IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA SC21/2023

BETWEEN

JOSHUA PERA VAN SILFHOUT

Appellant

AND

UDAYA LAKSHMAN AGAS PATHIRANNEHELAGE

Respondent

APPELLANT'S SUBMISSIONS ON APPEAL

Next event date: 18 July 2023

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1. ISSUES

1.1 The appellant appeals with leave the judgment of the Court of Appeal, dismissing the appeal from the High Court, dismissing the appeal from the Victims' Special Claims Tribunal, which awarded the respondent $5,000 in compensation. The appeals raised the ground that the respondent's claim was statute-barred by limitation.

1.2 In dismissing the appellant's appeal from the High Court, the Court of Appeal held that pre-sentence detention ("PSD") accruing under the Parole Act had to be applied to the PVCA's suspension of the usual six-year period of limitation of actions under the Limitation Acts.[1]

1.3 In summary, the appellant's argument is that:

1. While the Court of Appeal held the retrospective application of PSD following sentencing is included in the PVCA suspension period, the

[1] The 1950 Act is applies here but these submissions equally apply to the 2010 Limitation Act.

judgment does not address the situation where a limitation period expires while the prisoner is on remand for the relevant offence, but has neither been found guilty or sentenced to imprisonment, which are the conditions precedent for limitation to be suspended.

2. The Court of Appeal erred in its approach to context as a means informing the meaning of the PVCA.[2] The proper context of ss 5 and 64 is the limitation of actions under the Limitation Acts, not the Sentencing or Parole Acts[3] or PSD. If differences in sentence construction will alter the limitation period, the Sentencing and Parole Act regimes cannot provide relevant interpretive context.

3. The PVCA sets out expressly when it incorporates Parole Act provisions. The Act does not mention ss 90 or 91, Parole Act, or "pre-sentence detention" once. Indirect incorporation through a contextual analysis is thus inconsistent with the statutory scheme.

4. The Court of Appeal accepted that not all forms of PSD under the Parole Act could be applied to the suspension period but the PVCA provides independent means to determine PSD for limitation purposes.

5. Had the limitation provisions employed the term "prisoner" as used elsewhere in the PVCA, remand prisoners would have been included. Instead, the PVCA provides a limitation-specific definition of "offender" that is inconsistent with applying PSD.

6. The Court of Appeal did not address the application of the doctrine of legality to the interpretation of the PVCA.

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[2] Legislation Act 2019, s 10: meaning ascertained "from its text and in the light of its purpose and its context."

[3] 101.0038, paragraph [45].

2. FACTS / PROCEDURAL HISTORY

2.1 The appellant was awarded compensation for a qualifying specified claim[4] in January 2020. $9,993.05 was paid into the PVCA trust account.

2.2 The respondent claimed $10,000 against that sum under the PVCA for emotional harm arising out of a robbery in July 2010. The Victims' Special Claims Tribunal awarded him $5,000.

2.3 On appeal, the High Court held the Tribunal erred in its approach to limitation under the PVCA, but went on to hold the PSD deemed by the Parole Act to apply to the robbery sentence also suspended the limitation period. It was common ground that if PSD did not count, the respondent's claim would have been statute-barred.[5]

2.4 The Court of Appeal upheld the High Court's judgment that PSD suspended the limitation period. The Court of Appeal held the legislative context of the regime under the Parole Act informed the interpretation of s 64, PVCA: PSD was thus included.

3. THE PVCA AND LIMITATION OF ACTION - STATUTORY SCHEME

3.1 PVCA claims are an exception to the six-year rule on the limitation of common law actions:

> **64 Limitation periods suspended while offender serving sentence of imprisonment**
>
> (1) The limitation periods to which this section applies cease to run while the offender is serving a sentence of imprisonment in a penal institution, prison, or service prison.
>
> (2) In this section, **serving a sentence of imprisonment in a penal institution, prison, or service prison**—
>
> (a) means serving in a penal institution, prison, or service prison—
>
> (i) the sentence of imprisonment for the offence (as defined in section 5(1)(a)(ii)); and
>
> (ii) any earlier sentence of imprisonment on which the sentence of imprisonment for the offence is directed to be served cumulatively; and
>
> (iii) any later sentence that is directed to be served cumulatively on the sentence of imprisonment for the offence; and
>
> (b) includes spending time in a penal institution or a prison following a related recall application (as defined in section 59 of the Parole Act

[4] PVCA, s 6.

[5] Between appellant's counsel and then *amicus curiae*, Ms Casey KC..

2002), but only if a final recall order (as defined in section 4(1) of that Act) is made following the recall application.

(Emphasis in the original text)

3.2 Section 64(1) uses the s 5(1)(a), PVCA limitation-specific definition of "offender". This further limits the sentence creating the suspension of limitation to "the sentence of imprisonment for the offence".

