleaded guilty:

> "You have been convicted ... on your own plea of guilty ... of [the offence]."

[61] It was also noted (at [15]) by Holmes JA that the view had been taken in Queensland that a convicted person may at any time before sentence be allowed to withdraw a plea of guilty. One of the authorities referred to by Holmes JA for that proposition was *R v Phillips and Lawrence* [1967] Qd R 237 at 288 where Hart J, after referring to the forerunner of r 51 of the *CPR* (which was in similar terms to r 51), stated:

> "In my view when the prisoner is thus addressed, the Associate speaks for the Court and what he says is an acceptance of a plea of guilt. This means that in *Jerome's case*, on the assumption that the normal procedure had been followed, there had been a conviction. It does not mean however that the Court has no power to set aside a conviction before sentence. There are in the *Code* no express words abolishing the very just and convenient common law practice in force at the time of its enactment (for which see *Rex v. Plummer* (1902) 2 K.B. 339).
>
> If it clearly appears, at the time when the Court is considering sentence, that an accused person has mistakenly pleaded guilty, it is unthinkable that the Court has no power to rectify the matter itself, but must leave it to the Court of Criminal Appeal."

[62] Even though the defendant in *Verrall* was convicted immediately upon the administration of the allocutus and before sentence, the position in Queensland after conviction and before sentence should be characterised as equivalent to the first scenario in *White*.

[63] The focus of the Court on appeal is on the circumstances in which the guilty plea was entered to discern whether it is shown on appeal that it was a miscarriage of justice to refuse to allow a defendant to withdraw a guilty plea. As explained by Brennan, Toohey and McHugh JJ in *Meissner v The Queen* (1995) 184 CLR 132 at 141:

> "A court will act on a plea of guilty when it is entered in open court by a person who is of full age and apparently of sound mind and understanding, provided the plea is entered in exercise of a free choice in the interests of the person entering the plea. There is no miscarriage of justice if a court does act on such a plea, even if the person entering it is not in truth guilty of the offence." (*footnote omitted*)

[64] On the findings of fact made by the primary judge, the relevant factors taken into account in considering whether Dr Munro should have been given leave to withdraw his guilty pleas included:

(a) Dr Munro had to make a choice at the latest on 19 July 2021 whether to proceed to trial with the first lawyers putting the prosecution to proof or to plead guilty to counts 2-4 and obtain the benefit of guilty pleas together with the discontinuance of count 1 on sentencing;

(b) Dr Munro was familiar with the CDPP case against him at the time he pleaded guilty to counts 2-4;

(c) there had been extensive conferences between Dr Munro and the first lawyers on 9, 13, 15 and 18 July 2021 and a further conference before he pleaded guilty on 19 July 2021;

(d) the advice of the first lawyers as to the constraints that applied to Dr Munro's defence of the fraud charges at the trial was appropriate in the circumstances;

(e) there was no incorrect advice given by the first lawyers to the effect that it was easy to withdraw guilty pleas before Dr Munro pleaded guilty;

(f) Dr Munro expressly acknowledged in the written instructions to plead guilty signed by him on 18 July 2021 that "as a consequence of pleading guilty, the court will deal with me as if I were in fact guilty to the allegations against me and I cannot later change my plea or official records to not guilty";

(g) there were health issues affecting Dr Munro at the time of his plea and leading up to the plea;

(h) his change of mind was timely in that it was raised with the first lawyers the day following the entry of the guilty pleas;

(i) Dr Munro asserted a defence to the fraud charges but did not produce documents relevant to the TradeStation share trading or endeavour to show that there was a real question about his guilt in the evidence adduced on the application to withdraw his guilty pleas.

[65] Not all the above factors pointed in the one direction, but in considering the circumstances in which the pleas of guilty were entered by Dr Munro, the factors strongly supported the conclusion that the plea was "entered in exercise of a free choice in the interests of the person entering the plea". Even though the primary judge was expressly applying the miscarriage of justice test, the primary judge did not, in fact, overlook any factor of the type identified in *White* (at [65]) as relevant to determining whether leave to withdraw guilty pleas should be granted in the interests of justice applicable to Dr Munro's circumstances. On the basis of the evidence adduced before, and the factual findings made by, the primary judge, there was no miscarriage of justice in the primary judge's refusal of Dr Munro's application to withdraw his guilty pleas.

