DISTRICT COURT OF QUEENSLAND

CITATION:	*The Queen v Munro* [2022] QDC 80
PARTIES:	**THE QUEEN** **v** **ROGER MUNRO** (defendant)
FILE NO:	1330/21
DIVISION:	Criminal
PROCEEDING:	Application pursuant to section 590AA of the Criminal Code.
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	8 April 2022
DELIVERED AT:	Brisbane
HEARING DATE:	13, 16 August and 9 October 2021, 22 February and 30 March 2022
JUDGE:	Smith DCJA
ORDER:	**Application dismissed.**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – APPLICATION TO SET ASIDE PLEA OF GUILTY – Whether plea should be set aside – where the defendant was charged with four counts of fraud – where the allegation was the defendant improperly dealt with moneys he received for investment – whether there was a Ponzi scheme – whether improper pressure placed on the defendant to plead guilty – whether plea advanced the defendant's interests
LEGISLATION:	*Criminal Code 1899* (Qld) s 590AA
CASES:	*Hura v R* (2001) 121 A Crim R 472, cited *Maxwell v R* (1996) 184 CLR 501; [1996] HCA 46, cited *Meissner v R* (1995) 184 CLR 132; [1995] HCA 41, cited *R v Carkeet* [2009] 1 Qd R 190; 185 A Crim R 147; [2008] QCA 143, cited *R v DBY* [2022] QCA 20, cited *R v EP* [2020] QCA 109, followed *R v GV* [2006] QCA 394, cited *R v Liberti* (1991) 55 A Crim R 120, cited *R v Lovell* [2012] QCA 43, cited *R v Mundraby* [2004] QCA 493, followed *R v Murphy* [1965] VR 187, cited *R v Nerbas* [2011] QCA 199; [2012] 1 Qd R 362; 210 A

Crim R 294, discussed
R v Sagiv (1986) 22 A Crim R 73, cited
R v Wade [2011] QCA 289; [2012] 2 Qd R 31, cited
R v WBA (No 2) [2018] QCA 360, cited

COUNSEL: Mr J Hunter QC with Miss A Freeman for the Commonwealth Director of Public Prosecutions
Mr I Munsie for the defendant

SOLICITORS: Commonwealth Director of Public Prosecutions for the Crown
McDonald Lawyers for the defendant.

Introduction

[1] The defendant applies to set aside pleas of guilty.

[2] The defendant pleaded guilty to three counts of fraud on 19 July 2021.

[3] The trial was due to commence on 19 July 2021. It was the fifth trial listing of this matter since the indictment was presented on 12 March 2018.

[4] There has been a considerable delay in the proceeding, namely:

(i) The first trial listing 11 March 2019 was adjourned at the request of the defendant on medical grounds;

(ii) The second trial listing 23 September 2019 was adjourned at the request of the prosecution due to the complainant for count 1 receiving cancer treatment;

(iii) The third trial listing 30 March 2019 was de-listed due to the Covid-19 pandemic;

(iv) The fourth trial listing 22 March 2021 was adjourned by consent due to the concerns of the trial Judge the trial would not be completed within the timeframe allocated.

Defendant's submissions[1]

[5] The defendant in his written submissions submits that during a conference before trial, the defendant's previous legal representatives indicated that if he did not plead guilty they would no longer act for him in the three week trial which was due to commence on 19 July 2021. It is submitted the defendant is an older man with numerous health problems and would not have been able to adequately represent himself and feared being remanded in custody if unrepresented. He was left with no option but to plead guilty.

[6] It is submitted that a miscarriage of justice has occurred here. It is submitted that the current factual circumstances are analogous with *R v Nerbas*.[2] It is submitted the

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1 Exhibit 8.
2 [2011] QCA 199; [2012] 1 Qd R 362; 210 A Crim R 294.

defendant was unfairly induced into entering his pleas of guilty. In those circumstances the Court should order that the pleas of guilty be set aside.

Crown submissions[3]

[7] The Crown submits that no miscarriage of justice has been established. The indictment was presented on 13 March 2018 initially with five counts. The matter was listed for a three week trial on 19 July 2021. This was the fifth trial listing of the matter. On the morning of trial the defendant entered pleas of guilty to the three counts on the indictment and the Crown undertook to *nolle* the first count.

[8] Following the arraignment and allocutus the defendant sought an adjournment of his sentence for two weeks to get his affairs in order. This adjournment was not opposed and the defendant was granted bail.

[9] On 30 July 2021, the defendant's legal representatives withdrew from the matter as the defendant indicated he wished to withdraw his pleas of guilty. On 10 August 2021, the defendant filed an application seeking orders that the pleas of guilty be set aside.

[10] The Crown concedes the Court has a discretion to allow a plea of guilty to be withdrawn, but it is for the applicant to establish on the balance of probabilities that a miscarriage of justice has occurred. It has been held previously that a miscarriage of justice will not arise unless some circumstance exists which suggests the guilty plea was not really attributable to a genuine consciousness of guilt.[4]

[11] The Crown submits that the case of *Nerbas*[5] may be distinguished. It is submitted the evidence of Mr Hoare clearly demonstrates that he had a legitimate basis upon which to consider he might not be able to continue to act for the defendant if he wished to contest the charges and advance a positive defence given his admission to engaging in fraudulent conduct, albeit of a different kind to that particularised. Mr Hoare's evidence though is that he had not formed any final view as to whether he would need to withdraw.

[12] Secondly, the defendant seriously contemplated pleading guilty before the conference held on 18 July 2021. In the conference on 15 July 2021, a discussion occurred as to the defendant's options including pleading guilty to the offence of fraud. At the end of the conference the defendant was asked to consider his position. The recording shows the defendant was not any way threatened or coerced during the conference. There was a rational calm and reasoned discussion whereby the defendant was given advice about his options including pleading guilty. During the conference, the defendant indicated he considered that at that point there was no justification in him in fighting charges due to his health, the strength of the case against him and the lack of documents to support his contentions. He seriously contemplated pleading guilty at that point free of any improper influence or threats.

[13] An offer then occurred by the Crown to discontinue a significant portion of its case against the defendant. What caused the defendant's plea of guilty was this offer,

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3 Exhibit 30.

4 *R v Murphy* [1965] VR 187 at page 191; *R v Sagiv* (1986) 22 A Crim R 73 at pages 80-81; *Hura v R* (2001) 121 A Crim R 472 at page 478.

5 [2011] QCA 199; [2012] 1 Qd R 362; 210 A Crim R 294.

coupled with his personal and health issues and the strength of the case against him as opposed to any impropriety by his legal representatives.

[14] The defendant's conduct following the pleas of guilty on 19 July 2021 is inconsistent with his allegations that he was threatened or stood over.

[15] He had the opportunity to consider his options overnight on 18 July and speak to his wife. He signed written instructions. He carefully read this document which shows that he was not overwhelmed and made a conscious choice to sign the written instructions.

[16] In his email to Mr Clare on 21 July 2021 he was conflicted over his decision to plead guilty, but he was aware the compromise was an excellent one and he was aware of the difficulties he faced if he went to trial. At no stage in the emails dated 27 July 2021 or 5 August 2021 did he mention that he was induced to plead guilty as a result of threats or intimidation, but more rather there was a change of heart.

[17] He praised Mr Clare's efforts in emails after 18 July 2021.

[18] The defendant's evidence is not supported and should not be accepted. In those circumstances the defendant has failed to establish any miscarriage of justice and his application should be dismissed.

The facts

Background

[19] At the time the defendant entered pleas of guilty on 19 July 2021, he stood charged with four counts of fraud with circumstances of aggravation.

[20] The statement of facts[6] (which I note is not accepted by the defendant) but is the Crown case at its highest, noted that the total quantum involved the $711,100. The maximum penalty for each of the offences was 12 years' imprisonment.

[21] In December 2008, ASIC commenced investigating the defendant. This concerned his receipt of funds from about 70 investors through an Australian registered company R G Munro Futures Pty Ltd ("RGMF") and a company registered in the State of Delaware in the United States of America, The Starport Futures Trading Corporation ("Starport") and the use of those funds to undertake share trading activities in Australia and overseas. RGMF went into liquidation in October 2008. Starport went into liquidation in Australia in May 2009. In reports filed with ASIC, the liquidator of RGMF reported that the funds owed to investors by Munro, Starport and/or RGMF, were between AUD $90 million and $100 million.

[22] In June 2011, ASIC closed that investigation and no charges were laid. Since at least 2009, the defendant has asserted to investors, liquidators and to ASIC that at least USD $62,000,000 of Starport and RGMF investor funds are held in the USA. However, he has failed to produce documents to ASIC or to the liquidators of Starport or RGMF evidencing the existence of such funds, nor have any funds been returned to the investors.

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6 Exhibit 16.

[23] On 30 May 2014, ASIC commenced an investigation following the receipt of information that the defendant was continuing to raise funds purportedly to release USD $62,000,000 of Starport and RGMF investor funds he claimed were held in the USA.

[24] During the course of the investigation, an analysis of bank accounts held by the defendant and his wife, reveal that the accused appeared to be raising funds for a new trading scheme. In various emails and documents to investors, the defendant referred to this scheme as the TradeStation Futures Trading Fund ("TradeStation"). He was raising funds from some of the Starport and RGMF investors as well as family and friends.

[25] The investigation revealed that in September 2011, he commenced emailing investors inviting them to invest money with him in TradeStation.

[26] A number of common representations were made by him to the investors namely:

(a) He was trading with a small group of clients;

(b) He was using a dormant trading account held by his friend David Imgraben in the USA with a brokerage firm called TradeStation;

(c) The minimum investment was $20,000 being one unit and multiples thereof;

(d) Investment returns would be paid quarterly;

(e) He would receive a 20% management fee from profits.

[27] The investors whose funds are the subject of counts 1 to 4 provided statements to ASIC stating:

(a) They deposited investment funds into the defendant's National Australia Bank account;

(b) They provided funds to the defendant to invest in TradeStation in response to the representations made in the emails described above;

(c) They understood that any profits generated by the defendant from trading were to be returned to them on a quarterly basis, less the defendant's management fee;

(d) They understood the trading account was located in the USA;

(e) Since the end of 2014, they have not received any return on their investment or a redemption of their capital with the exception of Mr Armstrong (count 2) who received a cheque for $3950.00 on 20 May 2015;

(f) The defendant has continued informing the investors that TradeStation funds still exist and are located in the USA.

