IN THE SUPREME COURT OF NEW ZEALAND SC CRI 20/2004

IN THE MATTER of an Application for Leave to Appeal

BETWEEN **THOMAS MAXWELL CLARK**

Appellant

AND **THE QUEEN**

Respondent

Hearing 6 April 2005

Coram Elias CJ
Gault J
Keith J
Blanchard J
Tipping J

Counsel C B Cato for Appellant
N Crutchley for Crown

APPLICATION FOR LEAVE TO APPEAL

10.03 am

Cato May it please the Court, Cato, I appear for the applicant, Thomas Maxwell Clark.

Elias CJ Yes thank you Mr Cato.

Crutchley May it please the Court, I appear for the Crown.

Elias CJ Thank you Ms Crutchley. Yes Mr Cato.

Cato May it please the Court. Has the Court received my supplementary argument?

Elias CJ Yes.

Cato Which was in fact what I proposed to address to the Court today but I thought, having typed it out, it was as well to save the Court time really that I send it down and a copy has been sent to my friend also.

The point today on jurisdiction in my submission is a very important point. It is an important point because it is important that this Court have the right to hear and properly resolve, when it considers it appropriate to do so, matters relating to pre-trial issues. In the modern times since 1967 or thereabouts, the trend has been for Courts to resolve as much as possible disputed issues pre-trial because there is a good deal of public interest which I've addressed in my submission in doing that. When the Parliament decided to constitute this Court, then it was important in my submission that it embodied the right of this Court to give final decisions on matters that arose before trial that were seriously determinative of matters affecting that trial. And s.379A was amended to incorporate the right of appeal of either party to this Court. Section 379 is the subject of some uncertainty because of the use of the disjunctive "or" when perhaps the use could be made of the word "and". Or if it were intended to seriously restrict the jurisdiction of this Court to hear pre-trial appeals that had been commenced by one or either of the two parties, because this is not a procedure reserved exclusively for the defence, if one or either of the two parties had constituted or applied for leave to the Court of Appeal first, thereby effectively eliminating the Supreme Court, it is my submission that that was not the intention of Parliament. If there be uncertainty on the issue, and I accept that there may be some uncertainty when one compares this section to what Parliament has done in relation to other provisions of the legislation, more particularly s.383A and other sections which the Court might like to note but they're not in my memorandum but there is a provision relating to I think contempt of Court and.

Keith J Doesn't the contempt of Court argument, provision Mr Cato show the standard drafting that was used when?

Cato Yes it is.

Keith J When there was to be a second appeal?

Cato Yes, yes, yes.

Keith J Because isn't the pattern of the amendments that were made not just to the Crimes Act but to other Acts as well, there's a pattern in which either there's a formula that says the Court of Appeal or the Supreme Court or second there's in addition, or sometimes not in addition but instead, a provision that says you go to the Court of Appeal and then with leave you can go to the Supreme Court?

Cato Yes there is.

Keith J And isn't the legislative purpose stated very plainly and distinctively in those provisions?

Cato Well it is. And that's 379A and there's I think the Animal Products Act 1999 legislation, appeals to the Court of Appeal, the Supreme Court where the Court is dealing with 406 applications. I'm not certain of the exact sections which were applied but.

Elias CJ 406 Crimes Act?

Cato Giving a 406 application. I'm sorry, the particular sections.

Keith J Well there too in 406 you get a double formula don't you?

Cato Yes. I'm sorry, I just seem to.

Keith J 406A says that.

Cato 406A.

Keith J Says that if the matter has been referred by the Governor General to the High Court, then under subs (1) there can be an appeal to the Court of Appeal or the Supreme Court.

Cato Yes.

Keith J But subs (4) says that's subject to the higher hurdle.

Cato Yes.

Keith J In the case of the Supreme Court. And then secondly and expressly subs (2) says that if you've lost out in the Court of Appeal, you can with leave go to the Supreme Court.

Cato Yes.

Keith J So you get the double formula.

Cato Yes, that's the point I'm making.

Keith J Yes. When it's against you isn't it?

Cato Yes it is against me. There is uncertainty.

Blanchard J They've very carefully, it seems to me, indicated where there's to be a second appeal allowed.

Cato Mm.

Blanchard J And conspicuously s.379A which they did amend, doesn't have that provision in it.

Cato Mm. Well it would be my submission that there is still uncertainty because you can get this situation arising, which doesn't seem to have been the intention of Parliament.

Blanchard J How can you say that?

Cato Well I would submit it wasn't.

Blanchard J It may have been a very deliberate intention. There'd be a sound policy reason behind it, namely that if any injustice was going to be done because, heaven forbid, the Court of Appeal got it wrong, it could be cured after trial if the person got convicted and if the point was still of any significance. But in the meantime, after one appeal, which hopefully would clarify the position, the trial could go ahead so that you didn't have the prosecution and the complainant kept waiting for what could be a considerable extra period whilst a matter proceeded to a leave application in this Court and then, if it got a leave application, got a hearing and perhaps a reserved judgment which, if it was a difficult question, might take quite a while.

Cato Well those are certainly factors. But on the other hand there are other factors as well. If one looks at the construction of s.379A you can get this situation arising it would seem that if the accused for example brings an application and is successful, the Crown can then appeal that, it would seem on the legislation, to the Supreme Court.

Keith J Aren't members of the Court saying the contrary Mr Cato, that there's no second possibility whichever the party is.

Cato Well I would not with respect.

Blanchard J Where does the Crown get its ability to appeal?

Cato It can get its ability from the provisions of the section at any time before the trial, or the case may require a later re-trial, either the prosecutor or the accused person, with the leave of the Court, may appeal to the Court of Appeal or the Supreme Court. Now it may be that the accused is the person who initiates the appeal but if dissatisfied with the result, the Crown can then initiate a further appeal.

Blanchard J But it wouldn't be against the orders which are listed in A, AA, B etc. It would be against the Court of Appeal's decision.

Cato Yes. But they may well either affirm the orders made or in some way vary those orders.

Tipping J Mr Cato I wonder whether the context of 379A(1) helps us. The context is a ruling by the trial Court isn't it?

Cato Yes.

Tipping J And in view of what the other members of the Court have said, which I am inclined to concur with, isn't it quite clear that the words "may appeal" in the middle of 379A(1) mean, may appeal from the trial Court to the Court of Appeal or the Supreme Court? And thus it becomes plain beyond peradventure that it is a leapfrog appeal to the Supreme Court that is being referred to.

Cato Well certainly with great respect I never read it that way.

Tipping J Well isn't that the only logical way to read it? Because you are talking about an order made in the trial Court and you may appeal from it to the Court of Appeal or the Supreme Court. And that reading, which is the natural reading, is supported by the pattern which my brother Keith has been referring to and the points which Justice Blanchard has been. What is the key point against that in your submission?

Cato Well the key point is one I've set out in my submission.

Tipping J Well no, no, never mind what you've set out in your submission.

Cato Alright, mm.

Tipping J Are you able to articulate it so that my slow brain can grasp it in a sentence or two?

Cato No, I simply read it differently.

Tipping J Oh.

Cato And it would be my submission.

Tipping J But how can you appeal from the trial Court directly to the Supreme Court other than by leapfrog?

Cato Well it's my submission that that provision gives the right of either party to do it.

Blanchard J Are you suggesting that that enables both a leapfrog and, if you've gone the other way and gone to the Court of Appeal, a second appeal?

Cato Yes.

Blanchard J Well why wouldn't it say so?

Cato Well.

Blanchard J It's a very obscure way of doing it and in all the other provisions they've avoided the obscurity.

Cato Well they have and I accept.

Blanchard J By expressly giving the right of appeal from the Court of Appeal.

Cato Yes, I accept that. But I don't know.

Blanchard J The drafting is not in parts of Part 13 particularly satisfactory I'd accept, looking, for the purposes of preparing for this appeal, at the provisions about a case stated, they're a dog's breakfast.

Cato Mm.

Blanchard J And the Crown in particular looks to be somewhat disadvantaged by them. But fortunately that's a very rare event. But this seems to me to be reasonably clear.

Cato Well equally speaking, if the Crown, if Parliament had only intended the jurisdiction to be one of appeal to the Court of Appeal or leapfrog, it could have expressly set that out.

Keith J Well they might say they have. That when they wanted to indicate a second appeal, they do it.

Blanchard J The pattern with the Supreme Court Act for civil cases is that you can appeal from the Court of Appeal unless there's a bar somewhere.

Cato Mm.

Blanchard J So the bias is in favour of appeals.

Cato Mm, mm.

Blanchard J With criminal it's been done the other way round for some reason and you've got to find a provision in Part 13. And there's two other, I think the Summary Proceedings Act, is the Court Martials appeal there listed?

Keith J Yeah mm.

Blanchard J You have to find a provision enabling an appeal in them before you can appeal to the Supreme Court. I don't know why it's been done that way round but that's what they did.

Cato Well that's the problem.

Blanchard J Mm.

Cato And it would my submission that unless it was, the jurisdiction was taken away expressly or some stronger indication given that s.379A appeals ought not to be limited to simply first appeals to the Court of Appeal or leapfrogging.

Elias CJ But you say the jurisdiction should be taken away but we're looking at where the jurisdiction comes from.

Cato Yes.

Elias CJ So it's not a question of starting with jurisdiction and saying that s.79A takes it away. It just doesn't provide it on the analysis that's been put to you.

Cato Well it's my submission that it does in this sense, and I know the Court's at variance with what I'm saying and I perhaps can't say anything further. But certainly it would be my submission that if one party institutes an appeal, gets a result which the other party does not accept, there is room in that legislation in subs (1) for that other party to seek leave to appeal to the Supreme Court.

Gault J I don't follow that. I couldn't follow it in your written submissions and I can't follow it now. What is the wording upon which you rely?

Cato I say it's the words, either the prosecutor or the accused person with the leave of the Court of Appeal may appeal to the Court of Appeal or the Supreme Court.

Elias CJ It's "or". It's reading "or" as "and".

Cato Yes.

Elias CJ And also the policy.

Cato Yes.

Elias CJ Issue of providing better access to justice.

Cato Yes.

Elias CJ But against you you have the pattern of the legislation and an equal policy argument that the legislature may well have been deciding that only one appeal in pre-trial matters was appropriate.

Cato Mm. Well it is my submission if that was the case then it should have been set out a lot more clearly than that. Because the plain fact is that leapfrog appeals will be extremely rare. One can only ever conceive of them in situations occurring where both parties agree that the Court of

Appeal is not for some reason the forum to consider the matter at all. And unless there were splits as it were or differences of opinion on questions of law, one can rarely if ever see any counsel being bold enough to go to the Supreme Court.

Elias CJ Well it's highly unlikely that anyone would be held to an election. If the Supreme Court said this doesn't fall within the exceptional circumstances leapfrog provisions, surely the matter would be taken up in the Court of Appeal then.

Cato Well that also would lead to a certain amount of delay also.

Elias CJ Well it might but that's the emphasis of the legislation.

Cato Mm.

Elias CJ That leapfrog appeals are going to be exceptional.

Cato Yes I accept that. But again.

Elias CJ But you're not going to be left high and dry. I find it hard to believe that an appellant would be left high and dry simply because he or she didn't come within s.14.

Cato No, that may well be the case. The Court may redirect the matter or tell the, of course you've got your appeal times running and things like that but.

Gault J Well they're both leave matters both in the Court of Appeal and in the Supreme Court.

Cato Mm.

Gault J And if a leapfrog appeal is declined, could you conceive of the Court of Appeal not granting leave?

Cato No, you'd have to go back to the Court of Appeal.

Gault J Yes, but they would grant leave wouldn't they?

Cato Well yes I assume they would.

Tipping J What I can't understand Mr Cato, and I'm sorry to sort of press this point, but how can you appeal against the trial Court's order to the Supreme Court other than by a leapfrog?

Elias CJ You say it's serial appeals.

Cato Yes.

Tipping J But you're not then, you're appealing against the Court of Appeal's order.

Cato Yes.

Tipping J To the Supreme Court.

Cato Yes, yes.

Tipping J Not against the trial Court's orders?

Cato Well if there has been an appeal which has reversed an order of the trial Judge or has perhaps confirmed it or varied it, then I would submit that that further appeal applies.

Tipping J Well no, you see that's your problem. If an accused person appeals, because the order in the trial Court favours the Crown, and the Court of Appeal changes it and favours the accused, the Crown is not appealing against the trial Court's order, it's appealing against the Court of Appeal's order. So your point actually is against you.

Cato Well it doesn't say clearly which Court the orders relate to, against the following orders.

Blanchard J Well they're all orders of the trial Court.

Cato Yes but they're not spelt out. But they can be varied by the Court of Appeal.

Tipping J Well inevitably the order appealed against according to the structure of this is the order made by the trial Court.

Cato Yes.

Tipping J And if it's changed in the Court of Appeal and someone doesn't like it then it's the Court of Appeal's order.

Cato Yes.

Tipping J You'd want to appeal to the Supreme Court?

Cato Yes.

Tipping J So it just doesn't work on your thesis.

Cato Well that, I appreciate that those are the originating orders but they may be varied or altered. And it's the appeal from that varied or altered order or ruling.

Elias CJ And indeed I think there are appeal provisions which say you may appeal to the High Court and then with leave of the court, and then to the Court of Appeal. So on your interpretation of "or" to mean "and" that is a tenable interpretation. It's just that the structure of the Act is so against you Mr Cato.

Cato Well Your Honour the structure of the Act, it may have been set out more clearly in relation to some of your post-conviction matters. But what I'm submitting is, because it was set out in that way, does that mean the Court does not have or will not accept that it's also got jurisdiction under 379A.

Blanchard J You're really arguing, aren't you, that the provisions of say s.383A were unnecessary?

Cato Yes, surpluses. And I think I make that point.

Tipping J But they can't be. They're put in there deliberately because of the fact that you need a right of appeal from the Court of Appeal, from the Court of Appeal's orders if that's what's intended.

Cato Even if that wasn't there, it would be my submission that post-appeal, a provision which permitted appeals to the Court of Appeal or the Supreme Court, this Court having come into existence for the first time, was wide enough to sensibly mean that it incorporated not only as it were an appeal from the first instance trial Court but also an ongoing appeal should either party leapfrog the Court of Appeal.

Elias CJ Mr Cato you mentioned I think the Animal Products Act.

Cato Yes.

Elias CJ Is that something that you're going to develop.

Cato I was saying that there were similar provisions as 383A in other items of legislation.

Blanchard J Yes like the Summary Proceedings Act.

Cato Yes. But it is my submission that.

Keith J That Animal Products provision is plainly though, isn't it, just a leapfrog provision?

Cato Yes. I think that's intended. And they spell out there, unlike in 379A.

Keith J Mm.

Cato The problems with leapfrogs.

Keith J Yep, yep.

Cato Well they don't point that out in 379A.

Keith J No that's true.

Cato And of course that might be a scintilla of light in my favour.

Keith J Yes, yes.

Cato But this is in my submission a very important point today because we are being given directives, rightly so, by trial judges to have all manner of matters resolved before hearing. And it's all very well saying, well you've got your rights at the end of the day under s.383. But if they're successfully exercised, then of course we've had consequences flowing already if a person has been convicted. It is in my submission far better that significant issues, and they can only be significant issues, counsel wouldn't be so silly as to suggest otherwise, that could reach this Court and should be determined by this Court pre-trial. It is the leave provisions which ensure that. Now there have been cases, there have been cases. One comes to mind and it is a case called **Hovell** (**R v Hovell** [1986] 1 NZLR 500) which was decided.

Elias CJ But that's in the inherent jurisdiction of the Privy Council, it's not, wasn't a statutory appeal.

Cato No, **Hovell** was a case in which I was the losing Counsel in 1986. **Hovell** was a case where the Crown appealed a pre-trial ruling of the Judge against the admission of a woman's statement, she having died before the committal of natural causes. It was a rape case.

Elias CJ No, what I mean is, the appeal to the Privy Council wasn't pursuant to a statutory right of appeal.

Cato No.

Elias CJ It was under the prerogative.

Cato Yes that's right.

Elias CJ Yes.

Cato But the issue there was that the Crown appeal, the Crown was successful 2 to 1. Had the Crown lost, the effect would have been as the law stood at that time, that Mrs Hovell's case, the case against **Hovell** I'm sorry, would have been discharged. Now if the interpretation placed upon s.379A is the one contended for here, the Crown would have a further right to appeal that matter to this Court.

Blanchard J Doesn't the Crown face a similar difficulty if an accused person is convicted and then appeals successfully to the Court of Appeal?

Cato Yes. Yes. But it is my submission that's a slightly different situation because.

Blanchard J Could be exactly the same point.

Cato It could be the same point but it is my submission that it's different where you are dealing, sorry, was it when a person was convicted or acquitted?

Blanchard J Convicted and then wins the appeal and the Crown doesn't have any further right of appeal.

Tipping J If you get off in the Court of Appeal, the Crown can't go further.

Blanchard J The Crown's only ability to go further is on sentence.

Cato Well that might be Parliament saying the Court of Appeal there is an end of it.

Keith J And it's the bias, if that's the right word, in favour of the accused that's quite often found in criminal law.

Cato Yes, having been through the trial.

Keith J Mm.

Cato I mean in some jurisdictions, for example where there's an acquittal, that's the end of the matter but that's not the case in every jurisdiction.

Keith J No, sure.

Cato They can at least for example seek advisory appeals in some jurisdictions.

Keith J Yes well that's something that's been recommended here but unfortunately not taken up.

Elias CJ Well the Crown can seek to have the point reserved.

Keith J Yes.

Tipping J Then it'll be into the thickets.

Blanchard J Then everybody runs into the problems of the drafting of 381 or whatever it is.

Cato My submission would be it's a very different situation before trial. It's in everybody's interests. It's in the public interest the law is set out properly.

Gault J I think that's where the policy issues may be just about in balance. Before 379A was introduced there were no pre-trial appeals. It was a very carefully constructed expansion to allow pre-trial appeals because of the consequent delay to trials. Now there's another interest. There's an interest of complainants, child complainants and the like being asked to wait an extra year before trial. There's a lot of policy against pre-trial appeals. They're not permitted in all jurisdictions. So that to hammer away at the importance of getting something clarified by two appeals has to be offset by those other factors.

Cato I accept that. And there are also in my submission very significant – it's a balancing factor. And there's room in the Court on the discretion or the leave basis of it to consider those matters, rather than say we simply do not have the jurisdiction. Those matters can be controlled either because the matter is not a matter of sufficient general importance or the risk of miscarriage is slight. Or, for example, it can be regarded in some cases as an interlocutory matter under the Act where there is a statement to the effect, I think it's 13(4), that the matter should not be resolved before the trial. But there are some matters in my submission that are of such profound importance that they should be able to be considered within, or by, this Court.

Blanchard J I'm inclined Mr Cato to be sympathetic to that policy argument and I think I would agreed with you that the number of matters which would get leave for a second appeal if there were jurisdiction would be quite small. Many pre-trial appeals to the Court of Appeal involve matters which are peculiar to the case in question and have no wider ramifications or are simply a dispute about the application of fairly settled principles to particular facts. But with all the sympathy that I might have for the point that you're arguing, I think you're up against an insuperable difficulty in the way in which this has been drafted. It looks to me very deliberate. And therefore, I know this may sound cynical, I don't mean it to, you may be arguing on the wrong side of Molesworth Street.

Cato Well you see that's a fundamental point. But with great respect to this Court, should it take a narrow view of it's jurisdiction at this stage? Is it not better that the Court say, look this hasn't been clearly set out, there are policy factors, though they may be evenly balanced, which encourage a liberal, a reasonably liberal interpretation and I'm not suggesting for a moment an interpretation which is absurd. But shouldn't the Court say, we think in the absence of this being spelt out clearly in this section, in this section, not divined from other aspects of the Act, that we do have jurisdiction. We consider we can control the floodgates, we can certainly control the way in which this jurisdiction is viewed. If Parliament does not like that then Parliament can do

something about it. But it is my submission from the outset when setting the meats(?) and bounds of its jurisdiction, whilst the Court with great respect has to be careful obviously, it ought not, as it were, be unnecessarily timid.

Elias CJ Well that Mr Cato, that's a very good note I think for you to end on. (Laughter). I think you've said everything that you want to develop.

Cato I did. Those were my submissions in the document there.

Elias CJ Thank you Mr Cato.

Cato That is, in my submission, an important approach.

Tipping J Don't be timid, I will write down in my notes.

10.39 am

Elias CJ Thank you. Yes Ms Crutchley.

Crutchley Perhaps I could start with policy issues given the other matters seem to have been aired that I also discussed in my submissions. And I would start with s.3 of the Supreme Court Act. And is there not a difficulty here given the increased access to justice, the reason for setting up the Supreme Court. With that comes of course the broader type of appeals that might be available to the citizens of New Zealand. Now that purpose must be very important in my view in looking at what is the extent of this Court's jurisdiction. That being the condition from whether you have jurisdiction, which in my submission is a matter for the legislature. So I think the first point is the policy point.

I think there is a problem in the drafting of s.13 in particular for this Court. And that is that the substantive way in which you determine appeals has been caught up with the gate-keeping processes that in other jurisdictions are provided for by procedural matters. For instance to get to the House of Lord pre-trial, it generally is the Court of Appeal that determines the case stated point. So you have legal minds looking at the issue of importance. Whereas here, or for instance in Canada, you can't go to the Supreme Court on pre-trial appeals prior to trial other than their kind of s.380 situation which is analogous. In Hong Kong you can only go further if it's a final decision. In the High Court of Australia you can go on interlocutories because they specifically in their legislation looked at incorporating what appeals you could take to the Privy Council as being available to the High Court. So this piece of legislation doesn't use any of those mechanisms, as I would call them gate-keeping, it means that the gate-keeping processes are included in s.13. And in respect of criminal appeals, if Justice Blanchard is right and the Crown has no way of bringing legal matters to this Court, then you're relying upon individual accused, ordinary citizens in a terrible process of being charged with something perhaps serious, to be

thinking about the important legal issues that this Court may need to be looking at in the criminal process. So I have to ask myself the question, well did Parliament intend that when you look at the purpose of what this Court is about. Do you then look at the interlocutory appeal provided in s.379A and consider what sort of significant cases have got to determined in the Court of Appeal which have an impact on a variety of cases. And I can think immediately of **Shahid**. That was an interlocutory appeal. Seven Judges determined it.

Keith J Well that could come by leapfrog.

Crutchley Yes.

Keith J And it could also come after conviction.

Crutchley Yes I suppose those are possibilities. The point I'm making however is that it was an interlocutory appeal and it happened prior to trial. That is the seven Court determined the issue. That is of course a case that when I looked at all the pre-trial appeals in the last four years that have gone to the Court of Appeal, that's the issue that is now the most significant thing dealt with by the Court of Appeal. So you can say an issue like that, it must be necessary for this Court to be looking at that. Now, how do you get there?

Keith J Well there are the two ways I've just mentioned at least.

Crutchley Yes but after trial Sir you may have, the point may have disappeared. And in this case, in **Clark**, there's been no calling of evidence. It's all been done on the depositions. So then don't you look at the problems that might occur where the point disappears? And yet it may actually be a really important point for this Court to be looking at in terms of criminal process.

Keith J But that's why you should have an Attorney-General reference procedure.

Crutchley Well yes. So my first point is of course the policy issue as to what this Court is here for. I am concerned that one would interpret s.379A to remove the Crown's right to apply for leave on important issues pre-trial. That's been a significant factor in s.379A because the Crown is more likely to think of or to see the significant issues that must be determined by the superior Courts. And when we look at the Crown, who's the Crown? The Crown is the State, the Crown is the people. It's not individuals who might represent the Crown obviously. So isn't that an important thing, this important ability for the Crown to bring to this Court, pursuant to s.379A, significant matters?

Elias CJ Well but then the leapfrog appeal can be invoked.

Crutchley Yes well I understand that's the Court's position.

Tipping J Well it can't always be invoked in fairness. If it was the accused that was appealing and unexpectedly the Court of Appeal came up with a ruling adverse to the Crown, it's your being able to go on from that that I understood you to be primarily concerned with.

Crutchley Yes, yes I am. I think it's a significant aspect of what has been, as far as the Court of Appeal is concerned, we've had this provision since 1967, that is we could take matters pre-trial.

Keith J Well exactly that same problem arises when, after conviction, the accused succeeds in an appeal and then perhaps gets a **Shahid** type ruling. And you can't.

Crutchley And the Crown can do nothing about that.

Keith J And you can't appeal that.

Crutchley So it's all very well to say, well you can do that after conviction. First of all the point might disappear. But secondly the Crown has no right to.

Keith J But that's the bias, as I said before, I'm not sure if that's the right word, but it's one of the basic features of the criminal law isn't it that the accused or the convicted person or the acquitted person has some advantages at various points in the process?

Crutchley Well yes but not necessarily always.

Keith J No, no sure.

Crutchley I mean I can think of the House of Lords case of **R v A** 2001 where the House of Lords was looking at an interlocutory matter and they were looking at the balancing of rights between a complainant and an accused. And of course the provisions in the European Convention on Human Rights which are Part of the Schedule of the Human Rights Act in the UK.

Tipping J Ms Crutchley I understand the force of your point and I'm not unsympathetic to it. But if for whatever reason the Crown can't appeal further from the Court of Appeal following an allowing of an accused's appeal, surely the parallel conclusion is that the Crown shouldn't be able to appeal post-pre-trial allowing by the Court of Appeal of an accused. I can see no policy difference because the same sort of issues are apt to come up in both instances. It's fortuitous whether it arises pre-trial or post-trial.

Crutchley Well I think that the reasons that Justice Gault talked about, the s.379A being there to resolve issues prior to the trial occurring.

Tipping J Oh yes.

Crutchley Would be a reason.

Tipping J But you're equally apt to get an important point of law arising after trial as before trial.

Crutchley But the Crown's only right is to do it before trial if it's a point of law.

Tipping J No but I'm talking about a further appeal from the Court of Appeal to the Supreme Court.

Crutchley Yes, yes, yes.

Tipping J Now if you can't do it after conviction.

Crutchley We've never been able to do it after conviction.

Tipping J No, I know, but why should you be able to do it before conviction?

Crutchley Isn't the opposite argument that we've been able to do it prior to trial through the provisions of s.379A. Never been able to do it after conviction or acquittal in New Zealand. And it's the preservation of that right for the Crown, in my view it must have been, there should have been an express provision in the legislature to have removed that important.

Tipping J It's never been a viable prospect for the Crown to appeal to the Privy Council pre-trial has it? You certainly can't do that post.

Crutchley Well the only one I could think of was **Grayson and Taylor** (**R v Grayson and Taylor** [1997] 1 NZLR 399) and it wasn't the Crown who actually appealed that.

Tipping J Yes.

Crutchley But we're talking here about the right rather than.

Keith J That was an appeal by Grayson and Taylor.

Crutchley It was but it was pre-trial and it was determined prior to the trial occurring.

Keith J Sure, mm.

Crutchley Now I looked to see whether the Crown had ever done that and we hadn't as far as I could find out. But we're not talking about whether the Crown did it or not. We're talking about the ability for the Crown to do it.

Elias CJ But in any event it wasn't a statutory right of appeal.

Crutchley No, no.

Tipping J But Ms Crutchley, say on a conviction appeal by the accused, you get from the Crown's point of view a terrible Decision from the Court of Appeal, you've got to live with that.

Crutchley Yes we do.

Tipping J Now I can see no policy reason why you having to live with that, you should have a second appeal from the Court of Appeal in pre-trial matters.

Crutchley I would have thought Your Honour if the legislature intended that, they would have said so.

Tipping J Well the difficulty is that I think they have said so. Because in that it applies to both sides. You decide which avenue to follow. If you want to try and leapfrog you go that way; if you go to the Court of Appeal that's it.

Keith J And if you've got a terrible ruling against you, it's on the books isn't it, and the next time the issue arises you can.

Crutchley Well I mean that's how the Crown does deal with it, by looking at it and finding another case to ask the Court to revisit the matter.

Keith J Yes.

Crutchley So that's how the Crown actually deals with the significant legal issues.

Keith J And if it's really significant, a leapfrog's available.

Tipping J Yeah, next time you could apply to leapfrog and say this is a terrible Decision. Let's get it sorted. There must have been a reason why they constructed this part of the Act in this, I have to say, somewhat indirect way. But it seems that when you look at it closely there is a pretty clear pattern emerging. But if there is an intention of going further from the Court of Appeal, it's expressly given.

Crutchley But isn't there a whole background to the purpose of the Supreme Court and what sort of appeals this Court will have? And that is that it's always intended that the Court of Appeal is the first appellate Court to deal with the matter, putting aside the leapfrogging section, for the purposes of distillation of the legal issues. This Court's not going to be concerned with factual matters very often. Maybe from the criminal arena. But occasionally, if there's an appeal from the s.406A determination in the Court of Appeal. But isn't it, whenever you look

at it, and I looked at it, there were 48 pieces of legislation that have Court of Appeal or Supreme Court the words added. Some of them are very clear, you've discussed one or two of them. But some of them do have the Court of Appeal or Supreme Court. And one takes from the section that on those matters you would be coming to the Court of Appeal first. That is the assumption.

Keith J Which ones do you say that of?

Crutchley Interestingly the Animal Products appeal, s.155. It's called the Animal Products Act 1999 and it's dealing with offences and penalties. And there's section 155 is an appeal of a compliance order to the Court of Appeal or Supreme Court.

Blanchard J Which part of the Animal Products Act is that in?

Crutchley Part 10. The appellate section. So 10 is dealing with offences, penalties and proceedings and then there's this appeal to the Court of Appeal or Supreme Court.

Keith J These are matters that started in the District Court.

Crutchley No the compliance orders I think start, yes they do.

Keith J So they would come within the regime of 144A wouldn't they?

Crutchley I would imagine so Your Honour. Although looking at s.155(3) it talks about, it refers to s.14 of the Supreme Court Act.

Keith J Yes.

Crutchley So it's confirming leapfrog.

Keith J Sure, sure.

Crutchley But I would say also that that section makes it clear that you can appeal to the High Court on matters relating to compliance orders made in the District Court and then you can go further to either of the two superior Courts. But I would suggest that that reinforces the expectation of the Court of Appeal first.

Keith J Well except as you say I think it expressly acknowledges the leapfrog possibility, that provision.

Crutchley But isn't that drawing people's attention to the fact that if you want to bypass the Court of Appeal.

Keith J Mm, mm.

Crutchley You have the criteria in s.14 but this section in my view isn't saying that you only leapfrog as one might apply to s.379A as the Court is doing.

Keith J I mean we need to know whether 144A wouldn't just directly apply in this case. Because, without having the legislation in front of me, I would have thought it would be the expectation.

Crutchley I mean I just did a quick look to see whether this phrase, the Court of Appeal or Supreme Court, came up given the question. So my view would be quite a number of these sections, by referring to s.14, they are reminding people about the leapfrogging but reinforcing the expectation that it is the Court of Appeal that one goes to first.

Keith J Well is that really right? I mean if you take s.384 of the contempt provision which Mr Cato mentioned. That contemplates direct appeals. And then defers to s.14. But it also expressly provides for appeals from the Court of Appeal to the Supreme Court.

Crutchley Yes, yes.

Keith J So that spells it out doesn't it?

Crutchley No, it does. I agree.

Keith J And then 385 has been amended to deal with both possibilities with direct appeals and second appeals. Those new subsections that were added to it.

Crutchley Yes, you're correct.

Keith J And the Court Martial Appeal provision which my brother Blanchard mentioned.

Crutchley Well that's very clear.

Keith J Provides for both possibilities. And 406A provides for both possibilities. 144A provides for both possibilities.

Crutchley Section 386 though does it too as well. It talks about the powers of appellate Courts in special cases and it's looking at the provision of an appeal under s.383 and it uses the words "Court of Appeal or the Supreme Court".

Blanchard J But that's just a powers provision. It's not a jurisdiction provision.

Keith J No.

Crutchley Well I would suggest you can't apply that kind of mutually exclusive definition of "or" or you get into difficulties. In any event I mean I just

looked at those. I think some of them are very clear and the abiding thing one takes away from looking at that legislative change is there is nothing that says, apart from the leapfrogging provision, there is nothing that says you don't go to the Court of Appeal first. I mean isn't that the intention of this Court that the Court of Appeal has distilled the issues as might happen in other jurisdictions through gate-keeping processes that this Court's got to deal with under s.13.

Tipping J Ms Crutchley, I wonder if you could help on this point. That if you're right, what is the purpose of s.383A as a whole and s.384(5)?

Crutchley Well I would say that, I asked the question of myself, does the structure of 383 and 383A provide any clues as to how you should interpret s.379A. And I think the answer is this. The reason for the difference is that there is a difference in appeal right. Under s.383, and if you just looked at s.383.

Tipping J Could you take this fairly slowly, because I think this is really getting, for me anyway, close to the heart of the matter.

Crutchley If you look solely at s.383, forget that there's another section, 383A.

Tipping J Yes.

Crutchley Then you have the same phrase, "may appeal to the", sorry you have the same phrase in relation to sentence appeals, subsection (2) for the Solicitor-General.

Tipping J Well you have the same phrase in subss (1) and (2).

Crutchley Yes, yes.

Tipping J But the funny thing is, in the sentence section they don't say, with the leave of the Supreme Court. It just says to the Court of Appeal or the Supreme Court.

Crutchley Well with the leave of the Court appealed to.

Tipping J Oh right, sorry, thank you, yeah.

Crutchley Now that I think is the issue. I would say the reason for the different, the reason for the need for section 383A is that after conviction there are different rights. For an accused person it is an appeal as of right. You don't have to seek leave. You may appeal to the Court of Appeal your conviction unless of course you're out of time or whatever. But the Solicitor-General however for the Crown in relation to sentence you have to seek leave. And so I would say s.383A clarifies because there is a different appeal right.

Keith J But that's clear from 383 on your reading isn't it already? 383 says that any person without leave may appeal to either Court, sorry, without leave may appeal to the Court of Appeal or with the leave to the Supreme Court and then subs (2) says the Solicitor-General's got to get leave on sentence appeals in both cases.

Crutchley Well not necessarily Your Honour. I mean I think.

Keith J It does say that though, I mean that's what the wording is.

Crutchley Yes but if you're going to be looking at how do you use the word "or".

Keith J I wasn't, I was looking at your point that you need the two sections.

Crutchley Well that is my point, that you do because in my view you clarify the appeal rights in s.383A. It's saying how you get there, which I've described generally.

Tipping J What, in 383, needs to be clarified by 383A?

Crutchley Depending how you use the word "or" isn't it?

Keith J Well the word "or" is used in the same way as it's used in 379A isn't it?

Crutchley That's right.

Keith J And so how does, my brother's question, how does 383A help.

Crutchley I think it clarifies the position. There's a different appeal right and 383A is saying, is reminding the accused person, I mean in the Court of Appeal you have an appeal as of right, in the Supreme Court you don't, you have to apply for leave. So 383A is a procedural section.

Keith J But 383 already says that.

Crutchley I don't know whether it does Your Honour in terms of how you would determine the word "or".

Keith J Well it says the convicted person may appeal to the Court of Appeal, no leave necessary, or with the leave of the Supreme Court to the Supreme Court.

Crutchley Then can't you go back then, okay forget about s.383A, go back in s.383 then to the policy issue of, first of all you go to the Court of Appeal. Isn't that what that section is saying? Isn't it reinforcing that policy argument?

Keith J Well that, yes, except that leaves open the leapfrog possibility doesn't it?

Crutchley It certainly does. And s.14 makes it really clear.

Keith J Mm, mm.

Crutchley That you can leapfrog.

Keith J Mm.

Crutchley So that was my argument, that in s.379A, a section like section 383A is not necessary because it is a leave, you have to apply for leave in any circumstances pre-trial. So whether it's the accused or the Crown. So therefore no clarifying section is needed.

Tipping J And is the same point the explanation for the need for subs (5) of s.384?

Crutchley Yes I would say so Your Honour.

Tipping J Yeah it has to be really doesn't it?

Crutchley Yes it clarifies it. Like the Courts Martial s.10, that appeal is clarified in a similar way. Yes.

Tipping J You're saying it's clarifying rather than Parliament thought it needed, because of the way in which it wanted 397A and 383 to be read, needed to give an express right of appeal from the Court of Appeal to the Supreme Court. I would have thought the second was more likely than the fact that something earlier needed clarifying. That's my problem Ms Crutchley.

Crutchley Yes I realise that.

Tipping J I don't think there's anything very unclear, before you get to this bit there's nothing that needs clarifying. So they must have thought that you needed something extra to give the right of appeal to the Supreme Court from the Court of Appeal as opposed from the High Court to the Court of Appeal. Or the trial Court is more accurate.

Crutchley I suppose what I'm deeply concerned about is what appears to be the removal of a right to apply for an appeal further albeit Your Honour by prerogative. But hasn't this Court replaced the Privy Council. And the idea of removing that right to apply for an appeal by both the accused.

Elias CJ Well it's not even a right. I mean it's not the right way to describe it to characterise it as a right. It's an ability to petition the Queen.

Crutchley Yes but this Court's replaced the Privy Council. That ability was there pre-trial albeit it may not have been used very often by anyone. And would not the legislature have provided an express provision in a Court

it has set up to look, to provide increased access to justice, and to look more broadly at provision of appeals to New Zealand citizens to have actually taken away a significant ability to have a matter pre-trial determined by a superior Court. Originally the Privy Council and now this Court.

Elias CJ Well it can hardly be characterised as a significant ability if you look at the extent to which it's been invoked.

Crutchley Sorry, I meant significant in relation to the issues, **Grayson and Taylor** of course being a very significant matter for them in their trial, and has been a significant authority for the way in which we deal with admissibility of evidence pursuant to search and seizure.

Blanchard J Ms Crutchley, just coming back to your explanation for 383A, do I understand you to be saying that the explanation is that it was thought necessary to spell it out that the appeal to the Supreme Court would only be by leave.

Crutchley Yes.

Blanchard J Well why was that necessary if s.12 of the Supreme Court Act makes it clear, and I quote, that appeals to the Supreme Court can be heard only with the Court's leave. The Supreme Court would never have had, because of that provision, the power to hear any appeal as of right.

Crutchley No but I think this is an important clarification for.

Blanchard J Well what's unclear about what I've just read to you?

Crutchley Well that's one way of looking at it Your Honour.

Blanchard J You're saying this is just a belt and braces approach?

Crutchley That is a clarification.

Blanchard J The draftsman who drafted s.12(1) thought as part of the exercise it was necessary to not only distinguish in s.383 between appeals to the Court of Appeal as of right and appeals with leave to the Supreme Court, but to do it again in 383A.

Crutchley Well Your Honour, the draftsman has done it in the other pieces of legislation as well confirming that you go to the Court of Appeal first. So the draftsman hasn't just done it in the Crimes Act provisions. Other provisions have clarification as well. So I can understand the force of Your Honour's arguments but the legislature hasn't decided that s.12 is sufficient. It has, in other pieces of legislation where there's consequent amendment talking about appeal right to the Supreme Court, has made clarifying provisions. You're quite right.

Blanchard J That's what it is?

Crutchley Well I would say it is a clarifying provision.

Blanchard J Yeah well I'd suggest to you that it isn't just a clarifying provision. That no clarifying provision was needed.

Crutchley Well yes I understand your point Your Honour.

Gault J Ms Crutchley, the reference to the **Grayson and Taylor** matter. Are you aware of there being any argument in that case before the Privy Council as to the appropriateness of pre-trial appeals?

Crutchley Yes I sought advice from Mr Pike who argued it. No, the matter was not discussed at all. It was just the substance.

Gault J Thank you.

Keith J Did he even get called on?

Crutchley Sorry?

Keith J Did he get called on in that case?

Crutchley I'm not aware of that.

Keith J No I don't.

Crutchley But in terms of any jurisdiction point no, I understand.

Tipping J The same point applies doesn't it as we were discussing earlier with Mr Cato in s.406A where there is a, it's even more stark there because it's successive subsections.

Keith J Yes, yes.

Crutchley Yes.

Tipping J And the explanation is the same is it, that it's this need to make it quite clear that you can only get to the Supreme Court by leave?

Crutchley I think in section 406 isn't there a further policy reason to make it even clearer given that 406A is a second trip to the Court of Appeal? And that to come to this Court it would have to be a significant legal issue that the Court of Appeal got wrong in a second trip. So I think s.406A's got some other policy aspects. The clarification has got some other policy aspects around it. That is that this Court should not be dealing with matters that arise out of a petition which are referred back to the Court of Appeal, which is the forum for dealing with the mix of evidence, particularly fresh evidence for instance, issues that might

arise, reserving the appeal, as I think is intended by the Supreme Court Act, on significant matters only.

Tipping J But the problem I have with your argument in 406A is that the very first words you come to, and I made this error before so I've been particularly careful to look for it, are the words "with the leave of the Court appealed to". So why on earth would you need to clarify that?

Crutchley Subs (3) though, why would you need the words in subs (3)? Because you've got with the leave of the Supreme Court. So isn't that section just.

Tipping J Well they've put it in in spite of the wording of section 12 of the Supreme Court Act.

Crutchley Yes.

Tipping J But this seems to me to be belt, braces and a tie.

Crutchley It might well be Sir.

Tipping J I've got it three times now.

Crutchley But why would you have subs (3) anyway?

Tipping J Well I can understand the belt and braces, but belt, braces and a tie is a little extreme.

Keith J You need subs (3) don't you on the argument that's being put to you Ms Crutchley because subs (1), as subs (4) says, is a leapfrog provision.

Crutchley Yes.

Tipping J Well subs (1) is when the High Court hears the reference and subs (3) is when the Court of Appeal hears the reference.

Crutchley Then why do you need the words, with the leave of the Supreme Court, if you've got with the leave of the Court of Appeal too in the first part of the section.

Tipping J Well I can just swallow the belt and braces but you know what my view is about the third support.

Crutchley Yes.

Gault J Is there any legislative history relevant Ms Crutchley about what was proposed with a pre-trial appeal? I know it was the subject of considerable discussion prior to the passing of the Supreme Court Act.

Crutchley Yes it was. I mean I made a deliberate decision in respect of this not to go there. I thought that the words of the sections were sufficient. Now I find myself perhaps hoisted on my own petard.

Elias CJ Is there legislative history bearing on it?

Crutchley I don't think so Your Honour. I think if I may be permitted to discuss some of the materials. The Attorney-General's report on the Advisory Committee in respect of interlocutory appeals made the recommendation that appeal rights that are current should remain but deliberately left the question of the extent of the jurisdiction for this Court to determine. The Select Committee report such as it dealt with the issue made similar kinds of noises. And I think there was one Minister of the Crown who made a comment about, a similar comment. But Hansard didn't, or any of these were dealing with the setting up of the Supreme Court, and so the precise legislative history and discussion about interlocutory appeals in the criminal arena was really not on the agenda as far as I could see from looking at all that material.

Gault J Thank you.

Crutchley Any other questions that Your Honours have, I think perhaps I've set out the position of the Crown in my written submissions. I'm just going to look at my notes to see if there's anything else. No, I haven't got anything in addition.

Elias CJ Thank you Ms Crutchley. Mr Cato, is there anything further arising out of that?

Cato No Your Honour.

Elias CJ Yes, we will take time to think about this matter. It does raise substantial policy issues and we're indebted to Counsel for your assistance. Thank you.

Court adjourns 11.10 am