IN THE COURT OF APPEAL OF NEW ZEALAND

CA453/2016
[2017] NZCA 213

BETWEEN	ELI DEVOY Appellant
AND	THE QUEEN Respondent

Hearing: 11 May 2017

Court: Harrison, Gilbert and Katz JJ

Counsel: J N Bioletti for Appellant
T A Simmonds and M S Gatland for Respondent

Judgment: 25 May 2017 at 10.30 am

JUDGMENT OF THE COURT

A The appeal against conviction is dismissed.

B The appeal against sentence is dismissed.

REASONS OF THE COURT

(Given by Harrison J)

Introduction

[1] The Serious Fraud Office (the SFO) charged Eli Devoy, her brothers and family associates with numerous counts of fraud. It alleged that they had operated an elaborate mortgage fraud scheme, using the crude but time-honoured process of submitting falsified and forged documents to lending institutions to obtain loans on

11 residential properties. Ms Devoy, her family and associates were said to have benefited unlawfully by about $6 million.

[2] The charges were tried before Judge Gibson sitting without a jury over a 10-week period in the Auckland District Court. The Crown's case was that Ms Devoy — also known as Ellie Stone, Eli Ghorbani and Elaheh Ghorbani Sar Sangi — was the mastermind of the operation. Her defence, about which she gave evidence, was that she was duped by a trusted friend, Zohreh Homei Azimi, and that in all cases she was no more than an innocent conduit in submitting fraudulent and forged documents to the various lending institutions.

[3] Judge Gibson rejected the essence of Ms Devoy's defence.[1] He found her guilty of 17 charges of deception, two charges of dishonestly using a document and one of knowingly using a forged document. Four charges were dismissed. Ms Devoy had earlier pleaded guilty to four charges of obtaining a pecuniary benefit by deception. She was convicted and sentenced to five years' imprisonment with a minimum period of imprisonment of two and a half years.[2] She has appealed against conviction and sentence.

[4] Judge Gibson found the other defendants guilty of various offences. They were convicted and sentenced to terms of imprisonment. Only Ms Devoy's brother Mehrdad Ghorbani appeals, and his appeal is limited to sentence only. We shall determine that appeal in a judgment being delivered contemporaneously.[3]

[5] Ms Devoy's conviction appeal was originally advanced on three principal grounds. The first was that the SFO investigation into the charges was deficient. Ms Devoy claimed that the agency failed to investigate properly the allegedly fraudulent conduct of her trusted associate Ms Azimi on two fraudulent transactions. However, even if there were deficiencies, which is not at all apparent, Mr Bioletti did not suggest that they materially affected the verdicts against Ms Devoy. The second ground of appeal was that the Judge made factual errors. Mr Bioletti accepted that

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1 *Serious Fraud Office v Devoy* [2016] NZDC 10933 [Reasons for verdicts].
2 *R v Stone* [2016] NZDC 15968 [Sentencing remarks] at [25] and [27].
3 *Ghorbani v R* [2017] NZCA 214.

there was no arguable foundation for this ground. He later withdrew both grounds of appeal.

[6] The third and only remaining ground was of errors by trial counsel, Mina Wharepouri[4] and Quentin Duff, relating to seven counts and in failing to apply to recall Ms Azimi. This ground was originally cast widely on the premise that the nature and extent of counsels' errors on one or all of the seven counts infected or tainted the Judge's verdicts on all counts. However, in closing Mr Bioletti properly acknowledged that the effect of any error was limited to verdicts on a particular charge or charges. That was the inevitable consequence of the Judge's discrete evaluation of the facts relevant to each charge as on a separate trial for each. On all charges where the Judge rejected Ms Devoy's exculpatory accounts he carefully examined the sufficiency of the prosecution evidence to satisfy himself that the charges were proved without drawing inferences adverse to Ms Devoy or resorting to propensity reasoning. This was reflected in his acquittal of Ms Devoy on four charges where she was given the benefit of the doubt. Mr Bioletti was also cognisant of the cumulative effect of Ms Devoy's four guilty pleas.

