IN THE DISTRICT COURT
AT NAPIER

I TE KŌTI-Ā-ROHE
KI AHURIRI

CRI 2017-041-750
[2018] NZDC 19100

BETWEEN	**THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT**
AND	**RUSSEL WILLIAM NORMAN and SARAH MAY HOWELL** Defendants

Hearing:	20 July 2018
Appearances:	C R Stuart for the Applicant R Mansfield for the Defendants
Judgment:	21 September 2018

DECISION OF JUDGE A I M TOMPKINS

Introduction

[1] On 10 April 2017, in the open ocean off New Zealand's east coast, three people associated with Greenpeace entered the water. They intended to, and did, impede the progress of a nearby ship, the Amazon Warrior.

[2] The Amazon Warrior was, at the time, conducting seismic survey operations by emitting high volume sound pulses every few seconds downwards into the sea. It was towing 14 eight-km-long high-tension cables carrying sonic arrays. These detected and recorded the sound waves bounced off the ocean floor, for later analysis.

[3] As a result of the three people entering the water, the Amazon Warrior stopped. Although on this occasion it stopped because of the three people in the water in front of it, the Amazon Warrior, in order to conduct its survey operations safely, necessarily had the ability in the ordinary course of its operations, to stop quickly if needed, so as to avoid any unexpected floating hazards to navigation, or indeed large sea mammals loitering on the surface of the ocean, that it might encounter from time to time.

[4] The defendants, Mr Norman and Ms Howell, are two of three people who entered the ocean that day. Both have pleaded guilty to a charge, under s 101B(1)(c) of the Crown Minerals Act 1991 ("the Act"), that they intentionally engaged in conduct resulting in the interference with operations or activities being carried out by a ship in an offshore area, namely the Amazon Warrior ship.

[5] The third person who entered the ocean with Mr Norman and Ms Howell, Mr Gavin Mulvay, was likewise charged. He was offered, accepted and completed diversion. I shall return to this important point later.

[6] Mr Norman and Ms Howell, after discussions between them and the Ministry of Business, Innovation and Employment, declined to undertake the offered diversion. Rather, having each pleaded guilty, they now seek a discharge without conviction.

Background

[7] As noted, Mr Norman, Ms Howell and Mr Mulvay were all part of a planned protest against the Amazon Warrior seismic survey ship.

[8] On 8 April 2017, four vessels (two larger vessels and two inflatables), with the two defendants and other crew on board, left Napier and headed offshore towards the area being surveyed by the Amazon Warrior.

[9] At approximately 11:50 am on 10 April 2017, all three donned wetsuits and appropriate safety equipment. They boarded the two inflatables. After arriving in front of the Amazon Warrior, but some distance away, they entered the ocean. As a result of this, the Amazon Warrior stopped.

[10] Two requests were made by the Amazon Warrior, seeking the removal of the three from the water. The first asked for the removal of the three swimmers from its

path, citing safety concerns. The second was an offer of the Amazon Warrior's fast response craft to assist with their extraction. Both requests were declined.

[11] The Amazon Warrior then took evasive action. It turned to its port side. In response, the three people in the water moved out of, then re-entered, the ocean in order to stay more or less in the direct path of the ship through the first part of its turning manoeuvre.

[12] Eventually, albeit after some hours, the Amazon Warrior completed a full 360 degree turn, and returned to its original survey course.

[13] Upon their return to Napier, the three swimmers were charged and guilty pleas subsequently entered.

The relevant legislation

[14] Section 101B of the Act provides:

> **101B Interfering with structure or operation in offshore area**
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> (1) A person commits an offence if the person intentionally engages in conduct that results in—
>
> (a) damage to, or interference with, any structure or ship that is in an offshore area and that is, or is to be, used in mining operations or for the processing, storing, preparing for transporting, or transporting of minerals; or
>
> …
>
> (c) interference with any operations or activities being carried out, or any works being executed, on, by means of, or in connection with such a structure or ship.

[15] This is the first case prosecuted under this provision since its introduction in 2013.

[16] Counsel for Mr Norman and Ms Howell, Mr Mansfield, characterised the admittedly pre-meditated offending as "low level civil disobedience" engaged in for the greater good of humanity. He now seeks a discharge without conviction under ss 106 and 107 of the Sentencing Act 2002. Those sections relevantly provide:

> **106 Discharge without conviction**

> (1) If a person who is charged with an offence is found guilty or pleads guilty, the court may discharge the offender without conviction,
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> …
>
> **107 Guidance for discharge without conviction**
>
> The court must not discharge an offender without conviction unless the court is satisfied that the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence.