5 Offender

(1) In this Act, **offender**, in relation to a victim, means—

(a) *for the purposes only of subpart 3 of Part 2*, a person—

(i) convicted (alone or with others) by a court or the Court Martial of the offence that affected the victim; and

(ii) on whom a court or the Court Martial has, because of the person's conviction for that offence, imposed a sentence of imprisonment (the **sentence of imprisonment for the offence**);

(Bold in the original text, italics added)

3.3 Under s 5(1)(a)(ii), the suspension of limitation in respect of a claim requires all of the following ("the key sentence"):

1. a sentence of imprisonment imposed on the offender;
2. for an offence against a victim;
3. that gives rise to the victim's claim;[6]
4. that is served in penal institution, prison or a service prison.

3.4 It is important at the outset to note how s 64 takes effect. It does not add the period spent "serving a sentence of imprisonment in a penal institution, prison, or service prison" onto the six year limitation period. It suspends the running of that six years, during the currency of the key sentence.

3.5 This means that if the six-year limitation period expires prior to the imposition of the key sentence, it cannot be revived retrospectively by that subsequent key sentence of imprisonment even if such a sentence would otherwise meet the criteria in s 5(1)(a)(ii), PVCA. Once a limitation period has expired[7] it cannot be revived by anything other than the most express statutory language. A limitation defence is absolute "if the

[6] Without a finding of guilt, or plea of guilty, to the offence giving rise to the claim the Tribunal has no jurisdiction to entertain the claim at all: PVCA, section 5(1)(b).

[7] Issues of late notice under s 14, Limitation Act 2010 do not add to the length of the limitation period but operate to provide a different period.

defendant proves that the date on which the claim is filed is at least 6 years after the date of the act or omission on which the claim is based".[8]

3.6 It is entirely inconsistent with the policy underlying limitation of actions for any suspension of the statutory limitation period to be dependent on some unknowable future contingency, such as whether the charge will even result in a prison sentence. Accordingly, before there can be a suspensory effect, there must be a date from which the suspension takes effect. Given the certainty limitation requires, that suspension date must be ascertainable at the time the suspension begins. The parties must now at the time that the limitation period is not running.

3.7 Logically, this would have to be the first day of a pre-sentence custodial remand applicable to the victim-related charge.[9] However, this is not how the Parole Act 2002 applies PSD to a subsequent sentence. Under s 90, Parole Act, the first day of the remand is actually the last day to be allocated towards a sentence.

3.8 The Court of Appeal judgment also proceeds on the incorrect legal premise that every day of PSD will count towards a resulting prison sentence. PSD only applies to the maximum term of the subsequent sentence. If the PSD credit is longer than the resulting sentence the period between the initial remand in custody and the statutory release date is discarded.

4. PAROLE ACT AND PSD APPLICATION

4.1 Under the Parole Act 2002, while the total amount of PSD is calculated from the date of the initial applicable remand in custody, it is not applied to a subsequent prison sentence from that initial date.

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[8] Limitation Act 2010, s 11.

[9] Which may not even relate to the charge on which the claim is based: *Booth v R* [2017] 1 NZLR 223 (SC).

4.2 A sentence of imprisonment commences on the date of its imposition ("sentence commencement date" or "SCD").[10]

4.3 The duration of a prison term imposed is added to the SCD to give its notional end date. It is only at this point is PSD accounted for, by subtracting the PSD period from the notional end date. If the PSD is greater than the sentence imposed, the sentence expiry date ("SED") coincides with SCD. The sentence begins and ends on the same day.

4.4 The High Court analysed these issues in detail in *Prince*,[11] and expressly rejected the argument that the length of a sentence should be calculated from the first day of the applicable remand in custody, as amongst other things that could lead to a sentence expiring before it had been imposed.

4.5 The facts are instructive. Mr Prince's five-month remand credit was significantly in excess of the custody period of the sentence of seven months a District Court Judge imposed, and of the sentence in its entirety, following his successful sentence appeal to the High Court (four months). As he was subject to release conditions for six months post-SED the question of determining sentence expiry date was critical.

4.6 If time ran from the date of his remand in custody (that is, by adding on the four months imposed on appeal from the day he was remanded on the charges), his SED would pre-date its SCD, thus reducing the period he was liable to release conditions. If time ran from the date of sentence, the application of PSD would see the SED coincide with SCD; the four months would be added to the sentence date, and then five months deducted, although in reality that five months became attenuated to four - the actual sentence length. That would mean the six months of release conditions would run for the full six-month period from commencement date.

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[10] Parole Act 2002, s 76(1).

[11] *Prince v Chief Executive of the Department of Corrections* [2020] 2 NZLR 260 (HC).

4.7 Justice Edwards held it was the latter. The Court of Appeal did not demur from that fundamental proposition, but failed to appreciate its consequences. Justice Edwards held the Parole Act "as it relates to the duration of a sentence"[12] is forward-looking in nature. The Court of Appeal analysis requires it to operate in the rear view mirror, by having future acts take retrospective effect. The error of that approach becomes readily apparent by a simple case study.

5. A USEFUL HYPOTHETICAL

5.1 A rape occurs on 1 January 2015, and the cause of action accrues. As is common, particularly in sexual violence cases, there is a significant delay in making a complaint, even though the identity of the defendant was known to the complainant. The complaint is delayed by years to December 2019.

5.2 The defendant is arrested, charged and remanded in custody on 1 January 2020. The defendant is convicted at trial on 1 June 2021, having spent 17 months on remand. On 30 June 2021 he is subsequently imprisoned for eight years.