Imgraben and TradeStation

[28] Between August 2003 and July 2012 Imgraben was the sole director of Midshipman Services Pty Ltd. Midshipman held an Australian Financial Services Licence.

[29] On 5 July 2011 Imgraben opened a trading account with FXCM Australia Limited ("FXCM"). There were two transfers to FXCM by the defendant:

(a) 11 July 2011: $6,000 to Imgraben's credit card for transfer to FXCM

(b) 24 August 2011: $12,000 to Imgraben's ANZ account.[7]

[30] On 1 November 2011 Imgraben closed the FXCM account and opened trading accounts with Global Prime Pty Ltd ("Global Prime") at the defendant's request.

[31] Funds from FXCM were transferred to the Imgraben's ANZ bank account and then the following amounts transferred to the Global Prime Accounts:

(a) $11, 324 on 3, 7 and 8 November 2011

(b) $25,000 on 28 February 2012.[8]

[32] Further on 24 and 27 February 2012 $48,500 was transferred from the Munro NAB account to the Imgraben ANZ account.[9]

[33] With respect to Global Prime account 902213 total deposits exceeded total withdrawals by $238.64 and with respect to Global Prime account 903328 total withdrawals exceeded total deposits by $3,656.98.

[34] The $25,000 referred to above is not part of count 1 and no funds were contributed from Armstrong, Heyer or Von Harten.

[35] TradeStation securities is a licensed securities dealer in the USA. Imgraben held two TradeStation accounts.

[36] In mid-2011 Imgraben obtained access for the defendant to trade on the accounts.

[37] Between August 2011 and June 2012 there were losses amounting to USD $60,932.52.

[38] Only $43,000 was transferred to the TradeStation account via the Imgraben ANZ account. This came from Canon. This is not part of count 1.

[39] There were no contributions by Armstrong, Heyer or Von Harten to the TradeStation account.

[40] On 11 April 2012, Imgraben sent the defendant an email advising that he and his wife had separated and the defendant had USD$34,000.00 in the TradeStation Futures account and AUD$26,000.00 in the Global Prime account.

[41] On 26 June 2012 Imgraben sent the defendant an email advising him he was closing down both accounts and he transferred the funds to the Munro NAB account. Following this, he did not receive any further funds from the defendant.

[42] As at March 2015, the defendant was still asserting to investors that their funds were being deposited and held in the TradeStation accounts in the USA. During the

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7 These funds are not part of the quantum alleged in the charges.

8 This was part of the $220,000 contributed by Cannon to the Munro NAB account.

9 This was part of the $220,000 contributed by Cannon to the Munro NAB account.

period that the TradeStation account was operational, it generally operated at a loss and did not generate the profits claimed by the defendant in his quarterly email reports to investors.

Halifax trading account

[43] During the charge periods the defendant's wife, Kathleen Munro, held a brokerage account with Halifax Investment Services ("K Munro Halifax account"). Halifax had administrators appointed in November 2018 and liquidators in March 2019. Between 12 March 2012 and 10 November 2014, a total of $427,100.00 was received into the K Munro Halifax account from external bank accounts. The majority of these funds were transfers from the Munro NAB account which were contributions from friends and family of the defendant as well as Cannon, Armstrong and Von Harten.

[44] None of Heyer's funds were contributions to the K Munro Halifax account.

[45] None of the investors the subject of Counts 1 to 4 were aware or agreed to the defendant investing their funds in the Halifax Trading account.

[46] In relation to the K Munro Halifax account for the period between March 2012 to March 2015, in almost every quarter, trading activity generated net losses and total deposits exceeded total withdrawals.

[47] As at 31 March 2015 the K Munro Halifax account had a zero balance.

[48] Redemptions totalling $307,793.84 were deposited into a Westpac bank account in the name of the defendant's wife (K Munro Westpac account).

[49] A payment of $28,155.50 was made to Fast Forward Charters from the K Munro Westpac account but there were no other payments from this account made to investors the subject of Counts 1 to 4.

Count one - Summary

[50] Count one involves an allegation that between 22 September 2011 and 7 April 2014, Robyn Cannon paid the defendant a total of $480,000 for the purpose of investing the money in the TradeStation Futures Trading Fund on the promise of a return on the investment. Of these funds the defendant did not invest a total of $411,500 as promised.

[51] Between 26 September 2011 and 27 May 2014, he dishonestly applied $411,500 of the monies invested by Cannon to his own use or to the use of another, by using the funds to pay for personal expenses, making cash withdrawals and paying about $119,035 in a Halifax trading account held in his wife's name. Cannon was not aware that her money was being used by the defendant in this manner and he continued to make representations to her during the charge period that her money was being invested in the TradeStation Futures Trading Fund and falsely reported on profits and losses being made out of the relevant period.

Count one - more detail

[52] Robyn Cannon and her husband Frank Grundy are directors of Fast Forward Charters Pty Ltd which is the trustee of their self-managed super fund, the Jackpot Super Fund. Cannon and her husband first met the defendant in about 1994 through a mutual friend, Warren Wearne.

[53] Between 1994 and 2008 Cannon and her husband invested $1.78m in Starport, and RGMF and had $1.395m invested when RGMF and Starport went into liquidation in 2008 and 2009. This money was never returned to them.

[54] On 8 September 2011, the defendant contacted Cannon by email and advised her of the TradeStation Futures Trading Fund. He made the representations referred to previously.

[55] On 22 September 2011 the defendant, via email, told Cannon that the funds would be transferred into the TradeStation trading accounts in the United States.

[56] Following this, between the period 22 September 2011 and 7 April 2014, Cannon deposited $480,000.00 into the defendant's National Australia Bank account.

[57] Between 27 September 2011 and 27 May 2014, the defendant dishonestly applied to his own use or to the use of any other person, $411,500.00 that belonged to Cannon. Paragraphs 50 to 73 of Exhibit 16 set out how the funds were expended.

[58] Paragraph 75 sets out a number of communications by the defendant in which he falsely reported on profits and losses and falsely asserted the funds were held in the TradeStation trading accounts.

Count two - summary

[59] As to charge two, the prosecution alleges between 7 March 2013 and 15 April 2013, Francis Armstrong paid the defendant a total of $39,600 for the purpose of investing the money in the TradeStation Futures Trading Fund on the promise of a return on the investment. The defendant did not invest these funds into the TradeStation Futures Trading Fund as promised. Between 8 March 2013 and 19 April 2013, he dishonestly applied the money invested by Armstrong to his own use or to the use of another, by using the funds to pay for personal expenses, making cash withdrawals and paying about $21,000 into Halifax trading account held in his wife's name. Armstrong was not aware that his money was being used by the defendant in this matter and the defendant continued to make representations to him during the charge period that his money was being invested in the TradeStation Futures Trading Fund, and falsely reported on profits and losses being made over the relevant period.

Count two- more detail

[60] Mr Armstrong met the defendant in 2005, when he was the fund manager for Tricon Capital Mortgage Fund. The defendant was doing some trading for Tricon at that time.

[61] On 12 November 2012, the defendant sent Armstrong an email inviting him to join the new trading group he had formed and he made a number of representations. As

a result, Armstrong deposited a total of $39,600.00 into Munro's National Australia Bank account between 27 March 2013 and 15 April 2013.

[62] Paragraphs 83 to 88 of exhibit 16 set out how the monies were expended.

Kathleen Munro Halifax account	13,000
Cash withdrawal	2,700
Kathleen Munro personal account	1,500
R Munro account	1,463.24
ATM withdrawal	1,100

[63] Paragraph 90 sets out communications the defendant had with Armstrong in which he falsely asserted the funds were being held in TradeStation trading accounts and falsely reported on profits and losses

Count three- summary

[64] As to charge three, the prosecution alleges that between 1 November 2012 and 11 November 2013, Catherine Heyer paid the defendant a total of $40,000 for the purpose of investing the money in the TradeStation Futures Trading Fund on the promise of a return on the investment. The defendant did not invest these monies into the TradeStation Futures Trading Fund as promised. Between 4 November 2013 and 22 November 2013, he dishonestly applied the money invested by Heyer to his own use or to the use of another, by using the funds to pay for personal expenses, making cash withdrawals and paying money to other investors. Heyer was not aware that her money was being used by the defendant in this manner and he continued to make representations to her during the charge period that her money was being invested in the TradeStation Futures Trading Fund and falsely reported on profits and losses being made over the relevant period.

Count 3- more detail

[65] Catherine Heyer and Roy Turner, her husband, first met the defendant in 2000 through Robyn Cannon and Frank Grundy. They made their first investment into Starport / RGMF in April 2000. At the time of the collapse of RGMF and Starport, Heyer was owed $975,000.00. Since the liquidation of RGMF and Starport, Heyer continued to provide limited financial support to the defendant to assist in the payment of legal and travel expenses to repatriate missing funds. Heyer had discussions with Cannon and the defendant about the defendant's new share trading scheme, TradeStation. As a result of this, she deposited $40,000.00 into Munro's NAB account between 1 November 2013 and 11 November 2013.

[66] Paragraph 101 sets out where the monies were expended.

Fast Forward Charters Jackpot Super (A Cannon account)	13,980
Cash Withdrawal	11,200

Robyn Cannon account	6,524
Von Harten account	5,503
Cash Cheque	1,864

[67] Paragraph 102 sets out the communications made by the defendant in which he repeated assertions the funds were held in the TradeStation trading account and falsely reporting on profits and losses.

Count four- summary

[68] For count four, the prosecution alleges that between 15 January 2014 and 8 April 2014, Gregory Von Harten paid to the defendant a total of $220,000 for the purpose of investing the money in the TradeStation Futures Trading Fund on the promise of a return on the investment. The defendant did not invest these funds into the TradeStation Futures Trading Fund as promised. Between 20 January 2014 and 27 May 2014, he dishonestly applied the money invested by Von Harten to his own use or to the use of another, by using the funds to pay for personal expenses, making cash withdrawals, paying money to other investors and paying about $80,000 into a Halifax trading account held in his wife's name. Von Harten was not aware that his money was being used by the defendant in this manner and the defendant continued to make representations to him during the charge period that his money was being invested in the TradeStation Futures Trading Fund and falsely reported on profits and losses being made over the relevant period.

