IN THE SUPREME COURT OF NEW ZEALAND
TE KŌTI MANA NUI O AOTEAROA

SC33/2023
CA750/2020
CIV-2020-485-43

BETWEEN **DAVID CHARLES RAE**

Appellant

AND

THE COMMISSIONER, THE NEW ZEALAND POLICE

Respondent

WRITTEN SUBMISSIONS ON BEHALF OF THE APPELLANT

1. The Appellant files these written submissions in accordance with the Minute of Ellen France J dated 10 July 2023.

2. These submissions address the 4 key matters identified.

    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. ("Jurisdiction")
    b. The possibility, that in the alternative, the Court should treat the Appellant's application as an application (with leave to appeal out of time) for leave to appeal from the Court of Appeal's initial judgment. ("Leave to Appeal.")
    c. Whether the leave criteria are met. ("Leave Criteria.")
    d. The substantive merits of the appeal (on the assumption leave to appeal is ultimately granted). ("Substantive Merits.")

Preamble – the 4 errors in the Court of Appeal Judgment:

3. This application for leave to appeal concerns the Judgment of the Court of Appeal dated 3 February 2023 (the Judgment) and the subsequent Judgment of the Court of Appeal dated 6 March 2023 (the Recall Judgment).

4. It is pertinent to set out the errors that appear in the Judgment to assist the Court in determining the 4 matters at 2(a-d) above.

5. The Appellant's position, which he understands is not gainsaid either by the Commissioner or the Court of Appeal, is that there were four linked factual errors in the Judgment. Those appear within paragraphs [3], [7] and [50] and relate to the bank accounts of R Ltd. These were not 'findings of fact' because the factual position R Ltd having three bank accounts (not just one) was already established in the Judgment of Cooke J - [2020] NZHC 3132. In addition, Cooke J did not discharge R Ltd from the effect of the without notice restraint order; he merely varied the earlier order by releasing funds from one of the R Ltd accounts. The restraint of R Ltd thus remained in place and R Ltd was not discharged. Those accepted factual errors which appear at [3] and [7] in the Judgment became, what the Appellant submits, a fundamental and important part of how the Court of Appeal reached its overall decision at [50]. That paragraph contained a further error. The phrase 'the Commissioner accepted these shortcomings once they were identified,' is also factually wrong.

6. The reasoning of the Court of Appeal is confined to paragraph [2] of the Recall Judgment and for ease of reference is set out below:

> *'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 it were, there is no basis to recall the judgment according to the principles articulated in Horowhenua County v Rush (No 2).'*

The Basis of the Application for Recall and Summary of the Four Errors (i-iv):

7. The Application for recall was not confined to the 'number of bank accounts held by R Ltd.' It was much wider than that. It focussed on the following 4 distinct errors:

    i. The combined errors regarding the number of bank accounts in both R Ltd and S Ltd – the error at Judgment [3].
    ii. The error regarding the 'discharge' of the restraining order on 23 June 2020 in relation to R Ltd – the error at Judgment [7].
    iii. The error regarding 'the Commissioner accepted these shortcomings once they were identified' – the error at Judgment [50(a)].
    iv. The error regarding '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' – the error at Judgment [50(b)].

8. As to the error at Judgment [3], the application for the Restraining Order identified the following R Ltd accounts.

    BNZ 02-0524-019307725 – approximate balance $50,276.22 (Account A)
    BNZ 805630-0000 – approximate balance $1,855.66 (Account B)
    BNZ 805630-0002 – approximate balance $253,111.19 (Account C)

    All three accounts were restrained at the without notice stage.

9. Judgment [3] was incorrect for the additional reason that the restraint order covered 2 companies (not simply 2 bank accounts) but with 3 separate credited accounts in R Ltd and 2 in S Ltd (for completeness, S Ltd had a US dollar and NZ dollar account).

10. As to the error at Judgment [7]. on 23 June 2020 the Minute of Cooke J contained the following paragraphs:

[11] Normally a Court is likely to discharge orders made in such circumstances. I accept, however, that it is not appropriate to fully discharge the orders made without a full hearing.