5.3 On the Court of Appeal analysis, a victim's claim under the PVCA would be within time until a year following his release from prison, whether on parole or at his statutory release date ("SRD") on 1 January 2028, as the 17 months PSD accruing since 2020 is applied to the eight-year sentence. It is however obvious none of this could have been known (or reasonably predicted) on the actual limitation date of 1 January 2021. At that stage the defendant was still a remand prisoner and the Limitation Act clock was still running, unmodified by the PVCA. Even the Court of Appeal judgment accepts the suspension it held applies does so retrospectively from the date of sentence.[13]

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[12] *Prince,* fn 11 above, at [33].
[13] 101.0038, at [39].

5.4 The inescapable problem with this is that the limitation period expired on 1 January 2021, well before conviction or sentence - the conditions precedent to "the limitation periods … [ceasing] to run while the offender is serving a sentence of imprisonment".[14] This is because, contrary to the Court of Appeal's assumption, the actual effect of the Parole Act is to calculate PSD from the date of sentence backwards rather than from the first day of the remand forwards.

5.5 For the Court of Appeal analysis of PSD to be correct, it would also require the language of suspension in s 64(1) to authorise the retrospective reinstatement of claims that were already statute-barred before either the conviction is entered or the key sentence was imposed. The text of s 64(1) simply cannot bear that weight.

5.6 As a further example of inconsistency with applying PSD, what if at trial the defendant is convicted of an included alternative count of indecent assault? He is sentenced on 30 June to home detention, taking into account his PSD. There is no suspension at all. If the claimant victim had stayed her hand in filing proceedings on the assumption that PSD suspended the limitation period for her claim, she would have lost any chance of claiming premised on that assumption.

5.7 In a further irony, the court can only impose home detention if it would otherwise impose a prison sentence.[15] As Heath J observed in *Taylor*,[16] the difference between home detention and prison may simply be the availability of an address on the day of sentencing, as all other factors of culpability are equal between either option. This is inherently arbitrary and courts set their face against interpretations that lead to arbitrary outcomes, based on arbitrary determinants.[17]

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[14] PVCA, s 64(1).
[15] Sentencing Act 2002, s 15A.
[16] *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791, (2015) 10 HRNZ 523, at [34]-[35].
[17] *Booth v R* [2017] 1 NZLR 223, at [32], Glazebrook J, [63], William Young J.

5.8 This simply underscores the need to know at the time if a limitation period is suspended. If suspension is contingent on unpredictable future events, the certainty of obligations that the limitation legislation is supposed to ensure is completely undermined.

5.9 The appeal could be allowed on this ground alone.

6. PAROLE ACT AS LEGISLATIVE CONTEXT GENERALLY

6.1 The central thrust of the Court of Appeal judgment was that the sentencing and parole regimes, but principally the Parole Act, provided necessary legislative context for the purposes of s 10, Legislation Act 2019 and thus dictated the proper construction of the crucial term "serving a sentence of imprisonment in a penal institution, prison, or service prison" in s 64, PVCA.

6.2 While the Court of Appeal refers to ss 90 and 91 of the Parole Act, the Court did not interrogate any of the other references to "serving a sentence of imprisonment" in that Act in relation to when an offender becomes subject to a prison term. While the Court rejected any difference between the use of the past or present participles,[18] the Act is more discriminating.

6.3 The Parole Act employs "serving" and "served", either with "a sentence of imprisonment" or in relation to a sentence of imprisonment or its like in a number of places:

1. Section 20(1)(a) – Parole Eligibility Date
2. Section 27(1)(a) – Board may make postponement order
3. Section 34(2)(a) – Prior report on suitability of residential restrictions
4. Section 51(1) – Date of release
5. Section 52(1) – Release of offenders released at statutory release date
6. Section 55(3) – Offenders may be released early for deportation
7. Section 59 – Definition of recall application
8. Section 66(1), (3), (3A) – Board may make final recall order
9. Section 75(1) "served" – Cumulative sentences form notional single sentence
10. Section 79(3) "served" – Start date if later sentence replaces original sentence

[18] 101.0038, at [36].

11. Section 82 "served" – Sentence expiry date
12. Section 86(1) "served" – Release date of sentence
13. Section 89 "served" – Determining time served
14. Section 90 "served" & "serving" – Period spent in pre-sentence detention deemed to be time served
15. Section 91(5), (6) – Meaning of pre-sentence detention[19]
16. Section 94 "served" – Time ceases to run in certain circumstances
16. Section 95 "served" – Time on bail pending appeal does not count as time served

6.4 When "serving" is employed it applies to the currency of a sentence previously imposed. Unsurprisingly, PSD can have no application to those sections. Its only relevance is in those sections in Subpart 3 of the Act that deal with the effect of PSD on a subsequent sentence.

6.5 While the Court of Appeal judgment does not refer to s 89, it should be considered in the context of the Parole Act's treatment of PSD:

> (1) When determining how much of a sentence imposed on or after the commencement date[20] an offender has served, the provisions of this subpart apply.