Count 4- more detail

[69] Mr Von Harten was employed as a pilot instructor in Vietnam. He became aware of the defendant and his trading activity following conversations with other investors who had invested in Starport. He first spoke with the defendant in late 2006. Following this, he made investments in the Starport trading scheme. Upon the liquidation of RGMF and Starport he was owed $495,000.00.

[70] Von Harten had discussions with the defendant about the TradeStation trading scheme. Following this, commencing in about mid-2011, he deposited funds into the Munro NAB accounts to invest in the TradeStation trading scheme. Investments made prior to 2014 are not the subject of Count 4.

[71] A total of $220,00.00 was deposited into the account between 15 January 2014 and 8 April 2014.

[72] Paragraphs 115 to 119 of the Statement of Facts set out how the monies were expended.

Kathleen Munro Halifax	80,000
Hannah Munro account	40,000

Von Harten account	30,000
Jackpot super (Cannon)	19,148
NAB Collections	10,000
Cannon account	5,852
HW Litigation	4,000
Cash withdrawal	3,016
Roger Munro account	1,980
Wyton Super Fund	558
ATM withdrawal	400
The Motley Fool	199
Hairdresser	126
Jackpot Super (Cannon)	12,590
Cannon account	12,048
Cash withdrawal	9,312
Helen Munro Account	5,000
Swanepoel Account	3,012
Heyer Account	3,012
Wearne Account	1,506
ATM withdrawal	1,400
HW Litigation	1,366
Unknown	300
Roger Munro account	283
Megaflix	107.56
Hairdresser	100
Norton Software	99.99

[73] In paragraph 120 the communications in which the defendant repeatedly asserted the funds were held in the US in the TradeStation trading accounts and falsely reporting on profits and losses are set out.

General

[74] Investors have sought redemption of the capital in TradeStation. Since 31 March 2015 the defendant has not met redemption requests or paid dividends.

[75] The defendant is 72 years of age, having been born on 4 June 1949. He was 62 to 64 at the time of the offences. He has no prior criminal history. He has been in receipt of a Centrelink pension since September 2014. He claims to have a doctorate in economics obtained from the University of New South Wales in 1979 and previously employed as an academic and self-employed trader. He now resides at Casino in northern New South Wales. The defendant's wife has also been receiving Centrelink benefits since 2015.

History of the matter

[76] On 12 March 2018 an indictment was presented in the District Court charging the defendant with five counts. The matter was next mentioned on 29 June 2018 at which time the defendant was represented by Buckland Allen Solicitors. After two more mentions on 8 November 2018, the matter was listed as Trial No. 1 before Judge D in the week commencing 11 March 2019. The matter was mentioned at a trial review on 1 March 2019 and the matter remained as listed.

[77] On 5 March 2019 the defence applied to adjourn the trial. The defendant sought to adjourn his trial based on treatment he was receiving which affected his ability to provide proper instructions. He was taking medications for his pain, including oxycodone for chronic pain. The application was opposed by the Crown. Dr Michael Gudury was called to give evidence. He was a consultant psychiatrist working at the Tweed Heads Specialist Centre. He was treating the defendant for a major depressive disorder. He gave evidence the defendant suffered medical issues such as chronic pain, prostate cancer and post-operative complications. The prostate was removed in 2016. The doctor did prescribe him oxycodone and advised him to see a pain specialist to obtain an ongoing script. The doctor gave evidence that oxycodone was likely to impair attention and concentration. The doctor gave the opinion that at that time his mental state was fragile. It did not mean he did not understand the proceedings, but his judgement could be impaired. He thought there would be a significant improvement in six to eight weeks' time. The doctor agreed to see him that afternoon to assess whether the trial could continue.

[78] The doctor gave further evidence. He noted that he had first seen him on 8 January 2019. At that time he was anxious, but his depression was under control. Since 5 February 2019 his presentation had changed and he was unable to focus and concentrate. His medication was changed. He thought there would be an improvement within three to four weeks. Ultimately, the matter was adjourned.

[79] On 5 April 2019 the matter was listed as No. 1 trial, week commencing 23 September 2019. That trial was delisted at a mention on 23 August 2019.

[80] On 7 November 2019 the trial was relisted as Trial No. 1, week commencing 30 March 2020. On 20 March 2020, the trial date was vacated. There was a mention on 12 June 2020 at which time the defendant had changed his lawyers.

[81] On 17 August 2020 the matter was listed as Trial No. 1 commencing 22 March 2021.

[82] On 14 December 2020 the trial was delisted and relisted as Trial No. 1, week commencing 19 July 2021. The matter was mentioned on 31 April 2021 and the trial remained as listed. It was further mentioned on 7 July 2021 and the trial remained as listed.

[83] On 19 July 2021 the defendant was arraigned and pleaded guilty to counts 2, 3 and 4. The matter was listed for sentence on 30 July 2021, and bail was enlarged.

[84] The matter was mentioned again on 28 July 2021, and the matter remained as a sentence on 30 July 2021.

[85] On 30 July 2021, Mr Hoare and his solicitors were granted leave to withdraw. The Court was advised that the defendant now wished to change his plea of guilty to not guilty and to withdraw his pleas.

[86] The matter was listed for an application for revocation of bail on 6 August 2021. After this Mr Munsie instructed by McDonald Law came onto the record for the defendant. The hearing of the application for revocation of bail was listed on 13 August 2021. That was adjourned until after the change of plea application is determined.

Defence evidence

Defendant's affidavit (Exhibit 7)

[87] The defendant has filed an affidavit[10] in which he alleges he has been diagnosed with bipolar disorder, a major depressive disorder and a dissociative disorder. He has sought psychiatric treatment for these conditions.

[88] He also has a number of physical health conditions including:

(a) Paroxysmal atrial fibrillation for which he had a pacemaker installed in 2016;

(b) Chronic plain/opioid addiction (resulting from post-operative pain);

(c) Essential hypertension;

(d) Carcinoma of the prostate as a result of which he had several post-operative issues.

[89] He is concerned that he will not receive adequate treatment in custody.

[90] Exhibits RGM-1, RGM-2 and RGM-3 relate to his current medical treatment.

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10 Exhibit 7.

[91] He presently lives with his wife of 49 years who suffers from a nerve-based disease. He assists her with basic day to day activities. He is concerned she won't receive adequate care if incarcerated. He has been involved in a number of court matters which have been stressful, traumatic and he and his wife have lost all of their personal financial resources. He has never been charged with breaching bail conditions and has never intentionally breached his bail conditions. He does not have a passport.

[92] At 8.57am on 17 July 2021, the defendant received an email from his solicitor which advised that if he pleaded guilty to counts 2, 3 and 4 on the indictment, the prosecution would discontinue count 1.

[93] On Sunday 18 July 2021, he had a meeting with Mr Hoare of counsel and Mr Clare the solicitor at Mr Clare's office in New Farm. He was running late for the meeting. He arrived at the office at about 2.45 to 2.50pm. He says that during the discussion he was often interrupted by Mr Hoare and Mr Clare. Mr Hoare indicated he was having discussions with the prosecutor. He advised that if he pleaded guilty to three counts, the amount of the fraud would come down to about $330,000 as the Crown would drop the count as regards to Ms Cannon. The solicitor Mr Clair said "you're mad if you don't take this deal". The defendant said he was in a terrible state having lost his dog and that his wife was very upset. He said that a life changing decision should not be made in the emotional state he was in. Mr Hoare stepped out to speak to his wife and when he returned he said he wanted a decision and said, "if you're smart you'd be pleading guilty to those three charges". The defendant alleges that Mr Hoare said that if he didn't plead guilty, he and Mr Clare would have a conflict of interest, would withdraw from the case and not act for him. The defendant told Mr Clare it was a big decision and he needed time to consider it. Mr Clare absolutely exploded and stood over him and said he was an absolute fool. He said this was the best deal they'd ever get for him. During this time Mr Clare was aggressive and badgering. Mr Clare said if he pleaded not guilty, they would withdraw from acting and it was likely his bail would be revoked. The defendant felt intimidated by Mr Clare. The defendant asked if he could call his wife to let her know what was happening. Mr Hoare returned and the defendant told Mr Hoare that he'd been berated by Mr Clare and Mr Hoare said that was the way Mr Clare operates. The defendant said, reluctantly, that he would plead guilty but he felt conflicted. Mr Hoare asked what he meant by conflicted and the defendant said he hadn't spoken with his wife about the matter, he felt it had been sprung on him and he would like to think about it overnight. Mr Hoare said he could not have overnight. At that stage Mr Clare returned to the room and typed a document on the computer. Before the defendant signed the instructions to plead guilty, he asked if he changed his mind if there was a way he could withdraw the plea of guilty. Mr Clare said there was a way. The defendant said he would sign the document provided he could change his mind. The instructions were put in front of him and he did not read the first part of it, only the sentence next to the boxes. He enquired with Mr Hoare about whether he could plead guilty without admitting the elements of the offence and Mr Hoare said he could not do this. He said to Mr Hoare if he signed the instructions he would be perjuring himself. As a compromise, Hoare told Clare to put a line through the third box. The defendant asked Mr Hoare about the sentence and likely penalty. Mr Hoare left the room as he was going to call the prosecutor. He was told that he could expect 15 months' of actual imprisonment, with the head sentence being three times that. He continued reading the document

and ultimately signed the instructions. When he signed them, he could not recall if each box was ticked.

[94] He felt under a strong obligation to plead guilty because of the constant urging to accept the deal and their advice he could rescind it after the event. He felt the intense pressure of a negative outcome if he did not sign the document. He raised the possibility of having an adjournment for a couple of weeks to get his affairs in order and Mr Hoare said he would try and arrange this. The signed instructions are marked as exhibit RGM-5.

[95] The defendant says he felt that he would not receive a fair trial if not represented and was worried Legal Aid Queensland would review funding. He was worried his bail would be revoked. He later told his wife that he was going to plead guilty and she was horrified.

[96] On 19 July 2021, he spoke to his wife who told him he should plead not guilty and should stand up for himself. He met the lawyers that morning. He did not raise the fact he did not want to plead guilty. Again, Mr Hoare indicated that if he changed his mind about pleading guilty, they would withdraw from acting on his behalf. Pleas of guilty were entered. Afterwards, he went to the Coffee Club and ordered breakfast and Mr Rounsefell came over to where he was seated. He sent a number of emails to his solicitor protesting his innocence.