[17] In the circumstances I will vary the restraining orders currently in place on a without notice basis. In particular the contents of ***the BNZ account numbered 02-0524-093077-02****5 personalised in the name of the third interested party, having a confirmed balance of $50,520.70 in February 2020, is to be no longer restrained.* ***The remaining funds are to remain restrained, however.***

11. The sealed Order of 23 June 2020 then specified that it was only that account (Account C) which had been the subject of the variation referred to in paragraph 17 of the Minute.

12. As to the error at Judgment (50a), this is set out in more detail below in the section which deals with the substantive merits; in short, the evidence before Cooke J shows that the Commissioner did not accept the shortcomings; the Commissioner's internal emails (privilege was waived, hence why the emails were in evidence) demonstrate the Commissioner attached great importance to the ability to restrain R Ltd and avoid its discharge.

13. As to the error at Judgment (50b), in the Judgment of Cooke J dated 26 November 2020, at paragraph 2 he further stated;

> *On 23 June 2020 I discharged the restraint in relation to one of the accounts so restrained having a balance of approximately $50,520.70.*

14. Therefore, contrary to the factual position outlined in the Court of Appeal judgment, Cooke J had not discharged the restraining order in relation to R Ltd but only one of the accounts; it remained fully in place at the time of the hearing on 20 and 21 October 2020.

Jurisdiction:

15. The Appellant has sought to research the jurisdictional issue, which the court has rightly raised. As a litigant in person, researching this point has proved difficult; he is grateful to the court for appointing counsel to the appeal, who, like the commissioner will be able to provide a suitably supported analysis of this point by reference to precedent.
16. What the Appellant has been able to establish is that the Supreme Court has the jurisdiction to deal with a direct application to recall its own Judgments and frequently does so.
17. Equally, the Court of Appeal has that same jurisdiction and frequently exercises it.
18. The Appellant submits that given the Supreme Court is the ultimate appellate court, it would be entirely in keeping with that status, that it should have the jurisdiction to hear an appeal from the Court of Appeal, on any point provided the criteria set out in section 74 of the Senior Courts Act 2016 are met.
19. It is respectfully submitted that the following should be taken into account.
20. In paragraph 2 of its Judgment dated 6 March 2023, the Court of Appeal declined to recall the result and stated *"the number of bank accounts held by R limited was not important to our reasoning"*
21. Firstly, that overlooks the point that the Court of Appeal had failed to acknowledge the clear fact that R limited had more than one bank account. The Judgment specifically states that there were only two bank accounts, R Ltd, and S Ltd, rather than identifying that there were two companies, R Ltd having 3 bank accounts and S Ltd, having 2 bank accounts
22. Secondly, the Court of Appeal misunderstood that R Ltd had been discharged from the restraint, because of the mistake that occurred in not appreciating that it had more than 1 bank account. The Court of Appeal appears to have proceeded on the mistaken basis that, because there was only 1 bank account, that Cooke J's order, which freed up money so that the Appellant could instruct New Zealand solicitors and counsel, meant that R limited had been discharged from the restraint order. It had not; there was a variation, and save for that, in all of the respects, R Ltd remained restrained, with the accounts held by the Official Assignee.

23. The erroneous reason that R Ltd had been discharged, appears as one of the five determinative factors in paragraph 50 of the Court of Appeal Judgment. Therefore, the position of R limited was an important part of the overall reasoning.
24. The final sentence of paragraph 2 of the 6 March 2023, Judgment states “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). The Appellant respectfully submits that what the Court of Appeal failed to do is articulate reasons for that part of its Judgment, particularly in circumstances where the Appellant sought to address those principles and explain how those factual errors had impacted upon the overall Judgment.
25. The Appellant submits that the failure to recall the Judgment means that a substantial miscarriage of justice may have occurred due to the issues identified re R Ltd. There is also a general or public importance, where an appellate court declines to recall the Judgment, but does not articulate or elaborate upon its reasoning; a prospective Appellant is not able to understand how and/or why the application for a recall has been declined where a vacuum of even a short, reasoned Judgment exists.
26. Firstly, succinctness is acceptable and desirable in a judgment. Secondly, it is not necessary to deal expressly with every point, but a judge must say enough to show that care has been taken and that the evidence as a whole has been properly considered. Which points need to be dealt with and which can be omitted itself requires an exercise of judgment. Thirdly, the best way to demonstrate the exercise of the necessary care is to make use of "the building blocks of the reasoned judicial process" by identifying the issues which need to be decided, marshalling (however briefly and without needing to recite every point) the evidence which bears on those issues, and giving reasons why the principally relevant evidence is either accepted or rejected. Fourthly, and in particular, fairness requires that a Judgment should deal with apparently compelling evidence, where it exists, which is contrary to the conclusion which the Court proposes to reach and explain why it is not accepted.