6.6 On a literal approach to the language it appears to alter the character of PSD from remand time to sentenced retrospectively, consistently with the Court of Appeal's judgment – "how much of a sentence … an offender has *served*". In marked contrast to the Court of Appeal's approach to legislative context as an interpretive tool, this is where the import of the section must be seen in the legislative context provided by the rest of Subpart 3 of the Parole Act. That requires a close analysis of s 90(1) in particular.

6.7 The Court of Appeal gave no consideration to the purpose and effect of, s 90(1), the principal PSD provision:

> **For the purpose of calculating the key dates and non-parole period of a sentence of imprisonment (including a notional single sentence) and an offender's statutory release date and parole eligibility date**, an offender is deemed to have been serving the sentence during any period that the offender has spent in pre-sentence detention.
>
> (Emphasis added).

[19] It is of note that the section uses an inclusive definition of "serving a sentence of imprisonment" that expressly excludes from the definition of PSD time spent serving a sentence of imprisonment.
[20] Here commencement date refers to the commencement of the Act not the sentence.

6.8 Section 90 is not a general for-all-purposes deeming provision and the text of s 89 does not change that. It is expressly limited, functional and "forward-looking".[21]. It is there to facilitate the Chief Executive's duty under s 88 to calculate the "key dates and non-parole period of every sentence to which an offender is subject, and the offender's parole eligibility date and statutory release date (if any)"[22] but only once a sentence has been imposed.

6.9 It is only once a sentence is imposed that the Chief Executive has the obligation to calculate key dates. At the risk of stating the obvious, the calculation cannot be performed until the sentence to be calculated is known. It follows the context in light of which s 89 must also interpreted is inherently forward-looking. It was never intended to alter the nature of past obligations or liabilities for anyone.

6.10 The section does not purport to override other provisions of the Act, especially those more directly relevant in determining when liability for a prison sentence begins. While the Court of Appeal was happy to import the deeming effect of s 90, Parole Act, as part of the PVCA legislative context, the Court ignored the express language of s 76(1):

> The start date of a sentence of imprisonment imposed after the commencement date is the date on which the sentence is imposed, except as otherwise provided in sections 77 to 81.

6.11 "Start date" is also a defined term in s 4:

> **start date**, in relation to a sentence of imprisonment, means the date on and from which an offender who is subject to the sentence begins to be subject to it (see sections 76 to 81)

6.12 Section 90 does not purport to derogate from or modify s 76, which dictates when a prison sentence commences and hence from when a prisoner starts "serving the sentence". It does not and could not alter the legal character of the prior custodial remand. Retrospective reclassification of remand time would also be to create a further and an unnecessary legal fiction. The existence of such a fiction lies at the heart

[21] *Prince,* fn 11 above, at [33], contrasted with 101.0038, at [42].
[22] Parole Act 2002, s 88.

of the Court of Appeal judgment. These factors are critical omissions from the Court of Appeal's reasoning.

6.13 As a matter of policy the legislature determined to reduce the amount of time spent serving a sentence of imprisonment by allocating some or all of PSD towards a resulting sentence, but that is not the same thing as saying a prison sentence takes effect before it is imposed.

6.14 A remand prisoner is not a sentenced prisoner. Under the Corrections Act 2004 they are not subject to the same conditions. A remand prisoner may be held in a police jail,[23] which is legally distinct from a prison and is not controlled by the Chief Executive under the Corrections Act.[24] A prison sentence may not be served in a police jail other than in accordance with s 34 of that Act.[25]

6.15 The Court of Appeal held that s 64(2)[26] is a formula for calculating the suspension period. If PSD is included, this contains the unarticulated premise that the Parole Act can, in all circumstances, be relied on to determine how much PSD suspends the limitation period. This is because the PVCA lacks its own means to determine applicable PSD. This contrasts with provision for cumulative sentences and recall in s 64(2)(a).

6.16 As s 91, Parole Act provides the definitive criteria for assessing PSD, it is necessary to set out s 91(2) in its entirety:

> (2) The types of detention that are pre-sentence detention are detention under an order made under section 24(2) of the Criminal Procedure (Mentally Impaired Persons) Act 2003 and detention on remand pursuant to a court order—
> (a) in a prison (*or in a Police station in accordance with section 35 of the Corrections Act 2004*):
> *(b) in a residence established under section 364 of the Oranga Tamariki Act 1989, or detention in Police custody under section 238(1)(e) of that Act:*
> *(c) in a hospital or secure facility under any of sections 23, 35, 38(2), and 44(1) of the Criminal Procedure (Mentally Impaired Persons) Act 2003:*
> *(d) in a hospital or secure facility pursuant to an order under—*

[23] Corrections A t 2004, s 32(1).
[24] Corrections A t 2004, s 8(1)(b).
[25] For no more than seven days or in cases of certified accommodation shortage.
[26] 101.0038, at [41].

> (i) *section 171(2) or 184T(3) or (4) of the Summary Proceedings Act 1957; or*
> (ii) *section 169 of the Criminal Procedure Act 2011:*
>
> (e) *in a hospital following an application under section 45(2) of the Mental Health (Compulsory Assessment and Treatment) Act 1992:*
> (ea) *in a secure facility following an application under section 29(1) of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003:*
> (f) *in a hospital under section 46 of the Mental Health (Compulsory Assessment and Treatment) Act 1992*.