Defendant's oral evidence

[97] The defendant gave evidence that he was treated appallingly by both Mr Clare and Mr Hoare. Mr Clare berated him and was aggressive and even denied him water.[11] He alleged that the idea of the plea of guilty was sprung on him and he had never contemplated this earlier. Despite this he said in a meeting with his lawyers that he had explored the possibility of this with his previous solicitors.[12]

[98] He accepted his affidavit made no reference to the conference on 15 July 2021. He accepted there were other conferences before Sunday 18 July 2021. The one on 15 July 2021 was via Zoom and recorded.[13]

[99] He agreed he was asked to provide relevant documents to show how the money was invested and with whom. He did not provide these documents. He did not have these documents personally. He had asked that the documents be subpoenaed.[14]

[100] He did not dispute he met Mr Clare and Mr Hoare on 9 July 2021 in Mr Hoare's chambers. This conference was for 1 hour and 20 minutes. He agreed Mr Hoare wanted the documents. The witness claimed he could produce only about seven.[15]

[101] He claimed he had difficulty reading Mr Clare's files note.[16] I cannot see this - the writing seems clear to me.

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11 Transcript day 3 page 8.
12 Transcript day 3 page 10.40.
13 Transcript day 3 pages 11-12.
14 Transcript day 3 pages 13-14.
15 Transcript day 3 page 15.30.
16 Transcript day 3 page 16.7.

[102] He accepted he was charged in 2017.[17] He claims he did not preserve the relevant documents. He claimed his computer disappeared and was not backed up and there were no documents in his iCloud storage.[18]

[103] He agreed he received an email from Mr Clare on 9 July 2021[19] requesting documents relevant to his defence. He replied on 9 July 2021[20] but did not provide the relevant documents.[21]

[104] He agreed there was a conference on 13 July 2021.[22] He denied that he said he used his own funds to make TradeStation look more profitable contrary to the note at page 176 of Exhibit 33.[23] He said that he said that in a profitable quarter he would spread the profits out over a number of quarters and he would also spread out his 20% management fee. He then said that the GFC and other events overtook him. But he later said this related to Starport, bearing in mind the GFC was in 2008.[24]

[105] He said sometimes he did not take the management fee.

[106] He agreed he received an email dated 13 July 2021[25] from Mr Clare which again asked him to produce relevant documentary evidence. He said he did have a few examples of the relevant emails.

[107] He sent the email 14 July 2021[26] in which he said he had fallen into a dissociative state and wanted an adjournment of the trial to be considered.[27]

[108] He accepted he told Mr Hoare that he had written an email purporting to come from an American Attorney John Cameron. He claimed though he only did this for his wife and without his knowledge his wife sent this to investors.[28]

[109] He agreed he received the email dated 14 July 2021[29] from Mr Clare which noted that there would need to be a psychiatric report to justify an adjournment and detailed written responses to the witness statements were needed. A Zoom conference was arranged for the next day. He denied he made any admission about topping up the TradeStation account.[30] I note though that he never challenged in his emails that he did say this.[31]

[110] He agreed he sent a further email at 5:31pm on 14 July 2021.[32] He alleged he mistakenly referred to a laptop rather than iPad and said the documents were

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17 Transcript day 3 page 21.1.
18 Transcript day 3 page 22. This is contrary to other documents where he refers to getting documents from iCloud e.g. Exhibit A pages 18 and 30.
19 Exhibit 33 page 4.
20 Exhibit 33 page 6.
21 Transcript day 3 page 23.2.
22 Transcript day 3 page 26.10.
23 Transcript day 3 page 28.20.
24 Transcript day 3 page 29.
25 Exhibit 33 page 14.
26 Exhibit 33 page 16.
27 Transcript day 3 page 34.22.
28 Transcript day 3 page 38.
29 Exhibit 33 page 19.
30 Transcript day 3 page 40.30.
31 See e.g. his response on 14 July 2021 Exhibit 33 page 21.
32 Exhibit 33 page 22.

obtained from the cloud. He said he still had that iPad. He accepted that his inability to produce relevant documents was a problem.[33]

[111] At first he claimed he did not recall the Zoom conference on 15 July 2021, but later conceded that Mr Hoare mentioned the possibility of a plea of guilty. He later claimed he did not recall what Mr Hoare said in the conference.[34]

[112] He agreed he sent the email dated 16 July 2021[35] again referring to the possibility of an adjournment. In a further email that day he said he failed in the tasks he had been sent.[36]

[113] He agreed he received the email from Mr Hoare at 11:50am on 16 July 2021 in which Mr Hoare referred to the possibility of sentence.[37] He did not send any emails protesting this possibility.

[114] He received the email from Mr Clare at 2:36pm on 16 July 2021[38] in which he was advised incorrectly as it turned out that the DPP would be not proceeding further with count 1. He knew that count 1 involved $411,000. The total quantum was $700,000 and the removal of count 1 halved the amount of the alleged fraud.[39]

[115] He sent an email on 21 July 2021 acknowledging he had an "uphill battle" at a trial.[40]

[116] He alleged at the conference on 18 July 2021 Mr Clare said he could change his plea and Mr Hoare did not say anything.[41] I might say I find this highly unlikely in light of the specific statement in the signed instructions on this point.[42]

[117] He accepted that in 2015 ASIC served upon him a notice to produce documents relevant to TradeStation. A Mr Daniel acted for him. In the response[43] the lawyer claimed that he had no relevant documents. The defendant claimed this was because the word "limited" was after TradeStation and therefore it was a different entity. I thought this disingenuous, particularly when he himself admitted using the term TradeStation Limited.[44] I consider this shows the defendant never did have these exculpatory documents in his possession. He then later denied telling Mr Daniel he was not involved in TradeStation.

[118] He claimed he lost the laptop in 2014[45] but this of course is contrary to the reference to the laptop at page 22 of Exhibit 33.

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33 Transcript day 3 page 43.
34 Transcript day 3 page 52.
35 Exhibit 33 page 32.
36 Exhibit 33 page 33.
37 Transcript day 3 page 60. Exhibit 33 page 34.
38 Exhibit 33 page 36
39 Transcript day 3 page 61.
40 Transcript day 3 page 63.10. Exhibit 33 page 100.
41 Transcript day 3 page 66.
42 Exhibit 33 page 170.
43 Transcript day 3 page 67. Exhibit 38.
44 Exhibit 33 page 50.
45 Transcript day 3 page 68.1.

[119] He said he did produce 84 pages of documents to Mr Harrison but was told the court would not accept these. These related to the Cannon matter.[46]

[120] He accepted he may have told Mr Daniel that he regularly deleted emails which again tends to show that the documents the witness claimed exist, do not. He did not think he told Mr Daniel he had lost the laptop.[47]

[121] He agreed that in an email dated 16 July 2021[48] he was advised of the correction concerning the previous email.

[122] On 17 July 2021 at 8:58am Mr Clare advised the defendant via email that the Crown was prepared to discontinue Count 1 if he was to plead guilty to counts 2-4. The defendant agreed that in conference, Mr Hoare told him that if he wanted a trial Mr Hoare was prepared to run the trial for him.[49]

[123] The defendant admitted that he knew that to have count one discontinued he needed to plead to the other counts.[50]

[124] A face-to-face conference occurred at New Farm on 18 July 2021 from 2pm to 5:30pm. Mr Hoare told him that unless there was evidence supporting the defendant's position there was no defence to the charges but that he would "put the Crown to proof" if that is what the defendant wanted. There were extensive discussions about the plea of guilty.[51] The defendant claims that he wanted subpoenas issued but there is no record of this anywhere in the written material. There is no mention of this in the defendant's affidavit.

[125] There was discussion about the head sentence being reduced if he assisted the police concerning a firearm.[52]

[126] He knew that if there was a trial the quantum would be about $700,000 but, on a plea, only about $300,000.[53] He conceded he was informed as to likely penalties. The defendant said he knew he was "up against it."[54] The defendant claimed they said they would not act if he didn't plead. But this is contrary to the documentary evidence here. Also, he conceded Mr Hoare said they could still run a trial.[55]

[127] The defendant pleaded guilty to counts 2-4 on 19 July 2021. On 20 July 2021 he sent an email to his lawyers asking if there was a legal mechanism to cancel the guilty pleas.[56] On 21 July 2021 Mr Clare advised the defendant in writing that if he wanted to withdraw his pleas of guilty, he would seek leave to withdraw.[57]

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46 Transcript day 3 page 69.
47 Transcript day 3 pages 75-76.
48 Exhibit 33 page 38.
49 Transcript day 3 page 83.15.
50 Transcript day 3 page 84.5.
51 Transcript day 3 pages 84-85.
52 Transcript day 3 pages 86.45-87.5.
53 Transcript day 3 page 88.
54 Transcript day 3 page 88.45.
55 Transcript day 3 page 90-91. Exhibit 31 Q 112 pages 27-28.
56 Exhibit 33 page 95.
57 Transcript day 3 page 95. Exhibit 33 page 96.