Leave to Appeal:

27. The Appellant respectfully submits that in the event of the court considers that it does not have jurisdiction at (1) above, then it would be appropriate to treat his application as an application for leave to appeal out of time and to grant leave.

28. It is clear that the Appellant acted promptly in identifying that he considered that the Court of Appeal judgement contained errors of fact, and made the appropriate application for the judgement to be recalled. It is submitted that was the appropriate and correct course of action to follow. With no criticism of any of the parties, or the Court of Appeal inferred, the passage of time between the lodging of the application for a recall and the time then taken to determine that application is what caused the normal time limit for a substantive appeal to expire. This is not a case where the Appellant was ignoring or ignorant of the time limits.
29. Accordingly, the reason for the delay is understandable in the circumstances. This is not a case where the delay is due to inactivity, incompetence, a failure to properly engage with the court rules and processes. On the contrary, because the Appellant was seeking to rectify already established facts, which the appellate court had not been addressed upon, and fallen into error, the reason for delay is due to an understandable reason; the Appellant was pursuing a recall and following a prescribed procedure to rectify errors in a Judgment.
30. The length of the delay is minimal. It is submitted that where the reason for the delay stands up to scrutiny (which is what is submitted here), then that is inextricably linked to the length of delay. This is not a case where there was a deliberate decision not to proceed, followed by a change of mind, or indecision, or from error or inadvertence.
31. The conduct of the parties is not a factor that should cause the court to refuse to grant leave and out of time. Both the Appellant and the Commissioner properly engaged with the factual errors whilst both, for understandable reasons, adopted a different stance as to their respective importance and the weight that ought to be attached. Both rightly accepted that errors, at least in relation to R Ltd had been made. There is nothing that would come close to misconduct with which the court need be concerned.
32. It is respectfully submitted on behalf of the Appellant, that no prejudice is caused by the delay. For example, there is no other timetabled order which will be adversely affected. Notably, the parties and the court have previously observed that the substantive Forfeiture hearing could not be listed until the issues arising from the extant appeal of Cooke J's order have been resolved.
33. Taking all of the above into account, the Appellant respectfully submits that granting an extension would "meet the overall interests of justice"; Havanco Ltd v Stewart [2005] NZCA 158.

34. It is further submitted, that, for the reasons set out below (see the section – Substantive Merits) that this is not an appeal wholly without merit and with no prospects of success.

Leave Criteria:

35. The criteria that the Court will address are:
    a. the appeal involves a matter of general or public importance; or
    b. substantial miscarriage of justice may have occurred, or may occur unless the appeal is heard.
    c. the appeal involves a matter of general commercial significance. (Section 74 Senior Courts Act 2016)
36. As to 44(a) it is submitted as follows:
    a. There is a general or public importance in any Court but particularly an Appellate Court handing down Judgments which do not contain errors of fact and particularly so, where those errors of fact form part of the key part(s) of the Judgment.
    b. Unless corrected, there is a Judgment of an appellate Court that contains factual errors and which were are not peripheral or unimportant; those 4 errors each underpin the critical paragraph (50) which determined the outcome of the central issue as to whether a restraining order where the lower court had been misled, ought to be discharged. The Court of Appeal ruling establishes a precedent. However, the integrity of the reasoning and logic and thus the outcome is based on significant errors of fact. If those facts were incidental or irrelevant to the key findings the integrity of the Judgment would not necessarily be effected.
    c. The refusal to recall the Judgment raises a point of general or public importance. The Recall Judgment at paragraph 2 compounds the errors in the Judgment by suggesting that the Appellant focussed on a solitary error regarding the number of bank accounts held by R Ltd. The errors are much more serious than that and had far-reaching implications that possibly undermine the fundamental reasoning in [50(a)] and thus the Judgment as a whole.

d. The corrections were not peripheral issues and not simply restricted to the number of bank accounts held by R Ltd (paragraph 2 of the Recall Judgment); the correction relates to the fundamental issue of whether a restraint order had been discharged and a remedy for material non-disclosure provided.