6.17 None of the italicised places of detention in (a) to (f) are penal institutions, prisons[27] or service prisons. As the Court of Appeal noted,[28] time spent on remand anywhere else but in a prison would not qualify as "serving a sentence of imprisonment in a prison, [etc]" and therefore would not trigger the suspensory effect of the Act. This represents a significant departure from the Parole Act's statutory scheme in relation to PSD calculation.

6.18 When it comes to using an extrinsic statute as a contextual interpretative tool, it must be on a 'take it as a cohesive whole or leave it' basis, without resorting to a section by section dissection, especially where that cuts across the basic functioning of that Act, in this case, the Parole Act's PSD provisions. The existence of internal PSD exceptions militates strongly against the conclusion the Parole Act is relevant legislative context, especially where the PVCA has no means of reconciling them with its broadly-expressed rule.

6.19 As the suspension period cannot be calculated under the Parole Act's comprehensive statutory definition of PSD without exception, it cannot be the necessary context within which to interpret the PVCA's modification of the Limitation Acts. As a 'formula'[29] s 64 cannot calculate PVCA-applicable PSD.

6.20 Under s 91(1), Parole Act, PSD may be applied from charges with no

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[27] A police station is not automatically a police jail, as a police jail requires a specific statutory designation by the Minister of Corrections under s 32, Corrections Act 2004.
[28] 101.0038 at [21].
[29] 101.0038, at [41].

relationship to the charge that gives rise to the victim's claim:

> Pre-sentence detention is detention of a type described in subsection (2) that occurs at any stage during the proceedings leading to the conviction or pending sentence of the person, whether that period (or any part of it) relates to—
> (a) any charge on which the person was eventually convicted; or
> (b) any other charge on which the person was originally arrested; or
> (c) any charge that the person faced at any time between his or her arrest and before conviction.

6.21 If the PSD that is applied to the s 64(2)(a)(i) sentence does not relate to the charge that creates the victim's claim, how can it meet the requirement of "serving the sentence of imprisonment *for the offence*" under the PVCA?

6.22 The earlier and later cumulative sentences expressly incorporated into s 64(2) cannot as a matter of law be equated with the s 91(1) 'other charges': there is no essential relationship between the two. They may coincide but equally they may not. Furthermore, as this Court held in *Booth*,[30] PSD on acquittals will count towards a sentence, whereas suspension of limitation is expressly tied to convictions and resulting prison sentences.

6.23 As shown above, the use of "serving" in the Parole Act and the PVCA is a superficial similarity at best. Even then, that similarity evaporates on a closer analysis of the actual effect of the Parole Act, which operates in a manner that contradicts the Court of Appeal judgment's underlying assumptions.

6.24 Such superficial similarity does not justify importation, especially through 'context' as an interpretive tool:[31]

> "Unless expressly adopted, the meaning given to a word in one piece of legislation is not affected by the meaning given to that same word in a different enactment. The courts have warned against the dangers of reasoning by analogy in statutory interpretation, especially between statutes dealing with different subject-matter ...."

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[30] *Booth v R* fn 17 above, at [36].
[31] *Barrie v R* [2013] 1 NZLR 55 (CA), at [36].

7. FURTHER PROBLEMS WITH USING PAROLE ACT'S SCHEME

7.1 Section 64, PVCA is as a limited departure from the strict codified rules of limitation under the Limitations Acts, which requires precise calculation of dates. While the same is true for the length of a prison sentence to be served (lest the Crown find itself liable in tort), a prison sentence may now be calculated with precision by reference to all forms of PSD prescribed by s 91(2).

7.2 As observed above, the same cannot be said for PSD under the PVCA, as the latter provides no means of ascertaining PSD that meets the Act's specific requirements for place of detention. This has important practical consequences for litigation in the Tribunal: it means the Chief Executive of Corrections' calculation of sentence duration under s 88 cannot be relied on to establish PVCA-applicable PSD.

7.3 Calculating PVCA-applicable PSD would require going behind the Chief Executive's sentence calculation, as non-qualifying exceptions would have to be identified and removed.[32] Without the ability to use the statutory calculation, this is a technical and challenging exercise.

7.4 By contrast, if PSD is not included, then the Chief Executive's sentence calculation is all the information required to determine the extension to the limitation period. It starts on sentence commencement[33] and ends on release. The resulting certainty militates against the inclusion of PSD.

7.5 The Court of Appeal accepted that the limitation period was only suspended *if* all the criteria in paragraph 3.3 above were met. The Court of Appeal disagreed that the period of suspension only took effect *once* all s 5(1)(a) criteria were met.[34] The Court of Appeal relied on what it described as a 'bespoke' definition of "serving a sentence of imprisonment in a penal institution, prison, or service prison" in s 64(2):

> [41] The role of this definition is to provide a formula for calculating the duration of the suspension of a limitation period. Four points may be

[32] Or rather, as confirmed in *Booth* fn 17 above, by delegation to the prison receiving office.
[33] *Prince*, fn**Error! Bookmark not defined.** 11 above.
[34] 101.0038, at [39].