[17] Counsel for the Ministry, Mr Stuart, opposes the s 106 application essentially on the basis that a proper application of the "out of all proportion" test requires that a discharge be declined. He submits that the defendants' offending was dangerous, disruptive, planned, premeditated and executed with perseverance and motivation. On that basis Mr Stuart argues that the offending cannot be described as "low level civil disobedience". Rather, he submits that the actions of the defendants were intentionally intended to, and did, obstruct lawful oil exploration activities, which merit convictions and the imposition of sentences.

Discussion

[18] Mr Mansfield submitted that a discharge without conviction is justified because the defendants' conduct was intended to bring about a necessary and desirable change to government policy. Such an asserted justification for the commission of a criminal offence, however well-intentioned, does not however form part of the statutory test to be met for a s 106 application to succeed.

[19] Rather, as the statute and indeed numerous and well-established authorities provide, Mr Norman and Ms Howell will only be discharged without conviction if the Court is satisfied, after a two-stage inquiry, that the direct and indirect consequences of a conviction would, for them personally, be out of all proportion to the gravity of the offence.

[20] The Court of Appeal in *R v Hughes* described s 107 as a "gateway" through which any discharge without conviction must first pass.[1] It is only when a Court is satisfied that the s 107 jurisdictional gateway has been passed through that it can then

[1] *R v Hughes* [2008] NZCA 546. [2009] 3 NZLR 222 at [10]-[1]; *Z v R* [2012] NZCA 599, [2013] NZAR 142 at [27]; *DC v R* [2013] NZCA 255 at [3]-[31].

consider whether to exercise the discretion to discharge without conviction under s 106.[2]

[21] The first stage of the inquiry therefore concerns the jurisdictional disproportionality test set out in s 107. The second stage of the inquiry is engaged only if the Court is satisfied that the jurisdictional threshold in s 107 has been met. Only then may the Court consider exercising the discretion to discharge without conviction under s 106.

Stage one: the disproportionality test

[22] The disproportionality test under s 107 itself requires a three-step approach. The Court must consider and assess the gravity of the offence, the direct and indirect consequences of a conviction, and then decide whether those consequences are "out of all proportion to the gravity of the offence".

Gravity of the offending

[23] As to the gravity of the offending, I agree, at least in part, with Mr Stuart's characterisation of the actions of Mr Norman, Ms Howell and Mr Mulvay as being disruptive, planned, premeditated, and executed with perseverance and motivation.

[24] In respect of the premeditation and planning, I note from Ms Howell's affidavit that Greenpeace New Zealand was running a campaign against Amazon Warrior when she joined Greenpeace in January 2017. Efforts were already being made at that time, and subsequently, to confront the ship out at sea. That indicates that there were some months of preparation prior to the dramatic events of 10 April 2017.

[25] In *Police v Darkadaki & Ors*, members of Greenpeace were involved in a different protest against the Amazon Warrior and charged with unlawfully getting onto a ship and trespassing.[3] His Honour Judge Sygrove in the District Court described the gravity of that offending as in the "moderate range", agreeing with the similar view earlier expressed by His Honour Judge Roberts in *Police v Buchanan et al,* which involved seven Greenpeace activists charged with like offending.[4]

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[2] *R v Hughes,* above n 1, at [22].
[3] *Police v Darkadaki & Ors* [2018] NZDC 16136.
[4] *Police v Buchanan & Anor* DC New Plymouth CRI-2012-004-011129, 7 February 2013.

[26] I also bear in mind the Court of Appeal's recent warning that in cases where a discharge under s 106 is sought, a carefully individualised assessment is required:

> Care needs to be taken, however, not to lose sight of the particular facts by undertaking an analysis by reference to other cases.[5]

[27] In conjunction with the submissions advanced in this case, I initially assess the gravity of the offending here as being in the low to moderate range in light of the facts that no violence or force was used, that no property was physically interfered with or trespassed on, that appropriate safety procedures and equipment were used, that throughout the incident the vessels involved (and indeed the three swimmers) remained physically separated, and that throughout all the vessels involved were operated in accordance with the normal rules of good and safe seamanship.

[28] However and importantly, the Ministry must necessarily have reached the view, similar to that expressed by Mr Mansfield, that the offending was indeed low level because it made an initial offer of diversion to all three co-defendants. Mr Mulvay was, as it turned out, the only defendant who felt able to accept that offer.