37. As to 44(b) the Appellant submits that even if the suggested corrections only extend so far as R Ltd, that means a substantial miscarriage of justice may have occurred; funds would remain restrained that the Court of Appeal clearly opined would have been rightly discharged from restraint by Cooke J; paragraph [50(b)].
38. It is submitted that to address the issue of whether a substantial injustice has occurred the Court might consider the effect that the correction of the errors at [50(a)&(b)] would have generally. The Court may consider that the underlying rationale is [50(a] is unaffected by the correction and that it does not result in the conclusion that the Commissioner acted in good faith.
39. However, the same cannot be said for [50(b)]. Its correction would lead to that part of the Judgment (50) being decided in the favour of the Appellant. Were that to be the position, then only (a) and (e) would be decided in the Commissioner's favour with (b), (c) and (d) decided in the Appellant's favour. That would mean the balance of interests applied by the Court of Appeal would overall result in the rescinding of the restraint orders as a whole; i.e. for both R Ltd and S Ltd.
40. The Appellant's position is that 50(a) is incorrectly decided, because the evidence before Cooke J does not demonstrate open-handedness and good faith. The Commissioner did not accept the shortcomings nor rectify them; had the US Government not taken the step (as a non-party) of preparing a correcting affidavit directly and insisting it was filed, there is no evidence to support the Court of Appeal's observation that, *"the commissioner accepted these shortcomings once they were identified."*
41. As to 44 (c) the Appellant submits that where a party potentially has assets restrained which should have been discharged and the Court has operated on the mistaken impression that they have, when they have not and that remains unrectified, that is a matter of general commercial significance.

Substantive Merits:

42. As to the error at Judgment [50(a)] to assess what the Commissioner's position was, the following are instructive:

    a. The affidavit of AUSA Barbara Ward on behalf of the US Government dated 25 July 2020.
    b. The affidavit of DS MacDonald on behalf of the Commissioner dated 27 July 2020.
    c. The transcript of Barbara Ward's cross-examination before Cook J on 20 October 2020.

43. Dealing with each in turn, AUSA Ward's affidavit stated:

    19. When it was brought to our attention in March 2020, the February 2020, affidavit stated that the United States was requesting repatriation of the funds in the S account and up to £196,882.09 dollars of the funds in the R account, I immediately realised that this was inconsistent with our decision not to seek repatriation of the funds in the R account. I told my colleagues that we need to rectify the situation immediately.

    23. On or about May 4 2020, Acting Detective, Sergeant Alex McDonald, informed us that because of the ongoing discussions between Rae's counsel, and the New Zealand authorities, the New Zealand authorities decided that they did not need to submit the May 2020, affidavit to the court at that time.

    24. Despite the decision by the New Zealand authorities, however, I considered it critical that we correct the inadvertent statement in the February 2020 affidavit. Specifically, I insisted that the D.N.J. request that the New Zealand authorities submit a supplemental affidavit as soon as possible…. We asked the New Zealand authorities to file the supplemental affidavit immediately.

13. That position was supported by the affidavit of Officer MacDonald:

    3.9 on 4 May 2020, I advised Special Agent Vanzetta, based on the ongoing nature of those discussions, with Mr Rae's legal representatives, the Commissioner had decided to defer filing the affidavit at that stage.

14. The relevant excerpts of AUSA Ward's evidence on 20 October 2020 before Cooke J are as follows:

Q. And you were sufficiently concerned upon correcting this mistake as soon as possible that you started the process of preparing a second affidavit with Special Agent Vanzetta immediately after this knowledge became known to you, didn't you?