[7] Ms Devoy originally appealed against sentence on a number of grounds. However, Mr Bioletti acknowledged that determination of her sentence appeal was solely contingent upon her conviction appeal. In the event that we allowed an appeal on one or more of the charges, Mr Bioletti's submission was that we should reduce the sentence accordingly. Otherwise he accepted the sentence appeal could not succeed.

Background

[8] Ms Devoy, her family and associates were immigrants from Iran who were either related or known to each other through their membership of the Persian community in Auckland. Ms Devoy had arrived in New Zealand in about 2001. She worked as a mortgage broker as did her husband. They had three children. At the time of trial they were living separately.

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[4] Mr Wharepouri is now a District Court Judge sitting in Auckland.

[9] The facts, about which there was little dispute at trial, pointed overwhelmingly to the existence of a fraudulent scheme directed at six banking and lending institutions. The real issue for trial was whether and to what extent each defendant had participated in the frauds, separately or collectively, and if so whether they acted honestly or with colour of right. It is unnecessary for us to visit the facts in particular detail. We gratefully adopt the Judge's summary or overview of the offending as follows:[5]

> [6] The allegations centre on the use of documents said to be false and fraudulent, and on false claims in mortgage loan applications forwarded to the various lending institutions. The Crown claims the applications were used to support successful applications for mortgage finance which led to the acquisition and sale of at least 11 properties. The defendants acquired or sold these properties either to themselves or to other members of the Iranian community who were used as 'dummy purchasers', the sale price being inflated or deflated from earlier purchases among the group as required. The total value of the loans obtained through the provision of information the Crown alleges was false, was $5,823,912.91. In some instances Mrs Devoy was the true owner of the properties which were bought in the names of other defendants or of third parties introduced by Mrs Devoy. The prosecutor alleges she was the primary beneficiary of the offending and is said to have obtained $759,170.46.
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> [7] The Banks were generally consistent in terms of the documentation they required for a loan. An application signed by the applicant was required with details of assets and liabilities as well as income and the source of income to be completed. Documentation was required to support the representations of income including evidence of employment and of the income earned. Payslips and bank statements were also required to support income claims. Proof of identity was required together with a copy of the agreement for sale and purchase of the property to be mortgaged and evidence that the applicant had sufficient cash, or a deposit as it was sometimes called, to meet the difference between the purchase price and the amount being advanced by the Bank. Sometimes a valuation was required.

[10] The Judge later described Ms Devoy's participation in more detail as follows:

> [45] At the centre of the offending was Mrs Devoy, described by the Crown as being the 'mastermind' of the scheme. She was the link between the accused all of whom, other than Mr Toraby, could be described as members of the Ghorbani clan. Mr Toraby, as with a number of Crown witnesses, was a friend of Mrs Devoy. She used members of her family or Persian migrants to New Zealand, whom she befriended, as purchasers and vendors of the properties as and when required so as to enable several of the properties to remain under the control of the Ghorbani family. Many of the properties, such as 23 Glenmore Road, [3]/78 Paihia Road, and 10B Heretaunga Avenue were used by various accused and their families as

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5 Reasons for verdicts, above n 1.

their residences. Mr Toraby's purchase, however, was in a different category in that it was an acquisition for him, and not for one or other of the Ghorbanis.

[46] Many of the property transactions involved what is colloquially known as 'mortgage ramping'. For the counts involving the initial purchases of 23 Glenmore Road and 10B Heretaunga Avenue, Mrs Dana Omidvar, the mother of Mrs Devoy and her brothers, was used as the initial purchaser. She entered into an agreement for sale and purchase with the family member who was purchasing the property but for a higher price than she was paying for the property, and settlement of both transactions would be effected on the same day. A valuation would be obtained to support the second transaction and mortgage finance would be applied for. The existence of the first transaction involving Mrs Omidvar's purchase would not be disclosed to the mortgagee. The mortgagee would then provide mortgage monies in excess of the original purchase price which would enable that transaction to settle and produce a surplus for the family member selected to be the purchaser.

[47] The Bank would be convinced by the use of false documents that the purchaser for the second transaction was making a cash contribution or deposit, as it was usually described, for the acquisition of the property but that did not occur as the mortgage monies obtained were sufficient to settle the first purchase.