[66] Does the fact that the primary judge applied the wrong test, according to *White*, make any difference to the outcome on this appeal? Because of the unassailable factual findings made by the primary judge, it is arguable that the question on this appeal is merely whether the refusal of Dr Munro's application to withdraw his guilty pleas amounted to a miscarriage of justice. It was conceded by the respondent, however, that, if this Court followed *White* rather than *Nerbas*, the primary judge applied the wrong legal test on the application to withdraw the guilty pleas and that itself was sufficient to constitute a miscarriage of justice, as was held in *White* at [72] (based on a concession by the prosecution at [20]) and *Garcia-Godos* at [131] and [171]. It was

also submitted by the respondent that such miscarriage of justice was amenable to the application of the proviso pursuant to s 668E(1A) of the *Code* and this Court would conclude that there was no substantial miscarriage of justice. No submissions were made by Dr Munro in relation to the application of *White* and its consequences for this appeal.

[67] It is not necessary on this appeal to determine whether the respondent's concession was appropriate or whether *White* should be applied in Queensland, as the factual findings made by the primary judge which Dr Munro has unsuccessfully challenged on this appeal mean that the outcome of the appeal is the same however the test that should have been applied by the primary judge is framed. If the conclusion were that there was no miscarriage of justice as the primary judge's decision was justified by the factual findings, the appeal would be dismissed. If there were a miscarriage of justice as a result of the application of the wrong legal test by the primary judge, the factual findings would make it an appropriate case for the application of the proviso and the appeal would be dismissed, as it was patent there was no substantial miscarriage of justice.

[68] It follows that the appeal must be dismissed.

Orders

[69] The orders which should be made are:

1. Application for leave to adduce evidence refused.

2. Appeal dismissed.

[70] **BOND JA:** I have had the advantage of reading in draft the reasons for judgment of the President. Although I agree with orders proposed by her Honour[1], I would frame the question before this Court differently than has her Honour. The President's analysis of the relevant facts of the case enables me to express my own analysis in a relatively summary way.

[71] As the President records, the appellant pleaded guilty to three counts of fraud on 19 July 2021. On that date the allocutus was administered. The result was that the appellant must be taken to have been convicted of those three counts of fraud on 19 July 2021.[2]

[72] The appellant thereafter and before sentence was imposed advanced an application to the primary judge to set aside his pleas of guilty. This was a permissible course. Even though he had already been convicted, it was not the law that the only course open to him was an appeal to the Court of Appeal. At any time before he was sentenced it was open to the appellant to apply to withdraw his pleas of guilty.[3]

[73] On 8 April 2022, the primary judge dismissed the application to set aside the pleas of guilty.[4] There could be no appeal from that order.[5] The appellant was sentenced by

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1 For reasons which will appear, I would also make an order extending the time within which to appeal against conviction.

2 *R v Verrall* [2013] 1 Qd R 587 per Holmes JA at [3] to [5] and Philippides J at [54] to [56].

3 *R v Verrall* per Holmes JA (with whom Philippides and Douglas JJ agreed) at [15], citing with approval *R v Popovic* [1964] Qd R 561, 567 and *R v Phillips & Lawrence* [1967] Qd R 237 per Hart J, 288–289.

4 *The Queen v Munro* [2022] QDC 80.

5 *R v Verrall* per Holmes JA (with whom Philippides and Douglas JJ agreed) at [14] to [16].

the primary judge on 3 May 2022. Any challenge to his conviction thereafter was one which had to be brought as an appeal to this Court pursuant to s 668D(1)(b) of the *Criminal Code*.[6]

[74] In the present case, the appellant's notice of appeal was filed on 3 May 2022 and advanced as the sole ground of appeal that the primary judge erred in not allowing the pleas to be vacated. This was an error in two respects. First, the appellant should have brought an application for leave to extend the time within which to appeal his conviction. Second, the sole ground of appeal was irrelevant.[7] The question is not whether the primary judge erred in dismissing the application as that order is not the operative order to be appealed. In order to succeed on his appeal against his conviction, the appellant must persuade this Court that there was a miscarriage of justice sufficient to warrant setting the conviction aside under s 668E(1) of the *Criminal Code*.[8]

[75] The respondent has not sought to resist the appeal on the basis that no application for leave to extend time has been brought. Nor could it have done so given the fact that the time taken to deal with the application for vacating his pleas was obviously a sufficient explanation for the gap between the date of conviction (19 July 2021) and the date of lodgement of the notice of appeal (3 May 2022). Accordingly, the appellant's first error has no consequence. An order should be made extending the time within which to appeal.

[76] As to the second error, in the particular circumstances of this case it is not appropriate to dismiss the appeal on the basis of a wrongly framed appeal ground. I would ignore the error and address the substantive issue. Accordingly, the question for this Court is whether it should form the view that there would be a miscarriage of justice if the appellant's guilty pleas were not set aside and a retrial ordered.