[128] Even though he alleged Mr Clare had acted unethically, on 23 July 2021 the defendant sent an email to him complimentary of Mr Clare's conduct.[58]

[129] The defendant admitted signing the written guilty plea instructions at page 170 of Exhibit 33. The defendant claimed he did not tick all the boxes. I disbelieved him on this. I consider it most likely he did tick all of them. He, by ticking the boxes, acknowledged he had not been forced into the pleas and pleaded voluntarily. Also, he acknowledged he could not later change his plea. He did not challenge this with the lawyers.[59]

[130] On 22 February 2022, the defendant's evidence continued. He agreed that Mr Armstrong, Mr Von Harten and Ms Heyer gave him money to invest and the money was deposited into his NAB bank account. He said once it was pooled together it was distributed to various brokers in order to undertake trading. He denied he used the money from one investor to pay dividends to the others. He said it was standard industry practice to have an "in Globo" trading account. The monies became part of a common fund.[60]

[131] The defendant's evidence resumed on 30 March 2022. He again said that an "in Globo" account was standard industry practice. He considered as he had a ledger recording the transactions, this was not an issue. He again said the money deposited was distributed to the trading accounts. He accepted he received Medicare benefits into this account.[61]

[132] He claimed the amount of $19,600 deposited to his account on 15 April 2013 from Mr Armstrong was later put into the trading account. Despite the fact that $10,500 was paid to Mr Von Harten on 17 April 2013 he denied this was from Mr Armstrong's money. He was taken through the bank statements[62] but he denied this was a Ponzi scheme. He accepted at one point he may have paid his niece $40,000 but said she had invested this money with him. He accepted he paid for personal and business expenses from this account. He accepted he only had one bank account. He also accepted that after the payment of $200,000 from Mr Von Harten on 15 January 2014, $30,000 was repaid to Von Harten on 20 January 2014 and $40,000 to his niece. He said this was repayment for her contribution. As to the payment of $5,852 to Ms Cannon, this may have been a dividend and she had directed those funds be paid to her directly. The $19,148 to Jackpot was to a joint Cannon account which might be dividends. The $1,980 withdrawal was for power bills and data supply. Again, he confirmed that the "In Globo" account was used for personal and business expenses.[63]

[133] Exhibit 36 was the ledger the witness referred to. He accepted there was nothing in the ledger which stated his niece invested $40,000.[64] As to the alleged false quarterly reports, he said the Mr Hoare mistook his statement and thought they

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58 Transcript day 3 page 97. Exhibit 33 page 108.
59 Transcript day 3 pages 98-104.
60 Transcript day 4 pages 3-4.
61 Transcript day 5 page 5.10.
62 Exhibit 35.
63 Transcript day 5 pages 5-30.
64 Transcript day 5 pages 32-37.

related to TradeStation. In fact they related to Starport. Mr Hoare's recollection was not correct on this.[65]

[134] The witness said he was not being chased by a debt collector and was bankrupted at one point by ASIC. With respect to the withdrawal from his bank account on 23 January 2014, he did not dispute that the withdrawal of $10,000 was a payment to "Collections Australia".[66] He agreed that on 21 January 2014 monies were spent on a hairdresser. Also the amount of $4,000 was spent on HW Litigation which he said was a bonafide business expense. He said that he was due a manager's fee of 20 percent and left it in there and rolled it over. He said that once monies went to the trading accounts there were no personal expenses from those. He said that the fee of 20 percent appeared on the quarterly reports as did the profits. He said the problem with the audit by ASIC is it only looked at Halifax Trading. He alleged that there were three other accounts with overseas brokers for which he couldn't find the records.[67]

[135] He was asked about whether money came back from these accounts and was evasive about this, alleging that some of the money went to Mr Imgraben, although conceded his account closed in early 2013. He could not identify any funds in the bank statements which came from the overseas traders.[68] I might say having heard his evidence I did not believe him on this point.

[136] In re-examination, emails from the United States were tendered.[69] They related to February 2011 before the charge period. Dr Munro explained these in his evidence. As to the quarterly report issue, he said that at the end of each quarter he would work out the profit and then deduct brokerage fees and other expenses. He did this for all of the trading accounts including Halifax. He explained the Halifax account was used for hedging against losses. He said that most of the trading was done on the overseas accounts. He said that the quarterly reports were bonafide. He said that Mr Hoare was confused about these relating to TradeStation. He denied falsifying any quarterly reports and sending them to the complainants the subject of the charges.[70]

Crown evidence

Mr Clare

[137] Mr Clare has sworn an affidavit (Exhibit 34) and has produced his file with file notes and emails.

[138] In his affidavit he says:

- There was a conference with the defendant and Mr Hoare via Zoom on 9 July 2021.
- There was a further Zoom conference on 13 July 2021.

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65 Transcript day 5 page 32.25.
66 Transcript day 5 page 39.5.
67 Transcript day 5 page 40.
68 Transcript day 5 pages 41- 42.
69 Exhibit 36.
70 Transcript day 5 page 50.

- There was another Zoom conference on 15 July 2021.

- There was an in-person conference on 18 July 2021. This was at New Farm and Mr Hoare was present. The defendant was running late for this conference. At the conference there was a discussion as to the lack of a valid defence; lack of corroborating evidence; a pattern of fraud shown by quarterly reports and the defendant's possession of an unlicensed firearm. There was extensive discussion concerning a plea and co-operation with the police. The defendant read the instructions to plead guilty and was advised to tick the box next to the relevant paragraph if he agreed with it. The defendant clearly read the document as he did not want the phrase "I agree with the facts as presented" included. The defendant after reading the document and ticking the boxes signed it.

- The conference ended at 5:30pm. At no stage did the defendant appear emotional.

- Mr Clare denies that the defendant said he was conflicted.

- He denies that Mr Hoare said to him that if he did not plead guilty there would be a conflict of interest and they would withdraw from the case.

- At no time did the defendant ask for a drink of water and he did not say he did not have any. The defendant was in fact offered tea, coffee or water on arrival.

- At no stage did the defendant say he needed time to consider his decision.

- At no time did he "explode" and call the defendant an absolute fool.

- At no time did he tell the defendant in a firm tone of voice that he wanted him to take the deal.

- At no time was he aggressive and "badgering".

- At no time did he say that if he did not plead guilty they would withdraw from acting and that bail would be revoked.

- He agrees the defendant did say he would call his wife.

- He never said to the defendant there was no way he could change his mind.

- At no stage did the defendant say he would sign the paper provided he could change his mind.

- At no stage did he blow up.

- He does recall a discussion of a sentence of 6 years to serve 18 months.

- At the meeting just before court Mr Hoare never said they would withdraw if he changed his mind about pleading guilty.

[139] Following is an analysis of the file notes.

[140] There was a phone conference with counsel and the client on 9 July 2021. At this conference the following was discussed:[71]

- Admissions.
- The need for comments from the defendant concerning the witnesses.
- The need for documents and emails. The defendant said he had post 2012 documents. He said he would send those documents that day.[72]
- The defendant was to provide statements in reply.
- The defendant said that the previous solicitors had 89 pages of documents.
- A Zoom meeting was organised for 12 July 2021.

[141] After the conference Mr Clare via email[73] advised the defendant:

- He was to provide all documents relating to the accounts and trades.
- He was to provide a detailed written response to the witness statements.

[142] On 12 July 2021 via email the defendant advised he was locating relevant material[74].

[143] There are notes of a conference on 13 July 2021[75] which notes the client agreed to review his emails and send through relevant documents and he would respond in a detailed way to the witness statements. He never did this. The defendant also told his lawyers that he used his funds to top up the TradeStation account so the investors would remain with TradeStation and the quarterly reports were prepared on this basis without the knowledge of the investors. Mr Clare sent a letter reminding the defendant of the tasks he needed to do.[76]

[144] On 14 July 2021 the defendant via email[77] alleged he had fallen into a psychiatric state and wanted an adjournment.

[145] On 14 July 2021 Mr Clare advised the defendant that there would need to be a psychiatric report prepared to justify an application for an adjournment. He also repeated his request for a written response to the witness statements and a detailed written explanation of his admission that he used his own funds to top up the TradeStation account. A conference was arranged for 15 July.[78]

[146] Later on 14 July 2021 the defendant via email again in effect expressed his desire to obtain an adjournment because of his inability to obtain relevant documents.[79]

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71 Exhibit 33 page 172.
72 This did not occur.
73 Exhibit 33 page 4.
74 Exhibit 33 page 30.
75 Exhibit 33 page 175.
76 Exhibit 33 page 14.
77 Exhibit 33 page 16.
78 Exhibit 33 page 19.
79 Exhibit 33 page 22.

[147] The defendant sent another email raising medical issues.[80] On 15 July 2021 he sent an email raising "COVID difficulties".[81]

[148] A Zoom conference occurred on 15 July 2021. This was recorded.[82] In this conference the following transpired:

- There had been a three year history of requests for documents . These had not been produced. There could not be an adjournment on this basis.
- Mr Hoare advised the defendant he needed the defendant's written instructions to go to trial.[83]
- The defendant was advised that requests had been made for the relevant documents for three years and they had not been provided.[84]
- It was confirmed that the defendant had told them that there were times when the fund was not making much of a profit but the returns recorded a profit which Mr Hoare said was a fraud.[85] The defendant understood he had provided dishonest material to the investors.[86]
- The Crown particulars were explained to the defendant and the defendant was advised that if the jury heard there were false quarterly reports the defendant would be convicted.[87]
- The defendant explained that he had explored a plea of guilty with his previous solicitors but that if different charges were laid he would plead guilty.[88]
- Mr Hoare told the defendant that if there were documents which proved trading accounts in the United States then now was the time to give them to him.[89] The defendant said he had sent enough information of the existence of the accounts but to get further statements would mean doing a lot more work on the iCloud.[90]
- There was a discussion about the Crown being prepared to negotiate the quantum.[91] This would have a significant effect on sentence.
- The Crown was talking about a head sentence of 6 years and with mitigating factors Mr Hoare would argue for a custodial term of 18 months.[92]
- A further conference was arranged for Sunday 18 July.

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80 Exhibit 33 page 26.
81 Exhibit 33 page 29.
82 Exhibit 31 and Exhibit 33 page 177.
83 Exhibit 31 page 5 Q9.
84 Exhibit 31 page 6 Q12.
85 Exhibit 31 page 7.
86 Exhibit 31 page 7 A 23.
87 Exhibit 31 Page 8 Q28.
88 Exhibit 31 page 10 A33.
89 Exhibit 31 page 12 Q39.
90 Exhibit 31 page 12 A 40.
91 Exhibit 31 Page 13 Q41-44.
92 Exhibit 31 page 14 Q46.

- There was a discussion about the defendant providing section 13A or B evidence.