[48] Later, when the mortgages fell into arrears, the properties at 23 Glenmore Road and 10B Heretaunga Avenue were sold for substantially less than that which the purchaser, Mehrdad Ghorbani or his brother Mehrzad, had acquired the property for. The property would be sold to another Persian who had agreed to lend their name to the purchase and had been identified and approached by Mrs Devoy. A mortgage application, with false bank accounts and employment details provided, would then be made and a new mortgage obtained. Again the Bank would be led to believe that the new purchaser had a cash contribution or deposit and was contributing that to the purchase but through the use of various fraudulent and false documents the solicitors acting for the parties and the Bank would be misled and no monies would actually be introduced. This was not always the position as, for example, Mrs Azimi made funds available to purchase a property at 29 Chorley Avenue, Massey, and surplus funds arising from mortgages raised on one property would be used in the acquisition of another.

[49] Shortly thereafter the property would be sold at a much higher price to another purchaser, in the case of 23 Glenmore Road, Mr Mehrdad Ghorbani and his wife as purchasers, using their original names, and for 10B Heretaunga Avenue, Mr Mehrdad Ghorbani, again using his original Persian name, and Ms Kardani, so that the property remained within the control of the Ghorbani family.

[50] As the property was re-purchased for an amount substantially more than that which it had earlier been sold, sometimes under the pressure of a mortgagee sale, more monies were able to be raised against the property by way of mortgage. Again the Bank would be convinced that a cash contribution was being made by the purchaser and the solicitors acting on the transaction would be led to believe that cash contribution had been paid, usually by the device of false documents showing that monies had been paid

> in Iran, and the mortgage received would be sufficient to re-pay the mortgage raised on the earlier acquisition by the now 'dummy vendor', a person effectively under the control of Mrs Devoy introduced at that point in the chain of sales and purchases where a purchase at a low value was required, so the last transaction would provide a surplus of funds arising for distribution.
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> [51] In this way Mrs Devoy obtained approximately $759,170.46 from the various transactions. Others, including Mrs Azimi, also obtained funds from the transactions. Mrs Azimi was a real estate agent at Barfoot & Thompson. The evidence suggested she worked closely with Mrs Devoy and they had other business interests together. Their roles seemed to be that Mrs Azimi would identify appropriate properties for purchase and Mrs Devoy would handle the applications for mortgages necessary to acquire them. It is those applications and documents provided in support or to convince solicitors and mortgagees that funds were being introduced that are the subject of the counts in the indictment. A large number of documents can be tracked directly to Mrs Devoy who not only lodged applications and provided supporting documents, many fraudulent, to Banks when acting as a broker herself, but also liaised with solicitors both for the vendors and the purchasers and provided documents to them. When not acting as a broker Mrs Devoy tended to direct applications to 'friendly' brokers known to her and provided them with the documents necessary to support the applications, again many of which were fraudulent and were clearly specifically created for the purpose of obtaining the mortgage advances. False details, verified by the documents, would be entered in the mortgage applications.

[11] The essence of Ms Devoy's defence, as summarised by the Judge, was that (a) she was merely Ms Azimi's personal assistant and on the occasions when Ms Devoy had supplied fraudulent and false documents to banks, mortgage brokers and solicitors she was acting at Ms Azimi's behest; and (b) unless she had some specific reason for believing to the contrary, she accepted all documents which she received from other family members and clients at face value and simply forwarded them on to relevant third parties.[6]

[12] The Judge noted that Ms Devoy and her associates "were at great pains to blame Mrs Azimi for the offending".[7] Much of the cross-examination at trial was directed to this end. As the Judge recited, despite this attack none of the relevant documents were apparently sent by Ms Azimi to the various institutions. To the contrary, their dealings were almost invariably with Ms Devoy. As the Judge also

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6 At [52].
7 At [52].

recited, "[n]o amount of gainsaying by Ms Devoy" could alter the factual reality that the bulk of the documents led directly to her.[8]

[13] The Judge had earlier referred to a search warrant executed by the police and SFO at Ms Devoy's home in Eastern Beach on 27 March 2012. The search revealed what the Judge described as a "veritable Aladdin's cave of compromising material in the form of bank statements, loan applications, notes confirming payments of various deposits, a passport and a driver's licence".[9] Many of the documents were fraudulent or forgeries. A number of other incriminating documents were found as a result of searches of electronic media at the site including computer hard-disk drives, laptops and a home office PC. Ms Devoy declined to participate in an interview with the SFO.[10]

[14] As the Judge observed when dismissing Ms Devoy's exculpatory accounts and as the verdicts illustrated,[11] Ms Devoy's explanations had no truth to them.