> noted. First, the formula is not confined to the "sentence of imprisonment for the offence" as defined in s 5(1)(a)(ii). It extends to related cumulative sentences and to particular instances of prison detention consequent upon recall from parole.
>
> [42] Secondly, the relevant period of time is not confined to "future directed" service of the sentence but, by dint of s 64(2)(a)(ii), will include the serving of any earlier sentences of imprisonment on which the victim-affected sentence of imprisonment is directed to be served cumulatively.
>
> [43] Thirdly, it is inherent in the extended definition that the calculation of the period of any suspension will inevitably involve a hindsight or retrospective analysis. That is evident from both the scenario of a subsequent cumulative sentence envisaged in s 64(2)(a)(iii) and from the inclusion in the calculation of time spent in detention on recall from parole but only in circumstances where a final recall order is made.
>
> [44] Finally, the reference in that bespoke definition to such concepts which are the subject of the sentencing and parole legislative regimes necessarily imports those concepts into subpt 3. It follows in our view that the sentencing and parole regimes are thereby a part of the subpart's context, in the light of which the meaning of s 64(1) is to be ascertained.

7.6 The Court does not reconcile the first inconsistency, namely that PSD would only count if a prison sentence was imposed. If the eventual sentence was home detention, which can only be imposed if the court would otherwise imprison, there is no suspension, no matter how much time is spent in pre-sentence detention.

7.7 The reasoning in paragraphs [42] or [43] does not drive the conclusion that PSD must be included in the suspension calculation. It is equally arguable that Parliament made a specific and limited exception in respect of cumulative sentences only.

7.8 The specific inclusion of earlier and later cumulative sentences militates against the conclusion that those legislative regimes "necessarily imports those concepts into subpt 3". If they were part of the context, the inclusion in s 64(2) of cumulative sentences and applicable time on recall is otiose. The notional single sentence created by s 75, Parole Act and recall time under 91(6) would form part of the s 64 definition of "serving a sentence of imprisonment in a penal institution, prison, or service prison" by dint of context without the need for express inclusion.

7.9 There is a further difficulty with this reasoning. PSD applies to both cumulative and concurrent sentences, but s 64(2)(a)(ii) and (iii) modify

the limitation period for cumulative sentences only. The effect on limitation will therefore depend on the construction of the sentence.[35]

7.10 In *Booth*,[36] this Court interpreted ss 90 and 91, Parole Act so that PSD applied in aggregate on concurrent sentences led to exactly the same period of imprisonment as the single application of PSD to cumulative sentences. Irrespective of sentence construction or PSD accrued, the resulting prison time was the same.

7.11 In stark contrast to *Booth*, the imposition of cumulative or concurrent sentences leads to different periods of limitation, dependent on the eventual sentence construction and the sentence specific to the victim's claim, with or without PSD. With a concurrent series of sentences, the limitation period will only be suspended for the period of the individual sentence giving rise to the claim.

7.12 For example, if a claim related to a shoplifting and attracted three months' imprisonment, but was served concurrently with a four-year term for an unrelated robbery, the shoplifting claim's limitation is either one and a half months (the permissible period of detention on a short-duration sentence being half its length) or at most three months.[37] The Court of Appeal did not address any of these issues and the judgment provides no means by which the divergence is reconciled or explained.

7.13 Moreover, the fact that an earlier sentence is included cannot take the suspension period back further in time than the accrual of the cause of action itself: it is not a monolithic block of time that must be added to the normal six years, irrespective of its commencement date. Offences committed while on parole and the subject to recall may fall into that

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[35] It must also be noted this legislation was drafted on the assumption that *Taylor v Superintendent of Auckland Prison* [2003] 3 NZLR 752 (CA) was good law; Parliament legislated on a false premise.
[36] *Booth v R* fn 17 above.
[37] The text of s 64 does not assist with the answer, although s 86(1), Parole Act would mandate half of the sentence. This is an instance where the Parole Act's provisions are of direct relevance; the definition of statutory release date assists in determining when someone has "served" a sentence.

category (subject again to subsequent sentence construction).

7.14 Under the Parole Act, PSD could vary without changing the result. Under the PVCA the limitation period can vary markedly depending on sentence construction and PSD. Given the marked disparity in outcome as between cumulative and concurrent sentences for PVCA limitation purposes the sentencing and parole regime cannot provide interpretive context. Adopting that regime creates significant differences in outcome for no discernible reason, but further undermines the objective of certainty required in matters of limitation.

7.15 Sometimes the courts must simply accept that the legislation they must apply lacks a coherent scheme or purpose and the Legislation Act's injunction to ascertain meaning "from its text and in the light of its purpose and its context" is difficult, if it can be achieved at all. The problems identified above tend to show that the sentencing and parole regimes create more distortions when they are applied to the PVCA's limitation provisions than they supply assistance in the meaning of "serving a sentence of imprisonment". Use of the term in other legislation tends to give the same result.

8. "SERVING A SENTENCE OF IMPRISONMENT" IN OTHER STATUTORY CONTEXTS

8.1 Counsel for the Secretary of Justice have provided a useful table of other legislative uses of "serving a sentence" and its cognates. Space does not allow for an analysis of every such reference, so the following represent some of more glaring instances of inconsistency with the Court of Appeal's approach.