- The defendant agreed with Mr Hoare communicating with the Crown on quantum upon entry of a plea of guilty.[93]

- Mr Hoare also said they could still go to trial and they could put the Crown to proof.[94] He could still technically run a defence and if the defendant wanted him to do it, he would do it.[95] Mr Hoare said the critical thing was that the defendant should give him his version so that the position could be considered.[96]

- Mr Hoare wanted the defendant to provide a version as to the creation of the quarterly statements to be considered.[97]

[149] On 16 July 2021 at 9:16am the defendant sent an email to his lawyers stating he had COVID tests and asked for an adjournment to be considered until he could arrive at Brisbane safely.[98] At 9:37am the defendant forwarded a number of medical reports to Mr Hoare.[99]

[150] In a further email at 10:32am the defendant advised he had failed to complete the tasks given to him. He would be available for a decent conference on Sunday.[100]

[151] At 2:36pm Mr Clare informed the defendant that the Crown would not be proceeding with count 1 which would have an effect on quantum and the proceedings and a conference was confirmed for 18 July 2021.[101] This statement was corrected in an email at 2:48pm.[102]

[152] At 3:15pm the defendant forwarded a 2015 email from him to Imgraben.[103]

[153] At 5:15pm the defendant sent an email setting out his instructions concerning TradeStation.[104] There was another email from the defendant at 5:23pm.[105]

[154] On Saturday 17 July 2021 at 8:58am Mr Clare via email advised the defendant that if he pleaded guilty to counts 2-4, the Crown would discontinue charge 1.[106]

[155] In the early hours of Sunday 18 July 2021 the defendant sent emails concerning Ms Cannon and Mr Van Harten,[107] and emails from 2012 concerning interactive brokers and GET financial.[108]

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93 Exhibit 31 page 25 Q102.
94 Exhibit 31 page 27 Q110 and 111.
95 Exhibit 31 page 27 Q112.
96 Exhibit 31 page 28 Q116 and 117.
97 Exhibit 31 Q 136.
98 Exhibit 33 page 32.
99 Exhibit 33 page 79.
100 Exhibit 33 page 33.
101 Exhibit 33 page 36.
102 Exhibit 33 page 38.
103 Exhibit 33 page 46.
104 Exhibit 33 page 50.
105 Exhibit 33 page 57.
106 Exhibit 33 page 59.
107 Exhibit 33 pages 60 and 64.
108 Exhibit 33 pages 63 and 66.

[156] A conference occurred between the defendant, Mr Clare and Mr Hoare on 18 July 2021 between 2pm and 5:30pm at New Farm.[109] The following transpired:

- Mr Hoare confirmed there was no valid defence to the charges.
- It was confirmed that the client topped up the clients' funds.
- Mr Hoare said the client's version was inconsistent and not corroborated.
- Mr Hoare expressed the view the quarterly reports showed a pattern of fraud.
- There was an extensive discussion as to a plea of guilty and section 13B co-operation.
- The defendant was provided with written instructions to plead guilty.
- The advantages of the plea were discussed.
- The defendant signed the instructions. He was to obtain a report concerning his wife's health.
- It was agreed the CDPP would be advised of the plea on the proviso there would be a continuation of bail.

[157] The signed instructions are at page 170 of Exhibit 33. They note:

- He instructed he would plead guilty.
- He was pleading voluntarily and of his own free will.
- He had the right at this stage to plead not guilty.
- He could not change his plea once he pleaded.
- He had fully considered the matter and did not need more time to get legal advice.

[158] The defendant entered pleas of guilty on 19 July 2021 and the matter was listed for sentence on 30 July 2021.

[159] On 20 July 2021 via email the defendant said he felt conflicted over his choice to plead guilty. His wife did not understand why he pleaded.[110] Later that day in a further email he asked if there was a legal mechanism to change his plea.[111]

[160] The defendant was advised on 21 July 2021 by Mr Clare that if he instructed he wanted to withdraw the plea it was highly likely leave would be granted to withdraw.[112]

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109 Exhibit 33 page 185.
110 Exhibit 33 page 90.
111 Exhibit 33 page 95.
112 Exhibit 33 page 96.

[161] The defendant in reply confirmed he was conflicted over his decision. He accepted the deal reached was an excellent one from a negotiated settlement point of view and conceded he faced an uphill battle at trial.[113]

[162] On 23 July 2021 via email the defendant thanked Mr Clare asking him if he could still represent him if Mr Hoare departed from the case. He thanked him for his work on the case.[114]

[163] On 27 July 2021 the defendant advised Mr Clare that he had decided to proceed to trial.[115]

[164] Mr Clare was granted leave to withdraw.

[165] In cross-examination Mr Clare said he started representing the defendant in early 2020. He agreed that the conference was recorded on 15 July 2021 but there were other conferences on 9 and 13 July 2021. He agreed that the conference on 18 July 2021 was not recorded. He agreed that Dr Munro was late for that conference and he denied being irate.[116] Dr Munro arrived at about 2.40 to 2.50pm. He denied interrupting the defendant often during the conference. He recalled at some point there were discussions concerning the quantum of the claim and the withdrawal of one of the charges.[117]

[166] Mr Clare took notes of the conference. He never said, "you're mad if you don't take this deal."[118] The defendant did not talk about his dog dying and did not tear up. He did recall Mr Hoare at one point had to step out of the conference. There was no discussion with Mr Hoare about whether they could continue to act. He did not recall Mr Hoare saying, "if you're smart you'd plead guilty." Mr Hoare never threatened to withdraw if the defendant did not plead guilty. At no stage did he tell the defendant that he had no water and he did not get upset or explode at the defendant. He denied standing over him. He denied calling the defendant an absolute fool and did not raise his voice at him. He did not say if he pleaded not guilty they would withdraw.[119]

[167] At one point the defendant did say he wanted to call his wife. At one point the defendant did mention he wanted a forensic accountant to review the records. He said he'd been stopped from going to the USA to access bank accounts.[120] I might say this was consistent with what the defendant claimed in his evidence. He recalled Mr Hoare returning. At no stage did he leave the room to wash his hands. He agreed typing the instruction sheet. The defendant never said that the plea of guilty was sprung on him and he needed to think about it overnight.[121] Mr Clare said that he sat at a table with the defendant and they went through the instructions and the defendant was ready to make the final decision. At no stage did he say there was a

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113 Exhibit 33 page 100.
114 Exhibit 33 page 108.
115 Exhibit 33 page 111.
116 Transcript day 4 page 30.15.
117 Transcript day 4 page 31.10.
118 Transcript day 4 page 31.22.
119 Transcript day 4 pages 32-33.
120 Transcript day 4 page 33.40.
121 Transcript day 4 page 34.20.

way to withdraw the plea of guilty.[122] He never asked whether he could plead guilty without admitting to the elements of the offence.[123] At no stage did he talk about perjury. He agreed they struck out the words "I agree with the facts as presented." At no stage did Mr Clare have any concerns about the defendant pleading guilty.[124] He went through the document with him and at no stage did he get upset with him. There was a discussion about the sentencing during the conference. Mr Clare had no concerns that the defendant should speak to his wife. The instructions were the defendant's final position.[125]

[168] There was also a discussion concerning bail. There was an arrangement to meet the next day at Mr Hoare's chambers at 8:00am. Mr Clare said he was not aware of any particular medical condition suffered by the defendant. Mr Clare said he read the entire brief. As far as Mr Clare was concerned the defendant did not have any mental health issues or physical health problems.[126]

[169] On Monday 19 July 2021, there were three of them at the conference. At no stage did the defendant raise whether there was a mechanism to change his plea.[127] They went to court and the defendant entered his pleas of guilty. After this, Mr Clare took him to the registry so he could sign his bail. The first time the defendant mentioned the withdrawal of the plea was when he received an email after the arraignment in which the defendant said he had decided to plead not guilty. Until that email he did not recall any discussion with Mr Hoare about withdrawing from acting. [128]

[170] In re-examination, Mr Clare said there was no discussion on Sunday 18 July 2021 that the plea was provisional and could be set aside. There was nothing about the defendant which indicated he did not understand the advice he was receiving. The defendant did not seem confused at all.[129]

Mr Hoare

[171] Mr Hoare was the defendant's barrister. In his affidavit (Exhibit 29) he says he was first engaged in July 2019. He had several conferences with the defendant. The initial conferences with him were directed towards the settling of admissions.

[172] In conference the defendant was adamant that no fraud had taken place and that the complainants' monies had been invested in accordance with their instructions. The defendant said the quarterly statements were accurate. He also alleged that he had documents which would support his case.

[173] Mr Hoare formed the view the Crown case was a strong one. Mr Hoare explained to the defendant that any documents would be of assistance. However despite request these documents were not provided except much closer to the trial.

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122 Transcript day 4 page 34.37.
123 Transcript day 4 page 36.32.
124 Transcript day 4 page 37.10.
125 Transcript day 4 page 39.15.
126 Transcript day 4 pages 39-40.
127 Transcript day 4 page 41.10.
128 Transcript day 4 pages 41-42.
129 Transcript day 4 page 42.

[174] Some documents were provided closer to the trial date. They were provided electronically via email. The material however did not advance the defendant's case. The defendant when asked, was unable to point to any document that tended to support his case. He alleged that his previous lawyers had been provided with such documents but the previous lawyers denied this.

[175] The defendant conceded he wrote emails ostensibly from an attorney based in the United States. He had created these to address his wife's concerns. He also conceded that the quarterly statements were false and inflated by him.

[176] The conference was recorded via Zoom.

[177] The earliest an in-person conference could occur was Sunday 18 July 2021.

[178] On Friday 16 July 2021 as the prosecution had been refused leave to call Ms Cannon remotely, the Crown confirmed it would no longer proceed with that count.

[179] On 18 July 2021 the in-person conference occurred. The defendant was advised there was no effective pathway to an acquittal. The jury could not ignore the false quarterly returns. The advantages of a plea of guilty were discussed. The prosecutor was spoken to and she would not oppose bail. The defendant indicated he would plead guilty and signed instructions were obtained.

[180] At no stage did Mr Hoare tell the defendant that the setting aside of the plea was a mere technicality. He did tell the defendant that he would be unsuccessful at trial but he could put the Crown to proof.

[181] On 19 July the defendant attended Mr Hoare's chambers. He expressed his reticence to plead guilty but confirmed he would. Pleas were entered.