Decision

(a) Approach on appeal

[15] Our approach to determining appeals based on trial counsel error is well settled.[12] We must be satisfied that (a) an error or errors are established; and (b) if so, there is a real risk that the error or errors materially affected the verdicts. If both are not established, it cannot be said that the verdict is unsafe and justice miscarried.

[16] Ms Devoy swore a perfunctory affidavit in support of her appeal. Messrs Wharepouri and Duff swore comprehensive affidavits in reply and produced relevant documents including Ms Devoy's brief of evidence. All three deponents were cross-examined before us. Where there were material differences between them, we accept the evidence of Messrs Wharepouri and Duff in preference to Ms Devoy. She was not a credible witness.

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8 At [52].
9 At [13].
10 At [53].
11 At [52].
12 See *R v Sungsuwan* [2005] NZSC 57, [2006] 1 NZLR 730 at [63]–[70].

(b) Trial counsels' instructions

[17] Messrs Wharepouri and Duff were instructed at short notice, just over seven weeks before the trial commenced. The Christmas vacation was included in this period. Previous counsel had to withdraw because of another trial commitment. He had prepared a brief for Ms Devoy and assembled the relevant documents. With the benefit of this foundation, Messrs Wharepouri and Duff used the time before trial to brief Ms Devoy's evidence further and undertake additional preparatory work. Despite suggestions to the contrary in cross-examination, which Mr Bioletti did not pursue in closing, we are satisfied that trial counsel were fully briefed and prepared when the trial opened in early February 2016.[13]

[18] Defence counsel were required to discharge a problematic brief. The volumes of incriminating documents and Ms Devoy's central participation in their creation and submission to the lending institutions left counsel with no choice but to call her evidence. But this advice required them to exercise great care in advancing Ms Devoy's defence of deception by Ms Azimi. Ms Devoy had accumulated a number of dishonesty convictions, starting with benefit fraud in 2003 shortly after her arrival in New Zealand. Counsel could not allow Ms Azimi's cross-examination or Ms Devoy's own evidence to stray into an attack on Ms Azimi's character. Otherwise Ms Devoy would be exposed to cross-examination on her previous convictions.

[19] Moreover, at their second meeting in early January 2016 Mr Wharepouri became concerned that Ms Devoy's proposed evidence was being unduly influenced by one of her brothers. He was anxious to ensure that she was fully briefed independently of her brother. Mr Duff assumed primary responsibility for this function. But his real difficulty, as both counsel confirmed, was Ms Devoy's bare denials of knowledge about each and every transaction, leaving them without a detailed foundation for challenging the SFO witnesses. We accept Mr Duff's evidence that (a) Ms Devoy's instructions were often contradictory — she oscillated between admitting that she had prepared some of the documents and asserting that she had nothing to do with them; and (b) preparation of Ms Devoy's brief was of

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[13] Contrast *Aitchison v R* [2016] NZCA 529.

itself a demanding exercise because of her unsubstantiated assertions that others were acting fraudulently behind her back. Mr Duff was constantly reminding her that her evidence must be restricted to what she saw, did and heard.

[20] It was the consequence of Ms Devoy's frequent and unheralded departures from her existing instructions to counsel when under cross-examination which lies at the heart of her remaining ground of appeal. The issue arose in this way. When cross-examined on her evidence on some charges, Ms Devoy often volunteered affirmative, exculpatory explanations which had not previously been raised. The Judge apparently took the content of Ms Devoy's answers into account as adverse evidence on seven particular charges, referring consistently to her omissions either to challenge contrary evidence from SFO witnesses or produce evidence in support of her positive assertions.