Armed Forces Disciplinary Act 1971

8.2 Given the Court's minute, this will be brief.[38] The context of the

[38] It is notable from ss 168 and 175, AFDA that not all forms of service imprisonment would qualify under the PVCA, given the requirement that the sentence is served in a "service

references to "serving a sentence of imprisonment" in s 20 (Limitation of time within which charges may be dealt with summarily or tried under this Act), s 91 (Arrest of person unlawfully at large), s 156 ([Reconsidering] Authority may call for written reports and hear evidence) and s 168 (Manner in which sentences of imprisonment and detention are to be served) all appear to apply to imprisonment as a result of a sentence imposed. PSD does not seem to have any relevance or application to the content of any of the provisions.

Criminal Investigations (Bodily Samples) Act 1995

8.3 The reference to "detained under a sentence of imprisonment" in s 4A clearly could not include PSD as on its own text it requires the entry of a conviction and the resulting imposition of a prison sentence.

8.4 The references to "serving a sentence of imprisonment by way of home detention" are there for historic reasons, and relate to the time when home detention was imposed by the Parole Board subsequent to the imposition of a prison sentence.

Electoral Act 1993

8.5 The reference to "serving a sentence of imprisonment" in this Act can only refer to sentenced prisoners, as those serving a prison term of more than three years are disqualified from registering as an elector; remand prisoners retain the right to register and vote, although they are not expressly referred to in the Act's prisoner-related provisions.

8.6 However, on the Court of Appeal analysis, it would be arguable that if a remand prisoner cast a vote while on remand but became disqualified for registration by the imposition of sentence of three or more years after polling day but before the official count, the prisoner on election day would be deemed to be disqualified from registering and the vote

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prison"; s 168 provides for serving a sentence in a "detention quarter, or other service custody" which does not meet with the requirements of s 64(2), PVCA.

would be invalid.

International War Crimes Tribunals Act 1995

8.7 Section 15(1)(a) (Persons imprisoned under New Zealand law) may be more ambiguous:

> (1) The Attorney-General shall not issue a surrender warrant if—
> (a) the person is serving a sentence of imprisonment in respect of an offence against the law of New Zealand;

8.8 However, paragraph (b) clarifies it must be an actual sentence imposed because it refers to return to New Zealand "to serve the remainder of the sentence" which pre-supposes a sentence has been imposed. This militates against the inclusion of PSD.

Proper Interpretive Context – Limitation Acts

8.9 Given the note of caution expressed by the Court of Appeal in *Barrie*, the meaning of language on one statute will not necessarily transpose onto others where the same or similar terms are used. However, the above review indicates legislative references to "serving a sentence of imprisonment" sits at least uneasily with the inclusion of PSD.

8.10 This does go to the question of whether the use of similar language in the Parole Act provides useful or relevant "context" as that term is employed in s 11 of the Legislation Act at all.

8.11 This shifts if relevant legislative context is to be found in the Limitation Acts. As observed above, section 64, PVCA is a limited departure from the strict codified rules of limitation under the Limitations Acts, which requires calculation of dates precisely and very much to the day: a claim filed one day late (or arguably one minute after 5PM[39] on the limitation date) will be defeated by a limitation defence.

8.12 The appropriate context for s 64 is therefore the need for precision and the removal of uncertainty, implicit in limitation. There is neither

[39] High Court Rules 2016, r 3.1.

precision or certainty if the limitation date is contingent on future occurrences. This is however the ineluctable consequence of the Court of Appeal judgment.

8.13 If s 64 is interpreted with the need for certainty of the limitation date uppermost in mind, complex questions of interpretation fall away and simply by reference to the limitation-specific definition of the term “offender” in s 5(1)(a), PVCA, where there has been both conviction and sentence.

8.14 The suspension period in s 64 commences (subject to cumulative sentences as provided for by subsection (2)(a)) on the date of the imposition of a prison sentence for the victim-related offence and continues from that date until the offender’s release. It will recommence if the offender is recalled, but only if a final recall order is made. It will end at the statutory release date under by s 86 of the Parole Act.

8.15 In other words, s 64 does exactly what its text says it does, without extrinsic adornment or complication.

9. “PRISONER”

9.1 Under s 4, PVCA, “prisoner” is a defined term and remand prisoners are undoubtedly included. The Legislature must be taken to have known this.[40] Likewise, “prisoner in respect of the offence” would have captured all the time an offender spent in a prison in respect of the offence giving rise to the claim, on remand and sentenced. This is in essence, what the Court of Appeal held is the true construction of s 64.

9.2 It also would have meant the suspensory period would actually commence on the first day of the remand in custody, in marked contrast with the actual effect of the Parole Act.

9.3 If use of the term “prisoner” would have captured remand prisoners and put the question of the application of PSD beyond doubt the fact that the

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[40] Candidly, this does represent a change in position by appellant’s counsel since the hearing in the Court of Appeal. See 101.0038, at [18].

legislature chose not to employ it should be imbued with meaning: *expressio unius est exclusio alterius*. This lends weight to the argument that importing PSD conflicts with the text and scheme of the PVCA itself.

10. DOCTRINE OF LEGALITY

10.1 The Court of Appeal approached the question of construction of the PVCA as if it were a simple matter of statutory interpretation under s 10, Legislation Act 2019. The Court did not refer to the argument that the interference with the appellant's rights engaged the doctrine of legality.[41]

10.2 The settlement of his claims against Corrections by deed crystallised a chose in action, a recognised and protected property interest. This Court confirmed the doctrine of legality would apply to protect such interests,[42] by the presumption that infringement of property rights requires clear statutory language.

10.3 The PVCA interferes with the ability to freely enjoy the chose in a variety of ways, including by deferring its enjoyment, pending the PVCA claims process. The deferment can last for months or years. Interest under the Interest on Money Claims Act 2016 ceases to accrue once the money is paid to the Secretary. The PVCA further restricts the chose by extending the limitation period for claims against it.

10.4 The doctrine applies to limit the degree of the infringement; as with the presumption against retrospectivity,[43] even if there is an infringement, the proper interpretation is that which least infringes.

10.5 The PVCA is undoubtedly an infringing statute, but the incursions set out in 10.3 are clear on the text of the statute. The *ex parte Simms* requirement for Parliament to stare the rights infringement in the face when legislating was met. The same cannot be said of the additional

[41] *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, [1999] 3 WLR 328, [1999] 3 All ER 400, HL(E).
[42] *Fitzgerald v R* [2021] NZSC 131 [2021] 1 NZLR 551, at [209].
[43] *R v Pora* [2001] 2 NZLR 37 (CA), at [89].

restriction imposed by the inclusion of PSD by reason of interpretive context.

10.6 The Court of Appeal did not consider or apply the doctrine of legality. The absence of *any* reference in the PVCA to "pre-sentence detention" or ss 90 or 91 meant the requirement for clear language could not be met. The presumption against interference was not displaced and the Court of Appeal was therefore wrong to hold legislative context imported PSD into s 64.

11. COSTS

11.1 The appellant has been legally aided since the first appeal to the High Court. However, no invoices have been rendered for the High Court, Court of Appeal or leave proceedings.

11.2 His compensation award was modest and would be caught by the legal aid clawback applying to proceeds of proceedings.[44] Had a legal aid claim been made, then absent an after-the-fact write off of the claim under s 43, Legal Services Act 2011, his compensation would have been extinguished by the legal aid bills.

11.3 The grounds for write-off are limited[45] and cannot be determined in advance of submitting a claim for costs.

11.4 Given the public interest element to the case, counsel instructed has been willing so far to absorb the costs on a *pro bono* basis; this is an important case with significant consequences either way.

11.5 While the Secretary for Justice is now represented in the appeal, it is not clear whether the Secretary is a party or merely a contradictor. Counsel recognises that it would be unusual and difficult to reconcile with principle to order costs against a contradictor.

11.6 However, that should be measured against the Secretary's obligations

[44] There was little prospect of the courts making an adverse costs award against the respondent.
[45] Serious hardship or just and equitable.

under the PVCA. The Secretary is not obliged to give notice of the ability to claim by victims if the Secretary believes any such claim could be defeated by a limitation defence.[46] The Ministry of Justice's response to counsel's OIA request,[47] contained in the case on appeal, confirms the Secretary has never undertaken such an inquiry since the Act's inception. This is apt to engender false hope for those whose claims are patently statute-barred and the Secretary was supposed to takes steps to prevent that.

11.7 Counsel did in fact endeavour to make the Secretary for Justice a party to the appeal in the High Court for this reason.

11.8 If the appeal is successful this may be a factor the Court considers relevant in determining whether a costs award should be made.

11.9 In the event the Court does not consider it material and in the event of success, counsel for the appellant seeks the Court's indulgence by including a statement in the judgment that in all the circumstances the Legal Services Commissioner should write off the appellant's reasonable costs for this appeal.[48]

Dated this 30th day of June 2023.

I certify this document has been reviewed and information at the appellant seeks to remain confidential has removed and is in publishable form.

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D A EWEN
Counsel for the Appellant

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[46] PVCA, s 24(5).
[47] 201.0027.
[48] As no claims have been made on the High Court or Court of Appeal grant and the Legal Services Commissioner will not pay out on claims for costs incurred more than six months ago in all but truly exceptional circumstances (see Legal Services Regulations 2011, reg 19), no declaration is sought in respect of those unbilled costs. The time spent trying to justify a payment would be just another opportunity cost with little prospect of success.

<u>Cases referred to in Submissions.</u>

1) *Barrie v R* [2013] 1 NZLR 55 (CA).
2) *Booth v R* [2017] 1 NZLR 223 (SC).
3) *Fitzgerald v R* [2021] NZSC 131 [2021] 1 NZLR 551.
4) *Prince v Chief Executive of the Department of Corrections* [2020] 2 NZLR 260 (HC).
5) *R v Pora* [2001] 2 NZLR 37 (CA).
6) *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, [1999] 3 WLR 328, [1999] 3 All ER 400, HL(E).
7) *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791, (2015) 10 HRNZ 523.
8) *Taylor v Superintendent of Auckland Prison* [2003] 3 NZLR 752 (CA).