[29] As explored in their affidavits, Mr Russell and Ms Howell declined diversion as they felt they could not agree to the conditions that went with the offer, namely the making of a public statement of apology, because that would be contrary to their own personal views.

[30] While the offer and process of diversion is an out-of-court process, it is important here because the fact that diversion was initially offered is directly relevant to the proper assessment of the gravity and seriousness of the offending.

[31] In the end, and taking into account in particular the initial offer of diversion to all three defendants, I conclude that in all the relevant circumstances the gravity of the offending is low.

The direct and indirect consequences of a conviction

[32] In my assessment of the consequences, I do not need to be satisfied that these will inevitably or probably occur. It is sufficient if there is a real and appreciable risk

[5] *Rahim v R* [2018] NZCA 182, at [18].

of such consequences.[6] As described by the High Court in *Walker v Police,* a defendant needs to point "to some acute repercussion personal to the [defendant] which may result in a consequence wholly disproportionate to the seriousness of the offence".[7]

[33] As a preliminary matter, I conclude, contrary to submissions by Mr Mansfield, that any potential of a wider impact by deterring others from participating in peaceful protests, or a concern that a "message" of some kind might be "sent" to other members of the general public about protest activity which escalates to illegal conduct, in the event that a conviction is either entered or not entered, are not proper considerations to take into account when assessing the direct or indirect consequences personal to the defendants.

Reputation and employment

[34] Mr Mansfield argues that if the defendants are convicted a consequence for each would be a detrimental impact on their general reputation, their ability to maintain current roles, and to obtain future roles.

[35] Mr Stuart submitted that the case for a discharge is less strong on the basis of employment and reputation, in light of the offending being known, publicised and actively supported by the defendants' current employer, Greenpeace.

[36] Both defendants continue to be employed by Greenpeace. Mr Stuart argues that there is no evidence that their continued employment is in jeopardy. Nor he submits, would such employment be additionally jeopardised by the entry of convictions for activity which has already been widely reported.

[37] In regard to the defendants' ability to obtain unidentified future roles, this potential consequence is necessarily speculative. There is no evidence from the defendants that they are in the process of seeking separate or different employment away from their current line of work. I accept that in general terms a conviction can nevertheless hinder the future securing of employment, paid or unpaid, despite the

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[6] *Iosefa v Police* HC Christchurch CIV-2005-409-64, 21 April 2005 at [34]; *Alshamsi v Police* HC Auckland CRI-2007-404-62, 15 June 2007 at [20]; *DC v R*, above n 1, at [43].
[7] *Walker v Police* [2016] NZHC 1450 at [23].

Court of Appeal's perhaps optimistic comments in *Edwards v R,* that employers should be prepared to look beyond the bare fact of a conviction and examine the circumstances of the offending in light of mitigating factors, especially where a person is otherwise generally a person of good character.[8]

[38] Overall, I assess the real and appreciable risk of this consequence as low to medium, given both defendants' current chosen career paths of advocating (and protesting) in relation to a variety of environmental causes and because any future potential employer similar to Greenpeace is likely to be sympathetic to their past conduct as being for the greater good, even if a conviction has resulted. Unavoidably, however, a conviction may hinder, to an unknown degree, future employment.

Travel and immigration considerations

[39] Mr Mansfield argued that a conviction would impact upon the future overseas travel of both defendants and in particular their eligibility for travel or work visas to enter other countries. This requires a separate consideration of Ms Howell's immigration and travel circumstances, and the travel implications for Mr Norman.

Ms Howell's immigration issues

[40] Ms Howell was, at the relevant time, in New Zealand on a temporary visa. Mr Mansfield submitted that she may be liable for deportation by Immigration New Zealand if she receives a conviction. Mr Mansfield further claims she is unlikely to be successful in appealing or reviewing any such deportation decision. In addition, he submits a conviction might cause her significant hardship when applying for a visa to enter other countries.

[41] Section 157 of the Immigration Act 2009 confers on Immigration New Zealand the ability to determine whether there is sufficient reason to deport a temporary visa holder, having regard to any criminal offending and other relevant matters relating to character. Mr Stuart cited *Re Yang* as authority for the view that Immigration New Zealand is entitled to take into account the fact that a person has offended, and pleaded guilty to that offending, even where a discharge without conviction is granted.[9]

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[8] *Edwards v R* [2015] NZCA 583 at [27]-[28].
[9] *Re Yang* [2016] NZIPT 502927 at [22].

[42] A conviction would likely impact upon Ms Howell's eligibility for travel or work visas both here and in other jurisdictions. Ms Howell has already incurred an immigration consequence: she explains in her affidavit that the application to extend her working holiday visa in New Zealand for another year was declined because of the pending charge against her, and because she did not meet the character requirements.