A. I don't know if I, can't say put pen to paper anymore, can we, I don't know exactly when I started doing it because I believe this was right around the time that everything shut down in the north eastern United States because of COVID and we, Friday March 13th was our last day in the office and so things were a little crazy then so I don't know exactly when I started drafting it but I knew we had to do it and it, you know, it had to be done, you know, as soon as possible but I, we also knew it wouldn't, and we made this clear when we spoke to Mr Touger that this would not have the effect of releasing any restraint on the R Ltd account because that was New Zealand's restraint and it was not ours but we absolutely had to correct that error. We absolutely were going to, but it would not have the effect of releasing those funds.

Q. And just referring to – on the affidavit again, you transmitted a draft to the office of the Commissioner of New Zealand in April because in paragraph 21 you referred to commends being made on that draft that you transmitted?

A. If I can just look at that, if you don't mind.

Q. So, towards the end of paragraph 21?

A. Yes.

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Q. There was then some comment made about "there was no need for this affidavit to be filed with the Court, wasn't there, by the New Zealand Commissioner?

A. Well in paragraph 23 I say that I heard on or about May 4th that there was some kind of discussions which are between these counsel and the New Zealand authorities and New Zealand said they did not need to submit their – to the Court at that time but I insisted that we had to do it because we had to correct this mistake. We couldn't let this mistake stand in an affidavit. We still have to prove,, because we made them do it.

Q. That's right and that's the precise words you used didn't – in paragraph 24 that you insisted that this affidavit be filed with the Court, would it be fair to say that but for your insistence this second affidavit of Special Agent Vanzetta would not have been filed?

A. I can't say that because, you know, nothing is – is really fine until it happens and I don't know what was going on in New Zealand that they thought it wasn't significant or that they were in some sort of – sounds like they were in discussions with Mr Rae and they thought it might gum up the works. I don't know what their motives were but the United States interest was in correcting the statement of Special Agent Vanzetta's and my interest, that was my interest and so we thought our position was notwithstanding what New Zealand's interests was or what they thought was best for litigation we – that much.

44. What emerges from those extracts are the following points:

i. The Commissioner did not accept or accede to the shortcomings in the misleading information, insofar as R Ltd was concerned. Those were identified by the US Government.

ii. The NZ Commissioner did not consider it important or necessary to formally correct the position regarding R Ltd; that was only corrected following the insistence of the US Government.

iii. The US Government had accepted that it would not be pursuing restraint and/or repatriation of the R Ltd monies and that position was adopted before the NZ Commissioner commenced the without notice restraint proceedings.

16. As to the error at Judgment [50(b)] the Court of Appeal fell into error in 3 material respects

i. It did not reference the fact that R Ltd contained three bank accounts.

ii. It proceeded on the basis that the restraining order on R Ltd had been discharged, thereby releasing any and all funds.

iii. The Judgment does not refer to the fact that there was a variation, as opposed to a discharge which only released the NZD account nor the

reasoning behind it which was to allow the Appellant to secure legal representation for a future hearing to challenge the restraint order for both R Ltd and S Ltd. Had Cooke J rescinded the order regarding R Ltd as per paragraph 50(b) any future hearing would only have involved S Ltd. The hearing on 20 and 21 October proceeded to hear detailed evidence as to both R Ltd and S Ltd

The Reasoning at Judgment [50} and the importance of the 4 Errors: (iii)

45. The Court identified 5 key criteria at paragraphs [46-7] and then applied those, in turn, to the facts in the present case at paragraph [50].

46. They can be summarised as follows:

    a. Did the Applicant act in good faith; This was determined in the Commissioner's favour [50(a)]
    b. The significance of the missing information. This was determined in the Commissioner's favour. [50(b)]
    c. The identity of the Applicant. This was determined in the Appellant's favour. [50(c)]
    d. The interests protected and promoted by the duty of candour. This was determined in the Appellant's favour. [50(d)]
    e. The public interest. This was determined in the Commissioner's favour. [50(e)]

47. The balance of those interests rested narrowly in the favour of the Commissioner with (a-b) and (e) outweighing (c-d) which had been decided in the Appellant's favour.
48. However, [50](b) is underpinned by a factual finding which is demonstrably incorrect as to the position of R Ltd. The Court of Appeal ruled on the basis that R Ltd in its entirety i.e., all 3 of the named bank accounts had been released from the restraint order.
49. The error is demonstrated in paragraph 6 of the Judgment, which then feeds into the erroneous factual position posited at paragraph 50(b).