[182] In cross-examination, Mr Hoare accepted he may have been engaged in the matter in July 2020. At the first conference he had with the defendant, he intended to find out the nature of the defence. He was told by the defendant that the quarterly reports were accurate and reflected the returns investors received. He was of the belief at that stage that the quarterly reports were accurate and the funds were actually invested. This changed closer to the trial.[130] Mr Hoare admitted he was frustrated about this. The defendant at a later conference admitted the quarterly reports were not accurate and were false. He also told Mr Hoare that he'd invested his own money to create an illusion of return. Also, the defendant had not provided any documentation linking the reports with any base data. He was requested to provide these documents and they were not. Ultimately, Mr Hoare was informed all of the quarterly reports were inaccurate.[131]

[183] Mr Hoare took the view that the new instructions meant the defendant was instructing that he had committed a different kind of fraud. His instructions had become that he did invest the money, but the quarterly reports were falsified. Mr Hoare was concerned the instructions had changed drastically.[132] He was sure Mr Clare and he discussed this. He did tell the defendant he thought it was impossible

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130 Transcript day 4 pages 10-11.
131 Transcript day 4 page 11.
132 Transcript day 4 page 12.

to win.[133] The ethical position was on Mr Hoare's mind but he didn't have a firm view about it. He believed he could put the Crown to proof.[134] The instructions he had were of a different kind of fraud so he could not put to any witness that the quarterly reports were true and that if the defendant gave evidence he would have to concede the quarterly reports were false. It was in this context the plea of guilty was discussed. There were discussions about the Crown reducing the quantum and not resisting bail. Mr Hoare said there was more than one Zoom conference as far as he recalled. At no stage did Mr Hoare have any concerns about the defendant's health. He was frustrated with the defendant's presentation of his defence.[135]

[184] Turning to the conference on 18 July 2021, the defendant was running late and Mr Clare called him. After he arrived, Mr Hoare asked the defendant direct questions as to his defence. The defendant though drifted around the true point of the conference. Mr Hoare had nothing to advance the defendant's defence. Mr Hoare told the defendant that the Crown proposition (to reduce the quantum and drop a charge) was a good one and the defendant would be in a worse position after trial. Mr Clare may have said "you'd be mad not to take it."[136] Mr Hoare didn't recall the defendant mentioning his dog. He agreed that a document of instructions was prepared. He did not recall the defendant as teary and emotional, but he did express doubts about pleading. The defendant was not accepting of his guilt.[137]

[185] At one point Mr Hoare went home and told his wife what was happening. He did not recall telling the defendant that the defendant had to make a decision. In Mr Hoare's view, with the other cooperation and with his ill health there was a prospect they could keep the defendant out of prison. This would be if he was able to prove that he had invested the monies as directed. Mr Hoare discussed with the defendant that the sentence might be measured in months rather than years after a trial. At no stage did Mr Hoare say he was concerned he may have a conflict of interest. He never said that if he did not plead they would withdraw. Before he did this he would have spoken to a senior counsel like Mr Glynn in order to make that decision.[138]

[186] Mr Hoare went home for about 10 minutes. When he returned he asked him what he wanted to do. Mr Hoare never took any instructions without the solicitor present. The defendant did complain about how Mr Clare had spoken to him.[139] The defendant said, "I think I'll plead guilty." He wanted to speak to his wife and friends. Mr Hoare can't recall if he signed the instruction form then. The defendant was told there was no plea of guilty until it was entered in court. There was a conference the next morning. At no stage did Mr Hoare say he couldn't speak to his wife overnight about the matter.[140] He would have said to the defendant "can I convey your instructions to the Crown." Mr Clare did type the instructions sheet. At no stage did Mr Hoare say it would be easy to withdraw the plea of guilty. At no stage did the defendant say he would sign the instructions provided he could change his mind.[141]

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133 Transcript day 4 page 13.1.
134 Transcript day 4 page 13.
135 Transcript day 4 page 14.32.
136 Transcript day 4 page 15.35.
137 Transcript day 4 page 17.1.
138 Transcript day 4 page 19.15.
139 Transcript day 4 page 20.1.
140 Transcript day 4 page 21.17.
141 Transcript day 4 page 21.

[187] As a result of the instructions he received, Mr Hoare conveyed matters to the prosecution. There was toing and froing about bail and the withdrawal of count 1 and ultimately the Crown agreed not to oppose bail. Mr Hoare recalls the written instructions to plead being put in front of the defendant. Mr Hoare explained the effect of the plea of guilty. He did not recall perjury being discussed. He told him that he hoped the sentence could be measured in months. He told the defendant that jail was clearly in the range and never said he would not go to jail. The defendant wanted an adjournment to get his affairs in order and Mr Hoare told him the Crown would not oppose this. Mr Hoare said it was up to the Judge whether the adjournment was granted. The defendant agreed to attend the conference at 8am on the following morning. At no stage the next day did the defendant say he did not want to plead guilty.[142]

[188] Mr Hoare continued with his evidence on 30 March 2022. He denied telling the defendant it would be easy to withdraw the pleas of guilty.

[189] He also denied telling the defendant he would withdraw if the defendant changed his mind.[143]

Factual findings

Prosecution submissions

[190] Mr Hunter submitted that one would find that the defendant engaged in a Ponzi scheme here. The fact is that the bank statements did not support the assertions made by the defendant. There was no evidence of any money coming in from the overseas accounts. Most of the money deposited was repaid to other investors.

[191] It was submitted that the defendant's account was unworthy of belief. It was very unlikely that Mr Hoare would tell the defendant that a plea of guilty could be revoked at will. The defendant also alleged that he was treated very badly by Mr Clare, yet this was contrary to emails sent shortly after asking him to stay on the case. It was submitted that it was highly unlikely that Mr Clare would deny him a glass of water. It was submitted the defendant gave evidence inconsistent with the documents. He claimed in his evidence he didn't tell Mr Hoare he had topped up investors funds and claimed that any false quarterly reports were about Starport. However, if one looks at page 6 of Exhibit 31 questions 14 to 23 the quarterly report discussion clearly relates to these charges.

[192] He also claimed that the plea of guilty was sprung on him. However, this was contrary to Exhibit 31 pages 10 to 12 and the email dated 16 July 2021.[144] The prosecutor asked the court to reject his evidence of what happened on the Sunday. Mr Clare had made it clear to the defendant on 9 July 2021 what he needed in terms of evidence.[145] This is to be contrasted with the defendant's evidence where he alleged that these matters were not raised with him in conference. The defendant claimed in evidence that given time he could produce relevant documents and yet all he has produced was a ledger which is almost unintelligible and some documents

142 Transcript day 4 pages 22-25.
143 Transcript day 5 pages 28-29.
144 Exhibit 33 page 34.
145 Page 4 Exhibit 33 and page 173 notes of conference 9 July 2021, Exhibit 33.

from February 2011. The fact that there was some sort of trading is not disputed but there is no support that the scheme, the subject of the charges, was legitimate. There is no evidence that monies went from the NAB account into trading accounts and there was clearly a mixing of personal expenditure from these monies. And contrary to his evidence, the ledger did not account for every cent which he claimed in his earlier evidence. As to whether he possessed relevant documents, it should be noted that he instructed Mr Daniel that TradeStation was unrelated to him and yet at page 53 of Exhibit 33 it was clear he was intimately involved with TradeStation.

[193] As to whether the plea of guilty was coerced, Mr Hunter pointed out the defendant accepted Mr Hoare never said he would not do the trial.[146] This is to be contrasted with his affidavit. Mr Hoare said that he could put the Crown to proof. There was also a significant benefit for the plea of guilty.[147] In evidence the defendant accepted Mr Hoare said he could plead not guilty but he wouldn't win which was unremarkable advice.[148] Mr Hunter submitted the written instructions were clear and the defendant read through these carefully. Additionally, the defendant in his own evidence could not be sure whether the threat to not act was before or after the plea of guilty.[149] Also the second last written instruction was inconsistent with his claim that he was told he could change his plea of guilty. Also his evidence at day 3 page 95.15-17 where he accepted he was not forced to plead guilty was inconsistent with his affidavit.

[194] It was submitted the defendant must establish a miscarriage of justice, and he has not here. There has been a succession of lawyers and a late plea of guilty. The onus is very high. Ultimately, it was submitted the defendant was evasive in his answers and gave speeches in his evidence and would not be believed.

Defence submissions

[195] The defence submitted that it was understandable that the defendant would be nice to his lawyer after the plea of guilty. One should take into account the list of medical conditions specified in Exhibit 7. The defendant has struggled day to day with his conditions. He wanted to be nice to his lawyer so they would continue acting for him.

[196] It was submitted that the affidavit (Exhibit 7) was comprehensive and the court should rely on that more than his oral evidence as that was done shortly after the events in question. The court should take into account the stress the defendant underwent when giving his evidence. The fact is the defendant feels the plea of guilty was sprung on him despite the contents of the Zoom meeting. It was submitted that the strength of the defence is not a crucial factor relying on *R v Nerbas*. The fact that he maintains his innocence is enough.

[197] As to credibility findings, the defence submits that Mr Hoare did not exclude the possibility he mentioned withdrawal to the defendant. This is to be contrasted with Mr Clare's evidence where he rejected this proposition. It was submitted their

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146 Transcript day 3 page 89.25.

147 Count 1 involving about $400,000 would be discontinued which would reduce the sentence from say seven to eight years jail to five years jail and perhaps a sentence as low as 12 months on the bottom by reason of ill health.

148 Transcript day 3 page 91.36-37 and page 94.

149 Transcript day 3 page 90.23-30.

evidence is in conflict. It should be noted that the alleged threats in the affidavit were made in the absence of Mr Hoare. The court should take into account that Mr Hoare accepted that the client complained about Mr Clare's words to him.[150] This supports the defence evidence. It was submitted that Mr Clare's memory was not good. He said "I don't recall" a number of times. It was submitted that whilst firm advice is permissible, the allegations in paragraphs 35 (r) to (s) of the affidavit go well beyond this and Mr Hoare was not present at that stage.

[198] As to the conference on 19 July 2021, there was a conflict in the evidence between Mr Hoare and Mr Clare.

[199] As to the conference on 18 July 2021, it should be accepted the defendant was unwell and was still disputing the Crown facts.

[200] In respect of any submissions about the defendant rambling in his evidence it should be taken into account that the defendant is an older man with health conditions. It is submitted that the defendant's evidence about Mr Clare's threats should be accepted and in those circumstances improper pressure was placed upon the defendant to plead guilty and the plea should be set aside.

Conclusions

[201] I have taken into account of all the evidence both oral and documentary and the submissions made in reaching my conclusions.

Nature of the scheme

[202] I did not accept the defendant's evidence that the money paid to the NAB account was primarily used to conduct trading.

[203] An examination of Exhibit 35, the NAB account, between February 2013 and March 2014 shows:

1. On 15 April 2013, Mr Armstrong deposited $19,600 when the account balance was only $817.94. This money was not put into trading accounts as alleged by the defendant. $950 cash was withdrawn on 16 April 2013; $10,500 was given to Mr Von Harten on 17 April 2013; $8,035 went to Mrs Munro's Halifax account on 19 April 2013[151]; and $400 cash was withdrawn from an ATM at Kingscliff on 19 April 2013. It is clear the majority of the money was not spent on trading but more rather most of it was returned to other investors.