(c) Individual counts

[21] Count 3 is the exemplar of the pattern found in the Judge's verdicts on the other six disputed counts. The SFO alleged that Ms Devoy obtained property without claim of right and by deception, by falsely representing with intention to deceive and knowing the statement to be false that her brother Mehrzad had paid a deposit of $23,500 to the vendor of a property at 10B Heretaunga Avenue, Onehunga.[14] At trial Ms Devoy accepted that she had submitted false receipts to ANZ Bank confirming her brother's payment of a deposit of $23,500 from his own funds to settle a purchase. Her defence, reflected in her evidence in chief, was that she did not know the documents were false.

[22] However, in cross-examination Ms Devoy volunteered that one false receipt, which she had admitted providing, was for money actually paid by Ms Azimi. A receipt had been given in Iranian rials, which was rendered in Farsi and therefore not acceptable to the bank. So Ms Devoy falsified a receipt for the exchange of rials into $24,000, purportedly issued by one of the two businesses in Auckland which

[14] Crimes Act 1961, s 240(1)(a).

exchanged that currency.[15] The Judge noted that Ms Azimi's alleged involvement in this sequence of events was never put to her in cross-examination.[16]

[23] Mr Bioletti submitted that counsel had erred in failing to confront Ms Azimi with this proposition in cross-examination. However, we accept Mr Wharepouri's evidence that Ms Devoy's answer in cross-examination exceeded the scope of her existing instructions. It was the first he had heard of this explanation, and was directly inconsistent with her disclaimer of any knowledge of the details. Mr Wharepouri had no notice of Ms Devoy's incrimination of Ms Azimi on this particular count when earlier cross-examining Ms Azimi. As noted, Ms Devoy had originally accepted that she had provided the bank with false information but that she did not know the documents were false. She then asserted a fact which seemed to undermine her defence. Also, the Judge observed that Ms Devoy's proposition that Ms Azimi had paid the deposit was directly in conflict with her own brother's evidence.[17]

[24] Moreover, as Mr Simmonds emphasised, the SFO case was not based on what Ms Azimi may have done but on whether, as Ms Devoy represented to the bank, Ms Devoy's brother had actually paid the deposit. The receipt was signed by Ms Devoy's brother but completed and forwarded by her to the bank as evidence that monies belonging to her brother had been introduced to the purchase. Even if Ms Azimi had advanced some monies, the material misrepresentation was that the funds had come from her brother to pay the deposit. So, if Mr Wharepouri had in fact erred, which we are satisfied he did not, the error would been have immaterial to the result.

[25] It is only necessary for us to refer in more detail to four other counts in order to illustrate the untenable nature of Ms Devoy's appeal. Count 4 alleged that Ms Devoy obtained credit by deception without claim of right by falsely representing information known to be false with intention to deceive — namely the earnings of others as part of a loan application for a property at 23 Glenmore Road,

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15 Reasons for verdicts, above n 1, at [211].
16 At [212].
17 At [215].

Pakuranga. The Judge referred to Ms Devoy's first line of a two-pronged defence.[18] It was Ms Devoy's claim in cross-examination that a nominated bank officer at ANZ Bank had told her the documents which she submitted were never relied on by the bank. The Judge noted that Ms Devoy had not explained why the officer was not called to give evidence.

[26] Again, we accept Mr Wharepouri's evidence that Ms Devoy never raised this ground of reliance before giving evidence. But, more significantly, it was irrelevant to the charge. The relevant element of the offence of obtaining by deception was complete when she executed and delivered the applications and pay slips to the bank for the purpose of deriving a pecuniary advantage.[19] Counsel's alleged error was also immaterial to the Judge's rejection of Ms Devoy's defence of a lack of knowledge of the untruthfulness of all representations made in the documents.[20]

[27] Count 9 alleged that Ms Devoy used dishonestly and without claim of right documents with intent to obtain a pecuniary advantage — namely a loan to purchase the Onehunga property at 10B Heretaunga Avenue — through a loan application together with pay slips and bank statements.[21] These documents misrepresented the financial position of Ms Devoy's friend Nasrin Raisey, who granted Ms Devoy a power of attorney over her assets and was the nominal purchaser of the property from Mehzdad Ghorbani.[22] Ms Devoy was living in the property with her family at the time.[23] Mr Wharepouri admitted his failure, which was noted by the Judge,[24] to challenge Ms Azimi in cross-examination with a suggestion that she had given the false bank statements to Ms Devoy.