[43] Efforts were then made by Ms Howell to have her application accepted on the basis of a character waiver. However, two appeal attempts were unsuccessful, and she was advised that she did not meet the good character requirements. Ultimately her visa was officially refused on 28 January 2018 and she became liable for deportation. She was given two days to leave the country.

[44] After being put in contact with an immigration lawyer, Ms Howell advanced a humanitarian appeal to remain in the country until the current criminal process concluded. Ms Howell was advised that until the appeal was considered, and while she remained in the country, she would be liable for deportation but that that was unlikely to happen.

[45] After a two month appeal process, Ms Howell was successful in attaining a temporary visa until September 2018 to remain in New Zealand. I am unclear as to Ms Howell's current immigration status.

[46] It appears therefore that Ms Howell's publicised involvement in this offending has caused consequences that have already occurred with regards to her immigration status and residence in New Zealand. A conviction may or may not appreciably worsen her position.

[47] Mr Stuart noted that any future immigration implications for Ms Howell may exist even if she were to receive a discharge without conviction, as confirmed by Ms Kenny, Technical Advisor on Deportation from Immigration New Zealand.

[48] No direct evidence has been provided regarding the impact of a conviction on Ms Howell's ability to travel overseas. Nevertheless I accept that having a criminal record, depending on the charge and the country, can affect the ability of a person to enter that country.

[49] Ms Howell has in the past visited various countries to undertake volunteering positions, rather than to undertake paid work opportunities. A history of travelling for the purpose of unpaid volunteer work is beneficial both individually and to the wider community, and demonstrates that further travel overseas by Ms Howell is likely.

[50] Thus, a conviction may result in currently uncertain limitations or restrictions of her travel options. Whether or not Ms Howell will be prohibited from entering other countries at some future time is a decision that will be for those countries' appropriate immigration authorities. The Courts have generally left such decisions to those bodies so as not to usurp their statutory role. In *Zhang v Ministry of Economic Development*, the High Court stated: [10]

> In relation to a conviction affecting an offender's immigration status, or indeed ability to travel overseas, the courts often conclude that it is appropriate for the consequences of conviction to be resolved by the appropriate authorities, rather than the Court attempting to pre-empt that decision-making process by a decision to discharge without conviction: *R v Foox, Liang v Police* and *Steventon v Police*. There is nothing that requires the courts to intervene to try and impose their perception of what the right immigration consequences should be. That is best left to the immigration authorities. And there will always be occasions where in a finely balanced case a discharge may be warranted on these types of grounds: *R v Hemard*. The case for discharge may not be so strong where the details of the offending will be known and closely examined by the relevant authority in any event, than where the query will be only as to prior convictions, for instance in an application for professional certification.

[51] In *Rahim v R* the Court of Appeal cited *Zhang*, and concluded that the "reluctance of courts to intervene in the decision-making of specialist bodies such as Immigration New Zealand … is most often evident where the outcome cannot reasonably be predicted". [11]

[52] Ms Howell's likely liability for deportation, and that she will be detrimentally affected in future travel plans, is on the evidence necessarily somewhat speculative. Overall I assess each such consequence as presenting a low to medium but nevertheless a real and appreciable risk.

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[10] *Zhang v Ministry of Economic Development* HC, Auckland, CRI 2010-404-453, 10 March 2011 at [14].

[11] *Rahim v R*, above n 5, at [29].

Mr Norman's travel

[53] Mr Mansfield submitted that Mr Norman would face considerable logistical difficulties in applying for future overseas travel and/or work visas, that he would face being prevented or being delayed in that process, and/or delayed at airports during transit. Mr Mansfield also submitted that this would impact on his ability to accept a future international role or be able to travel at short notice, which is often a requirement for the kind of position he might otherwise be suitable for.

[54] Mr Stuart submitted that while travel for work purposes at short notice may be impaired or delayed by steps required to obtain visas and any other necessary permissions, this is not a real and appreciable risk for Mr Norman.

[55] Similar to my analysis of Ms Howell's position, I accept that a conviction may detrimentally impact Mr Norman's ability to travel abroad, be it for work or for personal reasons, to the extent that it presents as a low to medium but nevertheless a real and appreciable risk.