[77] The approach to be taken to that issue by this Court on an appeal after conviction and sentence is not in doubt and has been the subject of detailed examination by the High Court in *Meissner v The Queen*[9] and by this Court in *R v Wade*.[10] It was recently summarised in *R v Knudson*[11] by Kelly J (with whom Fraser JA and I agreed) in the following terms:

> "The appellant bears the onus of persuading this court that, in all the circumstances, it is appropriate to go behind his plea of guilty.[12] It is no easy matter for an appellant to persuade a court to set aside a conviction on a plea of guilty.[13] The entry of a plea of guilty

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6 *R v Whitehead* [2020] QCA 215 per Jackson J with whom Morrison and Philippides JJA agreed at [15].

7 In *R v Verrall* at [16] Holmes JA (with whom Philippides and Douglas JJ agreed) concluded that the third ground of appeal before the Court was irrelevant. The ground to which her Honour referred was that "the primary judge erred in not granting leave to set [the appellant's pleas of guilty] aside": see *R v Verrall* at [1].

8 *R v Verrall* per Holmes JA (with whom Philippides and Douglas JJ agreed) at [7] and *R v Whitehead* per Jackson J (with whom Morrison and Philippides JJA) agreed at [8].

9 *Meissner v The Queen* (1995) 184 CLR 132 per Brennan, Toohey and McHugh JJ at 141, 142 and Dawson J at 157.

10 *R v Wade* [2012] 2 Qd R 31, 39 [42] to [53].

11 *R v Knudson* [2021] QCA 267 at [43], footnotes in original.

12 *R v Wade* [2012] 2 Qd R 31, 39 [42].

13 *Borsa v The Queen* [2003] WASCA 254 [20], referred to with apparent approval in *R v Carkeet* [2009] 1 Qd R 190, 194 [25].

> constitutes an admission of all of the elements of the offence and a conviction entered on the basis of such a plea will not be set aside unless it can be shown that a miscarriage of justice has occurred.[14] There are three well recognised circumstances in which a plea of guilty will be set aside: namely, where the appellant did not understand the nature of the charge or did not intend to admit guilt, where upon the admitted facts the appellant could not in law have been guilty of the offence, and where the guilty plea was obtained by improper inducement, fraud or intimidation.[15] However, it should be observed that the court's jurisdiction on this appeal is not circumscribed other than by the existence of a miscarriage of justice.[16] Whether a miscarriage of justice has occurred depends on an examination of all of the relevant circumstances of the case.[17]"

[78] Because this is not an appeal from the decision by the primary judge to dismiss the application before him, it is not necessary to address the controversy examined in *White v R* (2022) 110 NSWLR 163. The law governing the appeal to this Court is that which is summarised in the previous paragraph and is not gainsaid by *White v R*.

[79] An interesting issue concerns the utility for the purposes of an appeal from conviction to this Court of the fact and outcome of the application before the primary judge. In *R v Verrall*[18] and in analogous circumstances, Holmes JA observed:

> "Although the appeal is from the conviction, not from the refusal of leave to withdraw the pleas of guilty, the proceedings before the primary judge are important, because they are the source of the record for this appeal and because his Honour made credit findings in relation to the appellant and his former solicitor, Mr Bale, favouring the latter's account. The appellant did not seek to supplement the record on appeal; nor did he advance any argument as to why his Honour's credit findings should be disregarded."

[80] In the present case the appellant did seek leave to supplement the record by adducing further evidence, but that application should be refused for the reasons expressed by the President. Otherwise I would follow approach of Holmes JA in relation to the significance to the question before this Court of the application before the primary judge and the findings which the primary judge made. The salient findings of the primary judge have been summarised by the President at [18] to [22]. No argument was advanced as to why the credit findings made by the primary judge should be disregarded by this Court. In that context and given the lack of any relevant supplementation of the record, it is difficult to see how the appellant could ever have discharged his onus of persuading this Court that it is appropriate to go behind his pleas. Certainly, there was nothing in the arguments which he did present (discussed by the President in her Honour's reasons at [27] to [45]) which did so.

[81] The result is that the appellant has not discharged his onus and his appeal should be dismissed.

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14 *Meissner v The Queen* (1995) 184 CLR 132, 157.
15 *Borsa v The Queen* [2003] WASCA 254 [20].
16 *R v Carkeet* [2009] 1 Qd R 190, 195 [26].
17 *R v Carkeet* [2009] 1 Qd R 190, 195; *R v Wade* [2012] 2 Qd R 31 [52].
18 *R v Verrall* per Holmes JA (with whom Philippides and Douglas JJ agreed) at [35].

[82] **MARTIN SJA:** I agree with the reasons for judgment of Mullins P and the orders her Honour proposes.