[28] However, we are of the view that this minor departure from Ms Devoy's instructions is of no moment. To the extent Ms Devoy's defence relied on shifting criminal liability for the offending to Ms Azimi, trial counsel consistently confronted her in cross-examination with the propositions that (a) she orchestrated her role in

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18 At [146].
19 Crimes Act, s 240(1)(c).
20 Reasons for verdicts, above n 1, at [149].
21 Crimes Act, s 228(1)(b).
22 Reasons for verdicts, above n 1, at [224]–[226].
23 At [217].
24 At [230].

transactions where she acted as a real estate agent so she could not be identified and (b) she had a financial interest in a number of the sale and purchase transactions, which Ms Azimi denied. As Mr Simmonds emphasises, the Judge rejected both propositions based on his credibility findings made on the competing accounts of Ms Devoy and Ms Azimi. Moreover, the Judge found the broader body of evidence "compelling" that it was Ms Devoy who was "at the heart of the false representations" for the purpose of retaining for her family the benefit of the property.[25]

[29] We have reached a similar conclusion on count 6, alleging false representations made on Mehran Ghorbani's mortgage application whereby he was able to obtain a loan of $279,000 from Westpac. This enabled him to purchase from his mother a property at 3/78 Paihia Road, One Tree Hill.[26] It was Ms Devoy's position that Ms Azimi was the true owner of the property; and that the purchase price had been agreed by Ms Azimi and Mehran.[27] Indeed, Ms Azimi acknowledged she wrote the purchase price of $316,000 on the agreement for sale and purchase; and Mehran supported Ms Devoy's position when he told the SFO that he paid Ms Azimi the agreed deposit of $10,000.[28] As the Judge recorded, it was never put to Ms Azimi in cross-examination that she was the true owner or that the deposit of $10,000 been paid to her.[29]

[30] Mr Wharepouri explained that these omissions were the result of Ms Devoy's instructions: she had told counsel that she knew very little about the transaction and even less about the circumstances in which the $10,000 deposit had been paid (if at all) and to whom. Moreover, we agree with Mr Simmonds that the absence of cross-examination is immaterial to the result. The Judge's guilty verdict on this charge was based soundly on his assessments of witness credibility and contemporaneous documentary evidence that (a) a deposit was never paid; and (b) the representation of payment made to Westpac was therefore false and

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25 At [233].
26 At [263].
27 At [265].
28 At [265].
29 At [267]–[268].

misleading.[30] These decisive factual findings cannot be impugned. The only issue, as it was on all counts, was whether Ms Devoy participated with the requisite guilty intent.

[31] Additionally, the indictment alleged three particular misrepresentations. The false statement about payment of the deposit was one. The other two were false statements about the purchase price of $316,000; and Mehran's payment of $27,000 to the vendor of another property. Proof of any one of these three misrepresentations would have been sufficient to sustain the charge. The Judge was satisfied that all three were established and that the evidence placed Ms Devoy at the centre of the transaction:

> [276] … The inference is overwhelming that she [played] a full part in deceiving the Bank by making the false representations referred to in the particulars of the count and with the intention of deceiving the Bank. She knew the representations were material to the Bank. Had they known of the falsity of them the loan application would have been declined, and plainly the representations were made without claim of right.

Again we agree with Mr Simmonds that Ms Azimi's rejection of Ms Devoy's propositions would have been the inevitable consequence of contrary questioning.

[32] Count 7 alleged that Ms Devoy obtained the One Tree Hill property at 3/78 Paihia Road without claim of right and by deception through a false representation intended to deceive and known to be false in a material particular by representing that at the time Mehran made the application for a mortgage loan he had no other mortgages in his name.[31] Ms Devoy's evidence was that she honestly believed her brother had unconditionally sold a property at Christchurch when she submitted the loan application but she only found out later that it did not proceed.[32] In rejecting this evidence, the Judge noted that Ms Devoy had not produced a copy of an agreement for sale and purchase for the relevant transaction.[33]

[33] Before us Ms Devoy asserted that she trusted her lawyers to find the documents. She could not recall, however, any of the details or whether she

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30 At [269].
31 At [283]; applying Crimes Act, s 240(1)(a) and (2)(a)(i).
32 At [284].
33 At [285].

provided her counsel with the name of the selling agent. We accept Mr Wharepouri's denial of any instructions to this effect, which is consistent with Ms Devoy's own equivocal evidence before us.