Sentencing parity

[56] I now consider the sentencing purposes and principles as set out in ss 7 and 8 of the Sentencing Act, as relevant considerations in the assessment of whether or not a discharge without conviction is appropriate in this case.[12]

[57] In *Hughes* the Court of Appeal held that the disproportionality test under s 107 requires consideration of all relevant circumstances of the offence, the offending, the offender, and the wider interests of the community, including the factors required to be taken into account under ss 7, 8, 9 and 10.[13] These same factors, as well as other applicable factors, were considered also relevant to the exercise of the s 106 discretion.[14]

[58] The Court of Appeal in *Blythe v R* departed to an extent from that approach and held that whereas aggravating and mitigating factors, as set out in ss 9 and 9A of the Sentencing Act, are relevant to the question of disproportionality, the matters referred

[12] *Blythe v R* [2011] NZCA 190 at [13].
[13] *R v Hughes*, above n 1, at [41].
[14] At [24] and [31].

to in ss 7 , 8 , 10 and 10B are not.[15] However, those matters will, together with ss 9 and 9A, be relevant at the point the discretion is exercised under s 106.

[59] Since *Blythe,* the Courts have differed as to when, in the context of ss 106 and 107, the sentencing purposes and principles should be considered. The Court of Appeal was silent on the point in *Z v R*. On balance, I consider that the sentencing purposes and principles are appropriately part of the s 107 analysis although, as noted, this issue remains unsettled.

[60] Mr Mulvay accepted the offer of diversion made from the Ministry. Mr Norman and Ms Howell did not. The non-acceptance of diversion in this case presents a consequence of its own peculiar nature: if Mr Russell and Ms Howell were now convicted they will receive a more serious penalty than their co-offender, when all three were equally involved in exactly the same sequence of events.

[61] Under s 8(e) of the Sentencing Act, the Court must take into account "the general desirability of consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offenders committing similar offences in similar circumstances". In this case, Mr Mulvay committed the exact same offence in the exact same circumstances, and was dealt with by "other means", namely diversion, which in particular did not result in a conviction.

[62] Under s 8(g) and (h) the Court must impose the least restrictive outcome that is appropriate in the circumstances, and take into account any particular circumstances of the offender that mean that a sentence or other means of dealing with the offender that would otherwise be appropriate would, in the particular instance, be disproportionately severe.

[63] In light of those principles, applied cumulatively, I conclude that the entry of a conviction for Mr Norman and Ms Howell would be an unequal and considerably more severe outcome compared to how Mr Mulvay ended up being dealt with. Convictions of themselves will create their own adverse consequences for each defendant that are absent for Mr Mulvay.

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[15] *Blythe v R,* above n 12, at [10]-[12].

Are the abovementioned consequences out of all proportion to the gravity to the offence?

[64] Taking a step back, I now need to consider whether or not the identified consequences would, individually or cumulatively, be out of all proportion to the assessed low level offending. I have expressed views as to each separate consequence that Mr Mansfield has identified. The following additional factors are also relevant:

(a) The defendants both pleaded guilty so as to not unnecessarily use Court resources.

(b) Mr Norman and Ms Howell declined diversion not because they did not accept responsibility or liability, but because they felt their personal and strongly-held views put them in a position of being unable to accept or complete the diversion process with integrity, simply to avoid a conviction.

(c) When offered diversion, the defendants engaged in resolution discussions with the Ministry in good faith.

(d) Neither defendants have any previous convictions and both have exhibited and demonstrated previous good character.

[65] Overall, whilst I am not convinced that any of the individual consequences as identified by Mr Mansfield would be disproportionate, I am of the view that the consequences, when viewed cumulatively, of the entry of a conviction would result in consequences for both Mr Norman and Ms Howell that would be out of all proportion to their low level offending. This conclusion is supported in particular by a comparison to how Mr Mulvay was dealt with.

Stage two: exercise of the s 106 discretion

[66] Given my conclusion that the jurisdictional test has been met under s 107, I consider that I should exercise the residual discretion and grant each defendant a discharge without a conviction under s 106. I consider that the two defendants currently before the Court should be treated alike to Mr Mulvay in order to achieve parity and consistency of result, the least restrictive outcome appropriate in all the circumstances, and an outcome that is not disproportionately severe. It is on the basis

of the application of those fundamental sentencing principles that I am satisfied that both Mr Norman and Ms Howell should be discharged without conviction.

[67] During his oral submissions, Mr Mansfield indicated that both defendants were prepared to make considerable donations to an appropriate charity. I do not consider that that should be a pre-condition to the making of an order for discharge. Whether either defendant chooses to give that offer substance is now a matter for them.

Result

[68] Both Mr Norman and Ms Howell are discharged without conviction.

A I M Tompkins
District Court Judge