2. On 15 January 2014, Mr Von Harten deposited $200,000 into the account. Again very little of this money, if any, went on trading. On 20 January 2014, $30,000 was given back to Mr Von Harten. On 20 January 2014, $40,000 was given to his niece. On 20 January 2014, $5,852 was given to Ms Cannon. On 20 January 2014, $19,148 was given to Ms Cannon's super fund. On 20 January 2014, $1,980 was withdrawn by Mr Munro. On 20 January 2014, $3,016 was given to Ms Wern. Again, the majority of the money was not spent on trading but only to pay existing investors.

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150 Transcript day 4 page 20.1.

151 This could be for trading noting the prosecution does not say that no trading was conducted.

[204] It is my opinion this shows the scheme clearly had the hallmarks of a Ponzi scheme. A Ponzi scheme is a fraudulent investment operation that pays returns to investors from their own money or money paid into the scheme by subsequent investors rather than from any actual profit earned from monies invested. The scheme entices new investors by offering returns from legitimate investments which are abnormally high and inconsistent. "The perpetuation of the returns that a Ponzi scheme advertises and pays requires an ever-increasing flow of money from subsequent investors to keep the scheme going."[152]

[205] Additionally contrary to the defendant's evidence, I could see no evidence that overseas traders paid money into this account. Even the defendant conceded that in his evidence. Additionally, it was clear that some of the money was also used for his personal benefit. A number of amounts seemed to have been spent on personal items such as:

1. Numerous ATM withdrawals
2. Medical Centre April 2013
3. Rental car 8 April 2013
4. Telstra payments
5. Bodyworks
6. Harvey Norman
7. Coles
8. Pharmacy
9. Drake Supermarkets
10. Chemists
11. Radiology
12. Braden's Sport
13. North Bondi Fish
14. Southport Bricks
15. Freedom Southport
16. Southcoast Radiology
17. Port Macquarie Workwear
18. Hairdressing
19. Mini Coach
20. Amazon Prime membership

[206] In all of the circumstances I do not accept the defendant's evidence that this was an entirely legitimate trading scheme.

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152 *R v Lovell* [2012] QCA 43 at [30] per Chesterman J.

Circumstances surrounding the pleas of guilty

[207] I prefer the evidence of Mr Clare and Mr Hoare over that of the defendant.

[208] I specifically have regard to the defendant's health issues, but despite this, I found the defendant was evasive at times and gave non-responsive answers on many occasions. I did not consider him to be an impressive witness and his evidence generally was not supported by the documentary evidence available.

[209] The documents show that the concept of a plea of guilty was not sprung on the defendant on 18 July 2021. At the recorded conference on 15 July 2021 the defendant said he had previously explored a plea of guilty. There was a discussion as to the likely sentence and discussions as to the quantum to be alleged. The defendant agreed that Mr Hoare could communicate with the Crown on this question.

[210] At no stage is there any record in the file note of 18 July 2021 of any improper threat being made by the lawyers. There was no recorded threat to withdraw if he did not plead guilty. The signed instructions were inconsistent with this as well.

[211] On the other hand, I found that the evidence of Mr Clare was supported by Mr Hoare and was far more consistent with the documents available.

[212] I was impressed by their evidence. I consider they approached their duties in an ethical manner and they did not place improper pressure on the defendant. I accept their evidence they did not stand over him. I do not accept that Mr Clare exploded as alleged or refused to give the defendant water.

[213] I accept Mr Hoare's evidence that the admission the quarterly returns were false made it very difficult for a successful defence to be run. I did not accept the defendant's evidence that somehow Mr Hoare was mistaken. Exhibit 31 pages 6-7 makes it clear the false quarterly returns related to TradeStation and the defendant understood this would cause him difficulties at trial (see Answer 23).

[214] Any inconsistencies between Mr Hoare and Mr Clare were peripheral and may be readily explained by the effluxion of time.

[215] The defendant claimed that important documents on a laptop had been lost in 2014. I did not believe him about this. The fact is according to one of the emails he took a laptop and not an iPad as he claimed to Ms Seering's office to download a large number of documents. I infer this was after he was charged in 2017. No crucial documents were obtained in that process. Further the defendant instructed Mr Daniel in 2015 in response to the ASIC notice to produce that he had no relevant documents. He at no time suggested his computer had been lost. At no stage to Mr Clare and Mr Hoare did he allege his computer had been lost.

[216] The defendant was charged in 2017. He has had a number of lawyers. He has had five years to produce any exculpatory documents. He has not done so because I do not think they exist.

[217] The defendant claims that his lawyers threatened him before he agreed to plead guilty and said they would not act if he did not plead. I do not accept him about this.

There is no suggestion in the contemporaneous notes of improper pressure being applied. Indeed, the reverse is true. There is nothing in the recorded conversation supporting the allegation of improper pressure. His allegation that he was told they would not run a trial is contrary to what Mr Hoare told him. Mr Hoare said he would appear for him at a trial.

[218] Also, the defendant's praise of Mr Clare in one email is inconsistent with allegation of bullying.

[219] The defendant's allegation that Mr Clare told him he could easily change his plea is unlikely and inconsistent with the signed instructions. It is also inconsistent with later emails from the defendant to Mr Clare.

[220] I also did not accept the defendant's evidence he did not tick every box on the instructions sheet. I think he did tick every box and he read each of the statements prior to signing the instruction sheet.

[221] I also found his allegation that he was denied water highly unlikely. I also found it unlikely that Mr Hoare told him it would be easy to change his plea. Indeed this is contrary to one of the ticked boxes on the instruction sheet.

[222] Yes it is true that the defendant complained to Mr Hoare at one point as to how he had been spoken to, but on my assessment at most, there may have been firm talk within the permissible bounds.

[223] In summary on my assessment of the evidence I find that:

(a) At all times the defendant 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) The defendant 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) The defendant 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) The defendant has simply regretted his decision and has changed his mind.

Disposition

[224] In *Meissner v R*,[153] the High Court held that 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 sound mind

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153 (1995) 184 CLR 132 at p 141.6; [1995] HCA 41.

and has an understanding the plea is entered in the exercise of a free choice in the interests of the person entering the plea. There is no miscarriage of justice to act on the plea even if the accused person is not in truth guilty of the offence.[154]

[225] As was noted in *Maxwell v R,*[155] the plea of guilty will constitute an admission of all the essential elements of the offence.

[226] For this reason the Court should exercise caution in determining applications to set aside or withdraw guilty pleas.[156]

[227] However, a plea of guilty may be set aside where the defendant did not understand the nature of the charge or intend to admit guilt; on the admitted facts the defendant could not in law be convicted; or where the plea was obtained by improper pressure, fraud, inducement or intimidation.[157] The first two limbs are not relied on in the present case.

[228] As to the third in *Meissner,* it was noted that it would be improper to intimidate an accused person into pleading guilty,[158] however:

> "Argument or advice that merely seeks to persuade the accused to plead guilty is not improper conduct for this purpose no matter how strongly the advice or argument is put. Reasoned argument or advice does not involve the use of improper means and does not have the tendency to prevent the accused from making a free and voluntary choice considering his or her plea to the charge. As long as the argument or advice does not constitute harassment or other improper pressure and leaves the accused free to make the choice no interference with the administration of justice occurs."

[229] The Court noted that it may be improper to offer a promise or benefit in consideration of the plea of guilty. However, it would not be improper if the offer is reasonably regarded as advancing the legitimate interests of the accused.[159]

[230] In the Court of Appeal decision of *R v EP*[160] the following summary of principles may be discerned:

(a) It is not an easy task for an appellant to set aside a plea of guilty. This is because the proper administration of criminal justice depends on the ability of courts to proceed on the basis that the plea of guilty is made in the exercise of the accused's free choice.

(b) A person may plead guilty on grounds which extend beyond that person's belief in his or her guilt e.g., to avoid worry, inconvenience, expense, or in the hope of obtaining a more lenient sentence.

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154 *Meissner v R* (1995) 184 CLR 132 at p 141.8; [1995] HCA 41.
155 (1996) 184 CLR 501 at 510.9; [1996] HCA 46.
156 *R v Liberti* (1991) 55 A Crim R 120 at p 122; *R v Wade* [2011] QCA 289; [2012] 2 Qd R 31 at [44]; *R v WBA (No 2)* [2018] QCA 360 at [14].
157 *R v Carkeet* [2009] 1 Qd R 190; 185 A Crim R 147; [2008] QCA 143 at [25].
158 (1995) 184 CLR 132 at 143.2; [1995] HCA 41.
159 (1995) 184 CLR 132 at 143.7; [1995] HCA 41.
160 [2020] QCA 109 at [7] and *R v DBY* [2022] QCA 20.

(c) A miscarriage of justice will only be shown where the accused did not understand the nature of the charge or did not intend to admit he was guilty of it or if upon the facts admitted by the plea he could not in law have been guilty of the offence. The circumstances are not restricted, but it must be shown that the plea was not really attributable to a genuine consciousness of guilt.

(d) It will not normally be possible to show a miscarriage of justice unless arguable case or triable issue is established.

[231] In all of the circumstances, I am satisfied that no miscarriage of justice has occurred or is likely to occur in the present case.

[232] I think this is a case where the defendant has regretted his decision to plead guilty, but it was his decision. Just because someone regrets a decision they make does not mean that their plea should be set aside. There is a reasonably strong case against the defendant. He was appropriately advised. I did not consider there was improper pressure placed upon him.

[233] As to *R v Nerbas*[161] I agree with the Crown that it may be distinguished. In that case (unlike the present) the Queensland Court of Appeal found the lawyers wrongly claimed they would have to withdraw. This threat was found to be unjustified (see [54]). On my findings in the instant case there was no such threat and indeed the defendant was told the Crown could be put to proof.

[234] The defendant 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 the defendant was facing if convicted after a trial.

[235] In those circumstances, I refuse leave to set aside the plea of guilty.

Order

[236] I dismiss the defendant's application.

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161 [2011] QCA 199; [2012] 1 Qd R 362; 210 A Crim R 294.