50. The Court of Appeal has proceeded on the basis that R Ltd and each of the 3 bank accounts had been discharged by Cooke J (when only Account C had been the subject of a 'variation' order) and the Court of Appeal clearly concluded that R Ltd should have been discharged and that is ably demonstrated by the first part of paragraph 50(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 being declined.'*

51. Thus, it is submitted that the Court of Appeal's Judgment was underpinned by factual errors. In relying upon the error re R Ltd being discharged, the Court reached a conclusion that the missing information re R Ltd was important and had led to that aspect of the restraining order being declined.
52. However, in finding, erroneously, that Cooke J had discharged R Ltd at a very early stage, the Court of Appeal concluded that problem had been remedied when it had plainly not been. It is submitted that it must logically follow, that its reasoning would have been different, if it had correctly recorded a variation of 1 bank account as opposed to a discharge (which would have led to the release of monies in each of the 3 accounts);
53. The Court of Appeal clearly thought that Cooke J had discharged R Ltd and that his decision in that regards was unimpeachable and that R Ltd ought to be discharged from the restraint order. If the Court of Appeal was right to think that Cooke J's decision to 'discharge' on 23 June 2020 should stand, it would be illogical not to adopt that reasoning now that the factual errors have been highlighted and their clear importance demonstrated.
54. The Court of Appeal had proceeded on the basis that R Ltd and each of the 3 bank accounts had been discharged by Cooke J (when only Account C had been the subject of a 'variation' order) and clearly concluded that R Ltd should have been discharged and that is demonstrated by the first part of paragraph 50(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 being declined.'

55. The Appellant has re-attached the Affidavit of Officer MacDonald dated 27 July 2020. The relevant document exhibited is the email dated 16 January 2020 (04.43). That email is internal and between the Officer and the Commissioner's legal team. It serves to demonstrate the importance of being able to ensure R Ltd was kept within the confines of the without notice restraint order and why.
56. At the time of that email, the Commissioner was formulating its application for a without notice restraint. It was doing so working on the basis of the following
    a. Cargill Ltd had received criminally tainted funds from Williamsky and that Cargill was a company controlled by the Appellant.
    b. Cargill had had made 14 wire transfers to R Ltd; R limited was under the effective control of the Appellant, even though the beneficial owner was his then wife, Sarah Rae.
    c. R Ltd had then sent those tainted funds to S Ltd, which, then funded the genetics screening model; notably, S Ltd was not the subject of any criminal proceedings in the US and furthermore the actions of S Ltd were not said to be relevant criminal conduct when it came to the sentencing of the Appellant in the US.
57. What are the above demonstrates is that the Commissioner's case, was that it was important that it could show the flow of money from Cargill to R Ltd and to S Ltd. In other words, it had to show R Ltd could be included within the overall criminality in the US.
58. The reality, is that the US had accepted that R Ltd had no criminal conduct that could be attributed to it and that is why it removed R Ltd from the US confiscation and why it would not support any repatriation of funds from R Ltd to the US.
59. R Ltd was important to the Commissioner; it follows that it was important to the reasoning of Cooke J and the Court of Appeal. At the without notice stage the Court was misled (whether accidentally or on purpose) as to R Ltd; The Court of Appeal was correct in determining the misleading should have led to R Ltd being discharged for the reasons it expressed, albeit the Court was in error about the fact of the discharge.
60. The Court of Appeal's rationale was that the non-disclosure re R Ltd had been rectified by Cooke J; *" Cooke J rescinded the order in relation to R Ltd long before the contested hearing on 20 and 21 October 2020."*

61. That was what the Court of Appeal agreed should have occurred and thought had occurred. The fact that it did not occur, means that its Judgment at paragraph 50, ought now to be corrected, with the result that the Appellant's appeal of Cooke J's ruling should be granted.

David Rae – Appellant

12 September 2023