NOTE: HIGH COURT ORDER PROHIBITING PUBLICATION OF ANY IDENTIFYING PARTICULARS OF R LTD AND S LTD REMAINS IN FORCE.

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 33/2023
[2023] NZSC 156

BETWEEN	DAVID CHARLES RAE Applicant
AND	COMMISSIONER OF POLICE Respondent

Hearing:	12 October 2023
Court:	Winkelmann CJ, Glazebrook, O'Regan, Williams and Kós JJ
Counsel:	Applicant in person D Jones and S B McCusker for Respondent Y Y Mortimer-Wang and J J Kim as counsel assisting the Court
Judgment:	30 November 2023

JUDGMENT OF THE COURT

A **The application for leave to appeal against the Court of Appeal's recall judgment (*Rae v Commissioner of Police* [2023] NZCA 38) is dismissed.**

B **The application for an extension of time to apply for leave to appeal against the Court of Appeal's substantive judgment (*Rae v Commissioner of Police* [2023] NZCA 4) is granted.**

C **Leave to appeal is granted.**

D **The appeal is dismissed.**

E **There is no order as to costs.**

REASONS
(Given by O'Regan J)

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Introduction

[1] This judgment involves an unusual, combined leave-and-appeal hearing. It deals with a jurisdictional issue, leave to appeal and the merits of the appeal. As the applicant was a litigant in person, the Court appointed counsel to assist.

[2] As set out in the background below, the case arose through an application by the Commissioner of Police (the Commissioner) under the Criminal Proceeds (Recovery) Act 2009 (the CPRA) for a restraining order over funds held in certain New Zealand bank accounts; and an allegation that the applicant had unlawfully benefited from significant criminal activity, in particular through engaging in money laundering by transferring to New Zealand the proceeds of fraudulent schemes committed in the United States of America.

Leave application: recall judgment

[3] The applicant, Mr Rae, applied to this Court for leave to appeal against a decision of the Court of Appeal.[1] In that judgment, the Court of Appeal declined to recall an earlier judgment dismissing an appeal to the Court of Appeal by Mr Rae.[2]

[4] The application raised a jurisdictional issue as to whether this Court has jurisdiction to hear and determine an application for leave to appeal (and an appeal, if leave is given) against a decision of the Court of Appeal declining to recall a judgment in a civil proceeding.[3]

Matters at issue

[5] The Court therefore decided to convene an oral hearing and issued a minute directing that submissions at that hearing should address the following matters:

(a) whether the Court has jurisdiction to hear an appeal from the Court of Appeal's decision to decline to recall a judgment in a civil proceeding;

(b) the possibility that, in the alternative, the Court should treat Mr Rae's application as an application for leave to appeal (with an extension of time to apply) from the Court of Appeal's substantive judgment;

(c) whether the leave criteria are met; and

(d) the substantive merits of the appeal (if leave to appeal is ultimately granted).

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1 *Rae v Commissioner of Police* [2023] NZCA 38 (Katz, Mander and Downs JJ) [CA recall judgment].

2 *Rae v Commissioner of Police* [2023] NZCA 4 (Katz, Mander and Downs JJ) [CA substantive judgment].

3 This issue was left open in *P (SC 46/2021) v Commissioner of Inland Revenue* [2021] NZSC 51, (2021) 30 NZTC ¶25-005. The Court has, however, decided that there is no jurisdiction to hear an appeal against a decision of the Court of Appeal refusing to recall a substantive judgment of that Court in a criminal proceeding: *Uhrle v R* [2020] NZSC 62, [2020] 1 NZLR 286 at [19].

[6] The Court appointed Ms Mortimer-Wang as counsel assisting, and she and her colleague Mr Kim made both written and oral submissions, for which we are grateful.

[7] We now address the issues raised in the Court's minute in the order in which they appear above.

Jurisdiction to hear an appeal against a refusal of recall?

[8] Section 68 of the Senior Courts Act 2016 provides that this Court may hear and determine an appeal by a party to a civil proceeding in the Court of Appeal against a decision made in that proceeding unless either of two exceptions applies (neither of which is relevant in the present context). On the face of it, that broad language would include a judgment of the Court of Appeal addressing an application for recall.

[9] However, s 73 of the Senior Courts Act provides that all appeals to this Court may be heard only with the Court's leave. Section 74 sets out the criteria for leave to appeal. Relevantly for present purposes, s 74(4) provides:

> The Supreme Court must not give leave to appeal to it against an order made by the Court of Appeal on an interlocutory application unless satisfied that it is necessary in the interests of justice for the Supreme Court to hear and determine the proposed appeal before the proceeding concerned is concluded.

[10] The respondent submitted that, if a judgment of the Court of Appeal on a recall application is an interlocutory application, s 74(4) may, in practice, prevent this Court from giving leave to appeal, on the basis that it will not be possible to hear and determine the appeal before the proceeding is concluded. Two issues arise:

(a) Is an application for recall of a judgment an "interlocutory application"?

(b) If so, does s 74(4) prevent the grant of leave to appeal?

[11] We now turn to address these issues.

Interlocutory application

[12] The definition of "interlocutory application" in s 65 of the Senior Courts Act is as follows:

> **65 Interpretation**
>
> In this subpart, unless the context otherwise requires,—
>
> …
>
> **interlocutory application**—
>
> (a) means an application in a proceeding or an intended proceeding for—
>
> (i) an order or a direction relating to a matter of procedure; or
>
> (ii) in the case of a civil proceeding, for relief ancillary to the relief claimed in the proceeding; and
>
> (b) includes an application for a new trial; and
>
> (c) includes an application to review a decision made on an interlocutory application

[13] An application for recall fits within the definition of interlocutory application in s 65 since it seeks relief ancillary to the relief claimed in the proceeding in terms of para (a)(ii).[4]

[14] Rule 8A of the Court of Appeal (Civil) Rules 2005 reinforces the view that a recall application is an interlocutory application. Rule 8A(1) provides:

> The Court [of Appeal] may, on an interlocutory application or on its own initiative, recall or reopen a judgment given in writing or orally, at any time before a formal record of it is drawn up and sealed.

[15] The Court of Appeal has ruled in relation to attempted appeals to that Court against decisions of the High Court declining recall that recall applications are

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[4] The definition of interlocutory application in s 4 of the Senior Courts Act 2016, which relates the High Court only, is to similar effect.

interlocutory applications for the purposes of s 56(3) of the Senior Courts Act.[5] This adds further support to the approach we have taken.

[16] We are satisfied that an application to the Court of Appeal to recall a judgment is an interlocutory application as defined in s 65. However, it is not so clear that the s 65 definition of "interlocutory application" should be applied in the context of s 74(4). We turn to that issue now.

Section 74(4)

[17] As noted earlier, s 74(4) provides this Court must not give leave to appeal against an order made by the Court of Appeal on an interlocutory application unless it is satisfied that it is necessary in the interests of justice to hear and determine the proposed appeal before the proceeding concerned is concluded.

[18] In the present case, the Court of Appeal's substantive judgment has been delivered but not sealed. The same applies to the Court of Appeal's recall judgment. There is a question as to whether the Court of Appeal proceeding is "concluded" for the purposes of s 74(4) once both the substantive and recall judgment have been delivered. It is arguable that it is.

[19] So, if a Court of Appeal judgment refusing recall is an order on an interlocutory application and the proceeding to which it relates is concluded, s 74(4) would, on the face of it, preclude the granting of leave to appeal. That is because this Court could not be satisfied that it is in the interests of justice "to hear and determine the proposed appeal before the proceeding concerned is concluded".

[20] But an application to recall a substantive judgment is an unusual species of interlocutory application and it is doubtful that s 74(4) was meant to apply to the situation now before us. It seems likely that the drafter of s 74(4) had in mind an interlocutory application made *prior to* the Court of Appeal's hearing of the

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[5] See, for example, *Ding v James* [2021] NZCA 578 at [15] referring to *Sax v Campbell* [2021] NZCA 346 at [2] (although in *Sax* the appeal against refusal to recall related to an interlocutory decision). There is High Court authority to similar effect: *Jiao v Commissioner of Inland Revenue* (2009) 24 NZTC 23,763 (HC) at [14].

substantive appeal before it — for example an application to adduce fresh evidence. The thinking behind s 74(4) seems to be that leave to appeal against a decision dealing with such an application should not be granted prior to the Court of Appeal determining the substantive appeal to which it relates where this Court is satisfied that, if the decision on the interlocutory application were wrong, the error could be remedied in the course of a later appeal to this Court against the substantive judgment.

[21] That line of thinking does not apply to a decision on an interlocutory application to recall. As mentioned above, the definition of "interlocutory application" appears in s 65. That section is prefaced with the words "unless the context otherwise requires". Given the apparent intention of s 74(4) as just explained, we think the context of s 74(4) does "otherwise require". In our view, the phrase "interlocutory application", where it appears in s 74(4), should be interpreted as excluding an application for recall of a substantive judgment.

[22] That means we do not see s 74(4) as precluding an appeal to this Court against a recall judgment.

[23] Having said that, s 74(1) of the Senior Courts Act still requires this Court to decline leave unless it is satisfied that it is necessary in the interests of justice to hear and determine the proposed appeal. When considering that question in the context of an application for leave to appeal against a recall decision, the Court will be aware that the applicant either has, or could have, applied for leave to appeal against the Court of Appeal's substantive judgment. If, as can be expected in almost every case, the matters of concern to the applicant that led to the recall application could be addressed by this Court in an appeal against the Court of Appeal's substantive judgment, it will not be in the interests of justice to grant leave to appeal against the recall judgment.

Conclusion: leave to appeal against a recall judgment

[24] In practice, therefore, if a litigant in the Court of Appeal considers that the Court of Appeal has erred in its substantive judgment and has applied for recall of that judgment unsuccessfully, the appropriate process to follow in this Court will, in almost

every case, be an application for leave to appeal against the substantive judgment, rather than an application for leave to appeal against the recall judgment.

[25] This case is not an exception to that rule. The appropriate course of action for Mr Rae to have taken in light of his concerns about the matters that founded his recall application was to seek leave to appeal to this Court against the Court of Appeal's substantive judgment. It is not in the interests of justice to grant leave to appeal against the Court of Appeal's recall judgment because Mr Rae's concerns can be addressed in an appeal against the Court of Appeal's substantive judgment. We formally dismiss his application for leave to appeal against the recall judgment.

Treating the present application as an application for leave to appeal against the Court of Appeal's substantive judgment

[26] Mr Rae asks that, if we decide that an application for leave to appeal against the Court of Appeal's recall judgment is inappropriate and/or that leave should be declined, we treat his application as an application to apply out of time for leave to appeal against the Court of Appeal's substantive judgment. The respondent does not oppose the Court taking this approach and we are satisfied that, given the prior uncertainties about this Court's approach to applications for leave to appeal against a recall judgment and the fact that Mr Rae is a litigant in person, it is appropriate to take that step. We grant the extension of time and now proceed to consider that application for leave to appeal.

Application for leave to appeal against the Court of Appeal's substantive judgment

[27] The application for leave to appeal against the Court of Appeal's substantive judgment is advanced on the basis that the errors made by the Court of Appeal have led to a miscarriage of justice. There is no suggestion that the legal test applied by the High Court and by the Court of Appeal in its substantive judgment was incorrect, and in those circumstances no matter of general or public importance arises. Moreover, as

this Court has observed on many occasions, the miscarriage of justice ground in s 74(2)(b) of the Senior Courts Act is of limited application in civil proceedings.[6]

[28] However, we are satisfied, having heard full argument, that there were errors in the Court of Appeal's substantive judgment that may be material. We see it as preferable for us to address the issues arising in substance, rather than in the context of a leave judgment. In those unusual circumstances, we are satisfied that it is in the interests of justice to grant leave and we grant leave accordingly.

Appeal

[29] We now turn to the merits of the appeal.

Background

[30] The factual background can be summarised as follows.[7]

[31] On 11 February 2020, the Commissioner applied on a without notice basis under the CPRA for a restraining order over funds held in certain New Zealand bank accounts of R Ltd (three accounts) and S Ltd (two accounts).[8] Those companies are associated with Mr Rae. The Commissioner alleged the funds were tainted property and that Mr Rae had unlawfully benefited from significant criminal activity, in particular by engaging in money laundering by transferring to New Zealand the proceeds of fraudulent schemes committed in the United States.

[32] In support of the without notice restraining order, the Commissioner adduced evidence to the effect that:

(a) the United States authorities had investigated the fraudulent schemes;

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6 For example, *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [4]–[5]; *Shell (Petroleum Mining) Co Ltd v Todd Petroleum Mining Co Ltd* [2008] NZSC 26, (2008) 18 PRNZ 855 at [4]; and *Midgen Enterprises Ltd v UV Water Systems Ltd* [2017] NZSC 68 at [8], n 15.

7 A more detailed factual narrative is set out in *Commissioner of Police v Rae* [2020] NZHC 3132 (Cooke J) [HC judgment] at [6]–[18].

8 The balances in these accounts as specified in the restraining order were: R Ltd: NZD 89,862.76, GBP 1,949.05 and USD 164,471.65; S Ltd: NZD 4,321.02 and USD 6,388,423.99. A High Court order suppressing the names of these companies remains in effect.

(b) in December 2019 Mr Rae had pleaded guilty in the United States to charges of conspiracy to commit international money laundering; and

(c) Mr Rae was to be sentenced on those charges at some time in February 2020.[9]

[33] On 13 February 2020, Cooke J granted the without notice restraining order. Given it was made without notice, the order was only for a period of seven days, unless an "on notice" application was made. Accordingly, the Commissioner then filed and served an application for an on notice restraining order.

[34] In response, on 12 March 2020, Mr Rae filed and served an affidavit in which he alleged that the Commissioner had not made full disclosure or had made misleading disclosures to the High Court when seeking the without notice restraining order.

[35] In a minute issued on 23 June 2020, Cooke J accepted it was arguable the Court had been misled or at the very least that important information was not disclosed. He varied the without notice restraining order in relation to the three accounts in the name of R Ltd.[10] The variation involved discharging the order in relation to one of those accounts (the NZD account) but leaving it in place in relation to the other two accounts (the GBP and USD accounts). This had the effect of enabling Mr Rae to have access to funds to allow him to instruct lawyers in New Zealand.

[36] On 20 and 21 October 2020, Cooke J conducted a hearing of the Commissioner's on notice application. Mr Rae did not challenge the legal basis for the making of the restraining order but argued that the material non-disclosure at the time of making the without notice restraining order was so serious that the appropriate remedy was to discharge the restraining order. In the alternative he argued the application was an abuse of process. In a decision delivered on 26 November 2020, Cooke J found that the grounds for an on notice order were established and dismissed

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9 Mr Rae was in fact sentenced on 7 February 2020 to 10 months' imprisonment but was released given the time he had already served. Other aspects of this evidence are not material to the issues before us and therefore not mentioned.

10 *Commissioner of Police v Rae* HC Wellington CIV-2020-485-43, 23 June 2020.

Mr Rae's grounds for opposition.[11] He adjourned the proceeding pending service on the parties required to be served under s 21 of the CPRA, a step which was subsequently taken, and the on notice restraining order was made.

[37] Mr Rae appealed to the Court of Appeal. His appeal was dismissed.[12]

The recall application

[38] Mr Rae identified errors in the Court of Appeal's substantive judgment. He therefore applied to the Court of Appeal for the recall of its judgment and submitted that it should allow in part his appeal to that Court.

[39] In his recall application, Mr Rae set out errors in four paragraphs of the Court of Appeal's substantive judgment. These were:

(a) At [3] of its judgment, the Court of Appeal said that the Commissioner's application to the High Court for a without notice restraining order related to two bank accounts which concerned R Ltd and S Ltd. This was incorrect. Rather, the Commissioner sought restraining orders over five accounts, three of which were R Ltd accounts (an NZD account, a USD account and a GBP account) and two of which were S Ltd accounts (an NZD account and a USD account).[13]

(b) At [7], the Court of Appeal said that on 23 June 2020, Cooke J "discharged the restraining order in relation to R Ltd". In fact, Cooke J lifted the restraint on R Ltd's NZD account but left in place the restraints over the other two accounts.

(c) At [50](a), when describing the omissions from, and misdescriptions in the information that had been placed before the High Court Judge, the Court of Appeal said that the Commissioner did not know that the

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11 HC judgment, above n 7, at [40]–[41], [80] and [91].
12 CA substantive judgment, above n 2.
13 See above at n 8.

United States authorities "had excluded the R Ltd bank account". This reflected its earlier error. In fact, Mr Rae's plea agreement with the United States authorities did not cover any of the accounts associated with R Ltd. Mr Rae also argued there was another error in [50](a): the Court's finding that the Commissioner acted in good faith was compromised by its assertion that the Commissioner accepted the shortcomings in the without notice application once they were identified. We discuss this in more detail later.[14]

(d) At [50](b), the Court said that the missing and misdescribed information was important, but "would not have changed the outcome had it been known, save in relation to the bank account of R Ltd". It noted that Cooke J had rescinded the order in relation to R Ltd before the on notice hearing on 20 and 21 October 2020. So, it reasoned, the concern arising from the missing and misdescribed information had been remedied before that hearing. As noted above, this was an error because Cooke J had varied the order against R Ltd to lift the restraint on its NZD account, but not in relation to its other two accounts. So, the funds in the other two accounts remained subject to restraint. We will revert to this later as well.[15]

[40] Mr Rae's application for recall of the Court of Appeal's substantive judgment was based on these errors. He asked the Court to recall its judgment and to allow his appeal in part by excluding the other two accounts of R Ltd from the operation of the restraining order.

[41] In a brief judgment, the Court of Appeal refused to recall its judgment. The operative paragraphs of its recall judgment are as follows:

> [2] We decline to recall the result and allow the appeal in part. The number of bank accounts held by R Ltd was not important to our reasoning. But, even if it were, there is no basis to recall the judgment according to the principles articulated in *Horowhenua County v Nash (No 2)*.

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14 See below at [43]–[50] and [54]–[61].
15 See below at [62]–[67].

> [3] For completeness, we also decline to amend [3], [7] and [50] of the judgment. We consider the better course is for our original judgment to be read with this one, especially as there is no agreement between the parties as to how the paragraphs should read.
>
> (footnote omitted)

[42] Mr Rae then made the application for leave to appeal to this Court to which this judgment relates.

Further context

[43] To assess the effect of the errors in the Court of Appeal's substantive judgment, some further context is required. The essence of Mr Rae's submission to the High Court at the 20 and 21 October 2020 hearing was that the restraining order should be discharged in its entirety. This submission was based on the Commissioner's failure to disclose a material matter when making the without notice application.

[44] The key information that was omitted from the without notice application and its significance was assessed by the High Court Judge as follows:

> [50] There is no dispute that there was certain key information that was not put before the Court on the without notice application. In particular:
>
> (a) The Court was not advised that a formal agreement had been reached between Mr Rae and the United States authorities, which led to the guilty pleas, and that forfeiture would be ordered limited to a particular sum (US$1,775,000).
>
> (b) That the forfeiture so agreed, and then ordered, did not include any funds in the R Ltd accounts.
>
> (c) That these limitations were agreed as a consequence of Mr Rae providing assistance to the United States authorities, including by providing detailed information at interviews.
>
> [51] Not only was the Court not informed of these matters, but Mr VanZetta's affidavit stated that the United States was asking for repatriation of the New Zealand funds for the purpose of compensating Medicare which had suffered more than $212 million in losses as a result of the criminal activity he described. The New Zealand funds described specifically included the R Ltd account. Those statements were made notwithstanding the agreement between Mr Rae and the United States authorities that forfeiture would be limited to US$1,775,000, and that the R Ltd account was not part of the agreed forfeiture.
>
> [52] I am satisfied the matters not disclosed, and misrepresented, were material to the decisions the Court made. In particular these facts and matters

> would have been relevant to the consideration of whether restraint should exist over the full amount of the balances in the New Zealand bank accounts, whether it should include the R Ltd account, whether the underlying offending had already been resolved, and whether there was genuinely a risk of dissipation given the cooperation Mr Rae had provided. It may well be that without notice orders would still have been made, but it was incumbent upon the Commissioner to squarely place those matters before the Court as information that could support Mr Rae's position.

[45] The High Court Judge considered that the Commissioner had not acted in bad faith because he had not been aware of the matters that were not properly disclosed and or incorrectly described in the without notice application.[16] He also found that there had been no bad faith on the part of the United States authorities. There had been no intention to mislead the New Zealand Court or misdescribe the factual position. Rather, the United States authorities were not aware of the need to provide full disclosure and had failed to review a previously written affidavit when new information was learned.[17]

[46] Mr Rae's appeal to the Court of Appeal focused on this non-disclosure and misleading of the High Court, supporting his argument that the restraining order should be discharged in its entirety given the failure to disclose all relevant information in the without notice application and failure to correct it promptly.

[47] The Court of Appeal noted that form 2 of the Criminal Proceeds (Recovery) Regulations 2009, which applies to without notice applications, required the applicant to certify that the application complied with r 19.10 of the High Court Rules 2016, which, in turn, requires compliance with r 7.23, dealing with applications without notice.[18] Rule 7.23 requires an applicant to make reasonable inquiries and take reasonable steps to ensure the application and supporting documents contain all material that is relevant to the application, including any defence that could be relied on or facts that support the other party's position. Failure to do this can lead to dismissal of the application or rescinding of an order that has already been made.

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16 HC judgment, above n 7, at [59]–[60].
17 At [61].
18 CA substantive judgment, above n 2, at [21].

[48] The Court of Appeal reviewed the authorities on the consequences of failure to disclose material information in a without notice application and summarised the law as follows:

> [46] First, the discharge principle is potentially engaged whenever an applicant fails to comply with their obligations under r 7.23(4); that is, whenever an applicant fails to disclose "all relevant matters to the court or to comply with subclause (3)".
>
> [47] Second, whether the discharge principle is exercised depends on the circumstances of each case, including:
>
> (a) Whether the applicant acted in good faith or otherwise. Unsurprisingly, the common law treats this factor as important. Campbell J discharged the orders in *Green Way* absent a conclusion of bad faith. But, as Campbell J noted, the applicant in that case was unrepentant about its failure to provide the Court with all relevant information.
>
> (b) The significance of the missing information. This too is an important consideration, for reasons that are self-evident. *Brink's Mat*, *Jennings* and *Malabu* all involved missing information that was relevant but immaterial. In each case, the Court concluded the order would have been made had the information been before the Court.
>
> (c) The identity of the applicant, at least when it is the Crown. As observed by Laws LJ in *Jennings*, the court "must be alert to see that its jurisdiction is not being conscripted to the service of any arbitrary or unfair action by the state … not least [in relation to] the duty of disclosure".
>
> (d) The interests protected and promoted by the duty of candour. This factor is largely implicit to the common law, but the concept is clear enough. Without notice applications trench upon natural justice. It is therefore important applicants in this context make full disclosure. It is equally important courts are not misused.
>
> (e) The public interest. This factor has obvious importance when the case involves restrained property believed to be tainted property; a respondent who appears to have unlawfully benefited from significant criminal activity; or both. In each situation, the Commissioner seeks restraint acting "in the public interest". *Jennings* and *Malabu* provide examples.
>
> (footnotes omitted)

[49] The Court then assessed these factors as they applied in the case of the without notice application for restraining orders of the bank accounts of R Ltd and S Ltd. Its assessment was as follows:

> [50] In any event, we consider Cooke J was correct not to rescind the restraining order given the considerations we have summarised, even if the Judge did adopt egregiousness as is suggested. In view of the considerations set out at [46]–[47], we note:
>
> (a) The Commissioner acted in good faith. He did not know there had been a formal agreement between Mr Rae and the United States authorities, and therefore did not know those authorities had excluded the R Ltd bank account. Relatedly, the misleading information provided by the United States authorities was "not the consequence of bad faith" for the reasons explained by the Judge. We add that unlike the applicant in *Green Way*, the Commissioner accepted these shortcomings once they were identified.
>
> (b) The missing (and misdescribed) information was important. However, that information would not have changed the outcome had it been known, save in relation to the bank account of R Ltd. The exclusion of that account by United States authorities would presumably have led to that aspect of the restraining order application being declined. But Cooke J rescinded the order in relation to R Ltd long before the contested hearing on 20 and 21 October 2020. So, this aspect had already been remedied by the time the Judge was asked to rescind the order in its entirety. And, as observed, the balance of the order would have been made had the missing information been before the Court.
>
> (c) The Commissioner was the applicant. Unlike the earlier factors, this favoured the restraining order being rescinded.
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> (d) The same is true of the interests protected and promoted by the duty of candour.
>
> (e) The public interest favoured ongoing restraint. Money laundering is a serious crime and one, we consider, that can be difficult to detect. Mr Rae allegedly derived significant benefit from that crime in New Zealand and through similar offending abroad.
>
> (footnote omitted)

[50] In his recall application, Mr Rae submitted that the factual errors made by the Court of Appeal substantially affected its analysis at [50] of its judgment. He said the Court of Appeal would have reached a different result if it had not made these errors.

Should the Court of Appeal have engaged substantively with the recall application?

[51] We consider the Court of Appeal should have engaged more substantively with Mr Rae's recall application. That is because the primary basis of Mr Rae's appeal was

the significance of the non-disclosure and the sufficiency of the High Court response to it, and the Court of Appeal had made factual errors in evaluating both aspects. In particular, it was not sufficient for the Court to simply assert that its error about the number of accounts of R Ltd subject to restraint was not material to its reasons. In our view, it needed to explain why this was so by effectively re-evaluating its analysis under [50] of its judgment in light of the corrections of the factual errors identified.

Addressing the points on appeal to this Court

[52] As is clear from our earlier analysis, we approach this case as an appeal against the Court of Appeal's substantive judgment. Having accepted that the Court did make factual errors in that judgment, we consider it is necessary for us to re-evaluate the Court of Appeal's analysis in light of the correct factual background. We note that neither Mr Rae nor counsel suggested that the Court of Appeal's summary of the common law at [46]–[47] of its judgment was wrong, and, in the absence of any argument about that, we proceed to analyse the case by reference to the criteria set out at [50] of the Court of Appeal's judgment.[19]

[53] Mr Rae argued that the Court of Appeal's analysis of the five factors addressed at [50] of its judgment was finely balanced. He said factors (a), (b) and (e) were in the Commissioner's favour and factors (c) and (d) were in his favour. So, he argued, if the basis for the findings in relation to (a) or (b) were shown to be wrong, the balance of the five factors would be 3–2 in his favour, leading to a conclusion that the restraining order should be discharged either in its entirety (that is, in relation to all accounts of both R Ltd and S Ltd) or in relation to the accounts of R Ltd.[20] We see the analysis as more nuanced than a numbers game of that kind. But, rather than dwell on this, we will address the factors ourselves and form our own judgment.

Paragraph [50](a)

[54] Mr Rae challenged the Court of Appeal's conclusion at [50](a) that the Commissioner acted in good faith, as the High Court Judge had found.

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19 See above at [48]–[49].

20 As we understood his argument in this Court, it is the latter sought before us.

[55] The Court of Appeal was correct that the Commissioner was initially unaware of the plea agreement between Mr Rae and the United States authorities and of the fact that the plea agreement did not cover the R Ltd accounts. (The Court of Appeal referred to "the R Ltd bank account", which reflected its error about the number of accounts, but the statement is correct in relation to all the R Ltd bank accounts.) Mr Rae took particular issue with the Court of Appeal's statement that the Commissioner accepted these shortcomings once they were identified. The evaluation of this requires a little more background.

[56] Mr Rae pointed out that Assistant United States Attorney Barbara Ward, acting on behalf the United States Government, swore an affidavit on 25 July 2020 dealing with the error in the information presented to the High Court in support of the without notice application. She said that when it was brought to her attention in March 2020 that the affidavit presented to the High Court said the United States was requesting repatriation of the funds in one of the R Ltd accounts which contained USD, she realised this was inconsistent with the United States authorities' decision not to seek repatriation of funds in that R Ltd account.[21] She told her colleagues that it was necessary to rectify the situation immediately and a correcting affidavit was prepared for that purpose. However, she recounted that Acting Detective Sergeant Macdonald of the New Zealand Police informed the United States authorities that, because of ongoing discussion between Mr Rae's then counsel and the New Zealand authorities, the New Zealand authorities decided they did not need to submit the correcting affidavit to the High Court. Ms Ward said the United States authorities insisted that the correction be made as soon as possible and asked the New Zealand authorities to file the correcting affidavit immediately.

[57] In his affidavit of 27 July 2020, Mr Macdonald confirmed that the Commissioner had deferred filing the correcting affidavit. At the hearing before Cooke J in October 2020, Ms Ward reiterated that the United States authorities had insisted on the correcting affidavit being filed after finding out that the New Zealand authorities had delayed doing so.

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[21] The United States authorities had not indicated any interest in the other two R Ltd accounts.

[58] Mr Rae said this indicated that the New Zealand authorities had not "accepted these shortcomings once they were identified", as the Court of Appeal said.

[59] We do not agree. In paragraph [50](a) the Court of Appeal was contrasting the position in the present case with that in one of the authorities to which it had referred, *Green Way Ltd v Mutual Construction Ltd*.[22] In *Green Way*, Campbell J discharged three orders made by the High Court without notice on the application of Green Way because of significant failures of disclosure in relation to those undertakings. When the matter came before Campbell J, Green Way firmly resisted the allegations of material non-disclosure.[23] The Court of Appeal in the present case described this as Green Way being "unrepentant about its failure".[24]

[60] In the present case, when the October 2020 hearing was convened before Cooke J, the Commissioner accepted that there had been material non-disclosure. Thus, the Commissioner was, to adapt the Court of Appeal's term, "repentant". We do not think that the Court of Appeal was suggesting in [50](a) that the Commissioner had been speedy in remedying the non-disclosure. It is clear from the High Court judgment that the Commissioner admitted the non-disclosure in the proceedings before Cooke J.[25]

[61] We do not, therefore, accept that there has been an error in the Court of Appeal's judgment in this regard. The Court of Appeal correctly found the Commissioner did not act in bad faith and the defects in the information provided to the High Court Judge in relation to the without notice application was not of such significance as to require the restraining order to be set aside.

Paragraph [50](b)

[62] Mr Rae said the Court of Appeal's erroneous assumption — that only one bank account of R Ltd was subject to restraint and that this restraint had been discharged — undermined the Court of Appeal's analysis at [50](b). He said the

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22 *Green Way Ltd v Mutual Construction Ltd* [2021] NZHC 1704.
23 At [30] and [80](a).
24 CA substantive judgment, above n 2, at [47](a).
25 HC judgment, above n 7, at [50]: "There is no dispute that there was certain key information that was not put before the Court on the without notice application."

Court of Appeal's observation — that the exclusion of the R Ltd account by the United States authorities would have led to that aspect of the restraining order being declined by the High Court — indicated that the Court of Appeal considered that the removal of the restraint on all the accounts of R Ltd was necessary to reflect the deal reached between Mr Rae and the United States authorities. The Court of Appeal mistakenly thought Cooke J had in fact rescinded the order in relation to R Ltd entirely, which is why it considered the issue had been already remedied.

[63] Mr Rae argued that the United States authorities had accepted that criminal conduct could not be attributed to R Ltd which is why it was removed from the plea agreement. Mr Rae noted the beneficial owner of the R Ltd accounts was his then wife, Sarah Rae, though the Commissioner's case was that R Ltd was under Mr Rae's effective control. Mr Rae said the funds transferred into R Ltd's accounts were not, contrary to the Commissioner's claim, tainted funds, as the acceptance by the United States authorities that R Ltd was not involved in criminal conduct confirmed. However, all of this is strongly disputed by the Commissioner and was not an argument advanced by Mr Rae in the Court of Appeal. As the Commissioner argued, if there was evidence that the United States authorities had accepted that R Ltd had not engaged in criminal conduct, it could have been expected that this would have been raised in the High Court and/or the Court of Appeal. Mr Rae said there were strategic reasons for not doing this, but it is hard to see why he would not have advanced such a telling argument if he had an evidential basis for doing so.

[64] It is also important that the application for a restraining order was not founded on Mr Rae's offending in the United States.[26] Rather, the question was whether the High Court Judge had reasonable grounds to believe Mr Rae had unlawfully benefited from significant criminal activity in New Zealand. The High Court Judge was satisfied there were reasonable grounds to believe this, on the basis that the activity relating to the funds in the accounts of R Ltd and S Ltd amounted to money laundering under New Zealand law.[27]

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26 Ms Ward's evidence was that she made it clear to Mr Rae when agreeing to exclude the reference to the R Ltd USD account from the plea agreement that this would not affect the New Zealand proceedings seeking restraint and forfeiture orders in relation to R Ltd's accounts.

27 HC judgment, above n 7, at [26]–[41].

[65] As we see it, the Court of Appeal erred in [50](b) and the observation it made in that paragraph was founded on its misunderstanding of what had occurred in the High Court. But we do not see any basis for Mr Rae's submission that the Court of Appeal's observation — that the exclusion of the R Ltd account by the United States authorities would have led to that aspect of the restraining order being declined by the High Court — indicated that the Court of Appeal must have considered that the removal of the restraint on all the accounts of R Ltd was necessary to reflect the deal reached between Mr Rae and the United States authorities.

[66] We are mindful that the without notice restraining order is an interim process pending resolution of the application for a forfeiture order which has been put on hold pending the outcome of the present appeal. If, as Mr Rae argues, there is no proper basis for forfeiture of funds in the accounts of R Ltd, that is something he can advance at the hearing of the Commissioner's application for a forfeiture order.

[67] In short, we do not see the error made by the Court of Appeal as affecting the overall result.

Paragraphs [50](c), (d) and (e)

[68] There was no suggestion that the Court of Appeal had erred in these paragraphs, and we say no more about them.

Conclusion

[69] We accept that the Court of Appeal made errors in its substantive judgment but we are satisfied that there is no proper basis for reversing the overall outcome. We therefore dismiss the appeal.

Result

[70] The application for leave to appeal against the Court of Appeal's recall judgment is dismissed.

[71] We treat the application for leave to appeal against the Court of Appeal's recall judgment as an application for an extension of time to apply for leave to appeal against the Court of Appeal's substantive judgment.

[72] We grant an extension of time to apply for leave to appeal against the Court of Appeal's substantive judgment and grant leave to appeal.

[73] We dismiss the appeal.

Costs

[74] As Mr Rae succeeded to the extent he established there were errors in the Court of Appeal judgment that were potentially material, we consider it is in the interests of justice for costs to lie where they fall. We therefore make no award as to costs.

Solicitors:
Luke Cunningham Clere, Wellington for Respondent