[34] Additionally, Mr Bioletti submitted that trial counsel erred in advising Ms Devoy against applying to recall Ms Azimi after she had given her original evidence. Mr Wharepouri accepted that Ms Devoy did in fact instruct him to this effect. We are in no doubt that his advice to the contrary was careful and considered. His conclusion cannot be impugned: nothing would be gained but much would be lost by applying to recall a witness whose evidence had been hostile to Ms Devoy's defence. The advice took into account all relevant circumstances and was well within the realms of trial counsel's judgment.

(d) Appellate counsel's obligations

[35] Ms Devoy's claims of trial counsel error in failing to put to Ms Azimi and others her exculpatory evidence offered in cross-examination was the underlying theme of her appeal. Mr Bioletti explained that its genesis was the Judge's frequent references to the absence of examination or cross-examination of witnesses.[34] In *Hall v R*, following this Court's earlier decision in *R v Clode*, a Full Court of this Court confirmed the three steps required of appellate counsel who has instructions to allege trial counsel error.[35] The second of these steps requires appellate counsel, after taking instructions and making a preliminary assessment of the merits, to approach trial counsel with the appellant's complaints in writing as soon as reasonably practicable and seek a response. Mr Bioletti advised us that he was unaware of these requirements, despite the publicity given to both decisions and the Registry's written notice of them.

[36] The steps settled in *Hall v R*, complementing the procedure set out under r 12A of the Court of Appeal (Criminal) Rules 2001, were designed to pre-empt the unfortunate consequences of the way this appeal was run.[36] We are satisfied that it is unlikely Mr Bioletti would have pursued any or all of Ms Devoy's allegations of trial

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34 See for example [146], [230] and [267]–[268].

35 *Hall v R* [2015] NZCA 403 at [26]–[30] applying *R v Clode* [2008] NZCA 421, [2009] 1 NZLR 312 at [29].

36 See generally *Hall v R*, above n 35, at [13]–[30].

counsel error if he had approached Mr Wharepouri and had the benefit of his response. Or, if Mr Bioletti had done so, it would have been on a more informed basis.

[37] In the result the SFO and both trial counsel were put to considerable and unnecessary time, cost and inconvenience in preparing detailed affidavits in answer, covering a wide range of issues, and appearing as witnesses before us. Apart from the waste of resources, both counsel have undergone the additional personal and professional burdens of having to confront serious but unfounded allegations of negligence.

(e) Conclusion

[38] In summary, we are not satisfied that trial counsel erred at all. To the contrary, we are satisfied that both acted according to their instructions throughout; and that they had no previous instructions from Ms Devoy on the factual content of her exculpatory answers proffered in cross-examination, many of them without an evidential foundation. They were not obliged to cross-examine witnesses on issues about which they had no prior instructions. Nor were they bound to produce documents of which they had no knowledge. The one error, which Mr Wharepouri candidly accepted, was inconsequential. It had no material effect on the particular verdict, and no question of a miscarriage of justice could possibly arise. In our judgment Messrs Wharepouri and Duff discharged their obligations as Ms Devoy's trial counsel with considerable skill and care in demanding circumstances.

[39] We also acknowledge the quality of Judge Gibson's reasons for verdicts. His decision comprised 150 pages of careful and methodical analysis. It is significant that none of his findings are challenged on appeal. He examined the evidence on each charge in meticulous detail, determining each solely on the evidence confined to it and excluding any adverse inferences to Ms Devoy where he rejected her exculpatory explanations. Neither did he resort to propensity reasoning even though that course was readily available to him. Ms Devoy was the beneficiary of a very fair and competent judicial evaluation of charges to which she had no credible defence.

[40] We repeat that the evidence of Ms Devoy's guilt was overwhelming. She has no rational basis for continuing to deny criminal liability. She cannot possibly claim that justice has miscarried in her case. It follows that Ms Devoy's sentence appeal must also fail.

Result

[41] The appeal against conviction is dismissed.

[42] The appeal against sentence is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent