IN THE SUPREME COURT OF NEW ZEALAND SC 11/2016

BETWEEN **KARL LESLIE RAYMOND MARWOOD**

Appellant

AND **THE COMMISSIONER OF POLICE**

First Respondent

ERANA KING

Second Respondent

THE PERRIN TRUST

Third Respondent

ANZ BANK

Fourth Respondent

Hearing: 17 June 2016

Coram: Elias CJ
William Young J
Glazebrook J
Arnold J
O'Regan J

Appearances: R E Harrison QC and M W Ryan for the Appellant
M D Downs and P D Marshall for the First Respondent
A G Speed for the Second Respondent
M W Ryan the Third Respondent
No appearance by or for the Fourth Respondent

CIVIL APPEAL

MR HARRISON QC:

If Your Honours please, I appear for the appellant with my learned friend Mr Ryan.

ELIAS CJ:

Thank you Mr Harrison, Mr Ryan.

MR DOWNS:

May it please the Court, Downs and Marshall for the Commissioner of Police as respondent.

ELIAS CJ:

Thank you Mr Downs, Mr Marshall.

MR SPEED:

May it please the Court, my name is Speed. I appear for the second respondent.

ELIAS CJ:

Thank you Mr Speed.

MR RYAN:

May it please the Court, counsel's name is Ryan. I appear for the trustees of the third respondent.

ELIAS CJ:

Yes, thank you Mr Ryan. Yes Mr Harrison.

MR HARRISON QC:

Your Honours, having read the Commissioner's submissions I've prepared a two page set of notes which really is so I can avoid having to read my own

writing. But it does contain some detailed references to some of the material before the Court and if it would assist I'm happy to tender it.

ELIAS CJ:
Yes it would assist, thank you.

MR HARRISON QC:
I'll make reference to it as and when necessary. Now I'm going to base my submissions on my written submissions but of course not trawl through them, but try and add value as and when I can. Just briefly in the introductory section at page 1 the challenged evidence referred to in paragraph 2 of my submissions is identified in paragraph 6 of the Court of Appeal judgment, which is to say at page 40 of the case on appeal. So that paragraph 6 lists the items which were found by reason of the unlawful search and breach of section 21. That's the physical subject matter of the dispute and the amount of the claim as formulated in the application is $334,000-odd, so that's the amount which the Commissioner is seeking to recover.

Now I'm not going to say anything more about the introductory part of my submissions. The submissions focus on a challenge to the reasoning of the Court of Appeal which very largely, if not entirely, adopted the submissions for the Commissioner in that Court, so that continuing to challenge the reasoning of the Court of Appeal, as I do by way of summary in paragraph 13 of the submissions, is going to be my preferred approach, because again the Commissioner repeats the submissions he made in below in this Court.

The appellant, as per paragraph 14, puts forward three alternative bases for a power to exclude evidence in this case. Common law or inherent jurisdiction, alternatively of that New Zealand Bill of Rights Act 1990 derived remedy and alternatively a power which I argue is directly conferred by section 12 of the Evidence Act 2006, which is to say I'm saying there is now a statutory power under section 12 for the Court to exclude evidence in residual cases where the matter is not otherwise directly covered by the Evidence Act. The third of

those, the section 12 power, was not, as I apprehended in argument, advanced before the Court of Appeal, but I am advancing it.

Section II of the submissions deals with the nature of proceedings under the Criminal Proceeds (Recovery) Act 2009. I make a series of points about provisions of the Act and their intended operation in that section. It doesn't seem as though the points I make are individually challenged by the Commissioner, who seems to accept that, yes, I have correctly stated the effect of what I'll call the CPR Act in that section of my submissions. So I won't go through it in detail, but obviously I emphasise the points which I make.

This section of the submissions is intended as an attempted corrective of the approach to the CPR Act adopted by the Court of Appeal. I accept, at once, that the Courts are obliged to give effect to the CPR Act, no question of that. However, they're not obliged to treat it as the greatest thing since sliced bread. They should, the Courts should approach it on the basis that it is what it is, an Act which deals with a criminal subject matter, that seeks to impose a forfeiture that either waters down the onus of proof or in one instance reversed the onus of proof so that the citizen has to disprove certain assertions and thus it is properly to be regarded as penal and quasi criminal.

Now I'm not, contrary to what the Commissioner's submissions suggest, I'm not saying this is criminal legislation, therefore section 30 applies. The argument is rather that it is, it has a penal intent and subject matter. It is properly regarded as quasi criminal and if we're going to draw analogies then the obvious and strongest analogies when it comes to evidence exclusion, given that the Commissioner is bound by the Bill of Rights provisions like section 30. So the – and equally the point also arises when we get to the balancing exercise because the way the Court of Appeal approached that balancing exercise which it didn't get to but dealt with obiter, was to say well the aims of the CPR Act are so important and so worthwhile that we don't apply a balancing exercise really at all. We're just going to say the purposes of the CPR Act overwhelm any breach of the Bill of Rights and any interests of

the defendant, the respondent to the application, that might otherwise exist. So again this is a corrective, simply a corrective, inviting the Court to accept that that is, that approach on the part of the Court of Appeal and now the Commissioner is, with respect, overdoing it in terms of this legislation.

So key features of the CPR Act are perhaps the two that I identify in paragraph 19 and 20 on page 6 of the submissions, which is to say the definition of unlawfully benefiting from significant criminal activity is that you knowingly, directly or indirectly, derive a benefit from significant criminal activity, whether or not you're engaged in it, and this has, for example –

ELIAS CJ:
Sorry did you say, oh, paragraph 19.

MR HARRISON QC:
Paragraph 19.

ELIAS CJ:
Sorry, I was looking at page, thank you.

MR HARRISON QC:
Paragraph 19. So this has relevance for bit players, if I may put it this way, like the second respondent, a spousal partner of someone who's identified by means of a search or other breach of the law as the principal offender carrying on the operation. Even if it's only standing by and knowing that the partner or spouse is carrying on a criminal operation, with an indirect benefit that person can be directly the subject of a profit forfeiture order and that could happen, for example, in more extreme cases than this appears to be where you've got an abused wife with a criminally inclined husband who insists on paying down the mortgage on the jointly owned home. The wife is so battered and intimidated that there's nothing she can do to stop the criminal offending, or in effect, unwillingly to benefit. But there's not only the person who's caught by the wide definition of unlawfully benefitting, there are the even the totally innocent players who maybe beneficiaries of a family trust, who have to try

and apply to get themselves excluded from the operation of the order. So that's paragraph 19 in my submissions.

Then the second point is paragraph 20, which is that the unlawful benefit obtained by the respondent doesn't have to have added to the value of the particular property. So you don't have to have paid down the mortgage on the house for the house to be got at. Now again this is the law, and I'm not suggesting otherwise, but it's, the gap needs to be considered in that context when we get to the point I finally make in paragraph 24 which is that – sorry, it's more my final point, 27. If the Act is silent on an issue like evidence exclusion, the CPR Act, and the Court has to determine whether the law permits exclusion and what approach that should be, then the fact that the State is trying to extract money from often a citizen, there this legislation, and ex hypothesi relying on its own unlawful act in breach of the Bill of Rights to prove its case then there must be due process safeguards for the respondent. The Court can, and should, as a matter of Bill of Rights, human rights imperative, read those in and the most obvious safeguard is the one that the Court of Appeal flatly rejected the ability to exclude improperly obtained evidence. So that's the perspective I submit the Court should be adopting here.

Now I turn at page 8 to what is, I suspect, the most heavy duty issue, which is the relationship between the Evidence Act and other statute and common law. And I argue, of course, that the Court of Appeal's approach to the interpretation issues raised was fundamentally flawed in two respects. My paragraph 29, first, it seems to have approached the Evidence Act on the basis that it was a comprehensive codification of the laws of evidence applying to all proceedings, and I make the point that it is not comprehensive. It is not a code, or even a partial code. Basically the position I submit is this. The Law Commission wanted a code. Provisions that said, that referred to it as a code, the Evidence Act as a code, were removed during the Parliamentary process. I accept that some provisions of the Act can be seen as a partial codification of a particular area of law. The propensity evidence section for example can properly be seen as codifying that particular area of

law. If you can't reason from the fact that some provisions occupy the field to a position that overall individual provisions of the Act, such as section 30 obviously, completely occupy their particular field. But my back up point is, well even if it is the case, contrary to theme which I'll come to, that section 30 occupies it's particular field, that particular field is exclusion of evidence in a criminal proceeding. In fact it's narrower. It's exclusion of evidence offered by the prosecution in a criminal proceeding. So even if section 30 occupies that field, it's not a rational or reasonable conclusion to draw that all other evidence exclusion in any other kind of proceeding, including, and I'll mention this later, a search warrant application, is ruled out by provisions of the Evidence Act. So that's the issue and we bring to bear the usual analytical tools to address those competing contentions. The legislative history but first and foremost the text of the statute and I argue that the Court of Appeal and the Commissioner's approach, which goes directly from the section 7 relevance principle, to section 30 and says, put those two together, and there's no power to exclude in a civil case, is misconceived because the true grouping, it's a bit like the Bill of Rights section, the 4, 5, 6 argument, the true grouping of provisions that you look at to get at the answer to this question are those in Part 1, the preliminary provisions, not section 30 which is later, and these are really 6, 7, 8, 10, 11, 12, and you read those provisions together to get the answer.

Now in opposing that approach it seems to me that the high water mark of the Commissioner's argument to the contrary is reliance on what the Commissioner claims is the legislative history of the Evidence Act and this is really dealt with at page 11 of my learned friend's submissions. And the high water mark is to say that the Law Commission proclaimed that improperly obtained evidence is admissible in civil proceedings, and I'd like just to spend a moment on page 11 there. But may I respectfully comment that the mere fact that the Law Commission formed the view that as a matter of law, common law, improperly obtained evidence was admissible in civil proceedings, or to put it another way there was no power to exclude, although they don't quite say that. It doesn't meant that that is truly reflects the law. The flaw with treating the Commission's opinion on that area of law as the be

all and end all, indeed the flaw in treating many of the earlier authorities which my learned friend cites as the be all and end all, is that none of them address the precise issue in this case. What happens when the civil plaintiff is the Crown in breach of fundamental rights. Now if the Law Commission had asked itself that precise question, I'm far from convinced it would have simply adhered to the simplistic and, with respect, wrong proposition that my learned friend now relies on.

But when we – the other further point I would make about reliance on what the Law Commission said at the various stages, is that when my learned friend says at page 11 at the top, the distinction between civil and criminal exclusion was known to the legislature, and my learned friend then cites the 1991 preliminary paper as evidence that the legislature, when enacting the 2006 Act, knew that distinction. That, with respect, is completely unreal. To say that 15 years later legislators enacting an Act which was no longer expressed as a code, had in mind what the Law Commission had said in 1991. The distinction was known to the Law Commission, but that's not to say, even in 1999 when the Law Commission, and this is what's set out in paragraph 26, when putting forward the Evidence Code, made that statement that it was somehow then part of the parliamentary intention when enacting the package of sections in part 1 from section 6 onwards, that I'm coming to, to positively exclude a power of the Courts to exclude evidence on proper grounds in civil cases. You can't move to that extreme position, in my submission, particularly when, as I will come to, you look at the subtle but various, quite numerous shifts between the wording of the Code as proposed by the Commission, and the Evidence Act as it was eventually enacted.

Now at page 9, paragraph 32 and following, I look first at section 7. So I want to just do now a little bit of a close textual analysis of these provisions and I address section 7 particularly in para 34 of my submissions, and I first query the proposition that section 7(1) is mandatory in the sense that it requires, subject to any other admissibility provision to the contrary, the admission of evidence which qualifies as relevant. And I make the point that that interpretation that it's mandatory, without exceptions, turns on a reading of the

word “admissible” in section 7(1) and assumes that it means required to be admitted rather than simply as the normal meaning is “able” to be admitted in evidence.

O’REGAN J:

Is there any difference, though, because it’s able to be admitted by a party to the litigation?

MR HARRISON QC:

Yes, but that – the argument for the Commission sees it as different because it is said unless you can point to another statutory provision that expressly overrules this, if it qualifies as relevant within the definition, it goes in no exceptions, no buts, no ifs. And my submission is that that is going too far. In one of the early cases –

O’REGAN J:

Well if that was so wouldn’t it say it’s admitted unless the Judge excludes it?

MR HARRISON QC:

Well that’s the interpretation I’m urging. In one of the early cases that’s mentioned by my learned friend –

ELIAS CJ:

No, but I think the point that’s being put to you is it doesn’t say that.

MR HARRISON QC:

Well, in one of the early cases, Justice McGrath referred to section 7(1) and meaning that all relevant evidence is prima facie admissible and that’s really what I’m putting, and there are textual indications that water down section 7(1). I’ll come to the other provisions but the immediate textural indication is in sections 11(2) and 12(a), because, and I’ll come to each of these provisions in turn but you’ve got 11(1) which says, “Inherent and implied powers not affected,” and then subsection (2), “Despite subsection (1), a Court must have regard to the purpose and the principles set out 6, 7 and 8

when exercising.” Then 12(b), “If there is no provision in this Act or another Act regulating admission,” then the question gets addressed and again, “Having regard to the purpose and principles set out in sections 6, 7 and 8.”

Now as a matter of interpretation this plainly means that because it’s only “must have regard to” and refers to the principles set out in inter alia section 7, what that is saying is that there are circumstances where section 7 is merely a principle that you have regard to rather than some overriding, inexorable standard that operates unless another Act or the Evidence Act expressly provides otherwise. So as a matter of textural analysis section 7 isn’t as absolute as the Commissioner contends here.

ELIAS CJ:
Well I suppose you could get some support for that in the text of section 7 and its heading that the fundamental principle is that relevant evidence is admissible because otherwise it would be “relevant evidence admissible” one would have thought.

MR HARRISON QC:
Yes, and it would be –

ELIAS CJ:
And no necessity to refer to fundamental.

MR HARRISON QC:
Yes, and subsection (1) would say, all relevance must be admitted, rather than is admissible.

ELIAS CJ:
Well, I’m not so about that because, you know, sort of drafting that maybe used in different places in slightly different ways. It’s a bit tricky.

MR HARRISON QC:

I mean I'm not going, I'm not suggesting that section 7(1) isn't a fundamental principle. The question is whether it is an absolute principle that is only inoperative if there's an expressed statutory provision to the contrary, and I'm submitting, reading this group of provisions in the language that I'm stressing, that that is not so as a matter of interpretation. In any event, of course, if you can bring yourself under section 11 or 12, explicitly you're bound by something less than whatever section 7(1) read alone is interpreted as meaning.

So the position then is that we look at section 7 and we interpret it, I suppose this is one of these old noscitur a sociis arguments where we're looking at the provisions immediately around section 7 and I'm submitting that section 30 is too far away to be an associate, I think that's roughly translating sociis. So focusing on that it's wrong, the Court of Appeal got distracted by section 30 when it regarded section 30 as the only available, in effect, the only available exclusion under this Act, or any other Act provision that was in play. The issue – I know section 30 isn't the section we rely on here, but it's useful, I submit, to challenge the assumptions of the Commissioner's argument in the Court of Appeal's reasoning, to spend some time on section 30 itself and ask what it does because if the premise of treating section 30 has implied exclusion of a power to exclude evidence in civil cases, must surely be that section 30 is comprehensive in relation to criminal cases. If section 30 doesn't occupy the entire field, even in criminal cases, the argument that it impliedly excludes exclusion of evidence in civil cases is destroyed, or at least substantially weakened in my submission. So the problem then with the Crown's argument is that while it doesn't come out and say the case of *Fan v R* [2012] NZCA 114, [2012] 3 NZLR 29, which I'll come to in just a moment, is wrongly decided and should be overruled, it's implicit in the argument, in the steps of the argument that I just indicated that *Fan* must be wrong, and also *Dabous v R* [2014] NZCA 7, at tab 3 of the main bundle, which followed that case, is also wrong, and there are some further downstream consequences in the criminal sphere which I want to explore.

I know this is slightly off the topic but it's a chain in the Court of Appeal's reasoning and I want to address it. So *Fan* is actually a helpful case for the appellant. It's at tab 2 of the main bundle and it's the reasoning at paragraphs 29 to 31 that I want to focus on. Now just before I start on that there's been criticism of *Fan* because it was suggested by the Law Commission that it took an unduly narrow approach to what was covered by section 30, and that's not where I want to go. It's the reasoning of the Court of Appeal in *Fan* that followed on, on that premise that I wish to refer to.

So paragraph 29, there's a reference to Mathieson, not surprisingly, of counsel for the Commissioner, noting that the leading New Zealand texts assume that the enactment of section 30 will make it difficult to argue that there's any residual unfairness or other ground of exclusion. Then paragraph 30, and I adopt this reasoning, "nothing to indicate in any of the Law Commission papers or reports an intention to exclude the common law discretion when enacting section 30 and to the contrary," and this is basically the reasoning I'm putting forward here.

Section 10(1)(c), "Act may be interpreted having regard to the common law, promotion," and so on. Under 11, "Inherent and implied power of a Court." Under 12, "If there is no provision decisions about the admission of the evidence must be made having regard to sections 6, 7 and 8 to the extent that the common law is consistent with the promotion of that purpose regard must be had," and then there's reference back to section 6(c), and then the reasoning, "It would be inconsistent where the common law and the purpose of the Evidence Act, which is to promote fairness to the parties to construe section 30 as excluding the common law discretion. The continued existence of the common law discretion is consistent with the purpose of promoting fairness and the Court must have regard to that purpose under 11(2). The exclusion of evidence on unfairness grounds can be seen as dealt with only in part in terms of section 12 by section 30 so that a decision on the omissions of evidence can still involve consideration of what is fair to the parties irrespective of section 30. We conclude that the common law discretions survives the Evidence Act, though section 30 governs those cases

to which this section applies." So that reasoning applies with at least as much force to the possibility of a common law or non-statutory power or jurisdiction to exclude. And, of course, *Fan* looks at the, by analogy, the section 30 criteria when it comes to then look at the balancing exercise.

And *Dabous* at tab 3 refers to *Fan* with apparent approval at paragraph 16 and certainly follows it, and then at 18 – well, 17 the Crown is saying – sorry, no, the accused, the appellant is saying that he could deal with it under section 30 but even if not, you apply the same standards. 18, we agree with counsel that the form of test to be applied in the present case is a matter of indifference. The extent of any impropriety committed was known to the police. Then the last sentence, "In the present context there's no difference in the assessment of unfairness whether it is addressed under 35(c) or under the common law.

And that makes perfectly good sense. Why, in the absence of clear, and I'm still talking in the criminal sphere at the moment, why in the absence of clear statutory indicators would you conclude, would the Courts conclude that they suddenly now lack their traditional abuse of process derived jurisdiction to exclude otherwise relevant evidence on grounds such as unfairness seen as falling outside the section 30. And can I just, jumping around a little bit –

GLAZEBROOK J:

The other way of dealing with that, of course, is to, I must admit I am in the camp that says section 30 does cover that, and I think I've said so somewhere, and so you would interpret section 30 in a way that was not restrictive, but that doesn't take away from your argument that where there's something outside of that it doesn't mean, I mean I'm looking in particular for instance the, one could say the same about 29, that in civil cases if you torture someone to get evidence then that's going to be admissible because 29 only applies to a criminal proceeding.

MR HARRISON QC:

Well I was about to just make some points that will amplify that, and this is at my two page note, I'm jumping around a bit, but if we go to paragraph 7, my paragraph 6 is the point I've been making, but paragraph 7 I make the point that section 30 relates only to evidence tendered by the prosecution. It doesn't apply to evidence illegally or otherwise improperly obtained by the defendant and there are various scenarios where section 30 would not apply either because it's a civil case, or because the evidence is not tendered by the prosecution, and let's just explore that by reference to this case of *Paiti v Police* [2016] NZHC 716. Again this is a reason why you can't possibly say, as the Court of Appeal did, section 30 is the only provision for exclusion of evidence in criminal cases.

This case, in a nutshell, involved a defendant to a charge of basically indecent exposure to a neighbour across the way, engaging a private investigator who persuaded the elderly neighbour to allow him to enter and take photographs from within her home, which showed her line of sight, and it was suggested that there'd been some deception involved. The police, at first instance, persuaded the Judge that the photographs had been unfairly obtained, even though the defendant was to produce them and they were ruled out, and Justice Asher on appeal overturned that and held that they weren't unfairly obtained, and thus the photographs could go on. It was a pretty clear case really. The private investigator had worn his badge. He said he had told her that he was a private investigator. The elderly lady simply assumed he was a police officer and that was why it was all okay. But interestingly the argument, in terms of the Evidence Act, on both sides, prosecution and defence, attempted to rely on section 8, the general exclusion provision, and this was, because this was the focus on both sides Justice Asher effectively –

O'REGAN J:

I think it's Justice Davison, isn't it?

MR HARRISON QC:

Pardon?

O'REGAN J:

It's Justice Davison I think.

MR HARRISON QC:

I'm sorry, yes, it is. Justice Davison analysed the case in those terms. For example at paragraphs 40, so he does a balancing exercise at 40. At 41 he looks more at section 8 and then at the very last sentence on page 95, at 41, he looks at section 8. Now my learned friend cites this case and he says the decision was right but for the wrong reasons because the logic of his argument is that there would be no power to exclude the defence evidence. Even in a case of a gross breach by a defendant of say a complainant's rights, or a gross illegality, robbing, getting evidence by entering a police station and taking it away, there would be no power to exclude, other than under section 8. But section 8 really doesn't serve – it's not capable of serving that purpose, even if this is a bit contrary to my interests, I cannot help but be persuaded by what Justice Cooper said at first instance in this case about section 8, which is at page 20 of the case. Paragraph 33, His Honour said, "I observe in passing that although counsel referred to section 8 of the Evidence Act, not, in fact, to be of any assistance. That is because the evidence is highly probative and a conclusion that would have an unfairly prejudicial affect on the proceeding could not be justified. Any unfairness here arises from the manner in which the evidence was obtained and not on any notionally unfair effect of –

GLAZEBROOK J:

I'm sorry, which paragraph was it?

MR HARRISON QC:

I beg your pardon?

GLAZEBROOK J:

Which paragraph? Number 30?

MR HARRISON QC:

Paragraph 33, page 20 to 33. So he put, any unfairness here arises from the manner in which the evidence was obtained and not only any notionally unfair effect it might have on the proceeding, which seems to me, with respect, correct. So you will have cases falling outside section 8 where evidence has been illegally or unfairly obtained by a defendant. Now I'm not saying the calculus is the same for exclusion of a defendant's evidence. I'm just saying the idea that there is no power is problematical.

Again, returning to my submissions at paragraph 7, you've also got the *Tranz Rail Ltd v District Court at Wellington* [2002] 3 NZLR 780 (CA) scenario where you've got the Commerce Commission in a civil proceeding gets evidence pursuant to an invalid search warrant. A separate judicial review proceeding is brought. The Commission is declared not entitled to retain the document seized pursuant to the warrant. Now what if, instead, the Commission brings its civil proceedings, seeks to adduce the evidence seized under the invalid warrant and the defence by collateral challenge to the legality of the warrant the admissibility of the evidence? What is the difference, what is the net difference between a civil proceeding that obtains a declaration that the Commission's not entitled to retain the document and calling upon the Court to exercise a power in the standard proceeding to exclude the evidence because the same warrant is equally invalid as was so declared in *Tranz Rail*.

Then paragraph 8, a further point back to civil proceedings, I note there is not only the *Paiti* scenario where you've got one defendant, but you could have police obtaining evidence unlawfully which is ruled out under section 30. The other co-defendant not affected by the breach gets discovery of that evidence and seeks to tender it in order to prove that the other defendant, rather than the tendering defendant, is the guilty party relying on the Crown's illegality.

We've got some provisions that apply but don't resolve the issue. That is to say section 31, if I can just take you to that, which says the prosecution may

not rely on evidence offered by other parties if excluded or liable to be excluded under section 30 in particular. But that doesn't prevent the co-defendant from relying on the excluded evidence.

There is also section 91 that was referred to in argument yesterday, 90(1) which is that you can't use a document excluded under section 29 or 30 for questioning but surely the Court must have –

ELIAS CJ:

Sorry, what section was that?

MR HARRISON QC:

Section 90(1), that's the don't cross-examine on an excluded document. Surely there will arise, or may arise, an extreme case where the Court has to uphold the Bill of Rights or protect the overall fairness of the trial by excluding evidence, even if tendered by a co-defendant rather than simply mitigating the effect pursuant to section 31 by saying the prosecution can't rely on it. These are all scenarios where you'd expect the Evidence Act to say there is a residual power to exclude evidence in the interests of trial fairness, even in a criminal case, and of course that's, I argue well, yes, that's precisely what sections 11 and 12 permit, and ditto in a civil case.

ELIAS CJ:

Section 8 also is again looking at the structure and the headings and what you can get from those sort of clues. It is here a general exclusion leaving hanging the indication that there are other, well I suppose there are other bases for exclusion in the statute, but, yes.

MR HARRISON QC:

Well but my point is if you read 7, 8 and in particular – well 10 is also important – but if you read 7, 8, 11 and 12, you haven't got a codification. You've got what you'd expect really. I mean the, you'd expect a sensible evidence regime to allow for cases that don't come within the main provisions that were intended to deal with evidence exclusion. Section 11, which as my

submissions mention, changed during the select committee process. 11(1), I can take you to the chapter and verse if you like, but it's in the Bill as reported back. Section 11(1) originally as limited to the abuse of process jurisdiction, and the change plainly intended to widen the operation of the provision, so it wasn't only what was strictly an abuse of process that could be invoked. And why is that provision there, if not to leave open powers of the court to deal with evidence, and excluding evidence is one of the main powers you'd expect, particularly when it, this provision came via the abuse of process notion, you'd expect to be covered by a provision such as section 11(1).

So, and then, no, just also wanted to without, I hope, in any way troubling the argument that my learned friend Mr Eaton QC was running yesterday, I just wanted to mention the issue of search warrant and these points are not crucial to my argument but there is an argument, one way or another, that the Evidence Act applies generally to the search warrant applications. The section 5(3) says that the Act applies to all proceedings, after the stated date. Proceeding is defined as meaning, "A proceeding conducted by a court and any interlocutory or other application to a court connected with that proceeding." And court is defined as including a District Court. The argument that was being dealt with yesterday appeared to me to, I know Justice Young was not quite that enthusiastic, but it seemed to contemplate that a decision-maker on a search warrant application, or other warrant application, if informed of the earlier illegality had power to disregard the evidence that was tainted by that illegality. Now what is that power if a search warrant application is a proceeding to which the Evidence Act applies, what is the source of that power. Is it section 30 or is it some other inherent power. It seems to me that the Court is grappling in these two appeals with these kinds of issues and it just does not make sense for the Court to adopt the Court of Appeal's interpretation, the Commissioner's interpretation, that section 30 occupies the field and in criminal cases, indeed in civil cases, there are no residual or inherent powers to exclude improperly obtained evidence.

Now if we go top age 11, I'm actually making reasonable progress I believe, but I'd just like to spend a little bit of time on the separate points, just teasing out section 11 and 12 separately.

ELIAS CJ:
Sorry, were you going to what in your submissions?

MR HARRISON QC:
Page 11, the submission that the Court of Appeal judgment fails to give effect to section 11. So this is an argument I touched on but obviously given, as I say in [39], given that there's an express reference, to section 7 and 11(2), you can't argue that section 7(1) provides otherwise in terms of section 11(1).

ARNOLD J:
Sorry, I didn't follow that.

MR HARRISON QC:
Well, if you say, yes, there would otherwise be an implied power to exclude evidence in a civil case, if ex hypothesi that was the case but you can't rely on that because the Act provides otherwise. My submission is you can't take section 7 itself as being the provision that provides otherwise, because that is inconsistent with the fact that subsection (2) refers to section 7. It wouldn't make sense to treat section 7 per se as being the provision that provides otherwise.

So that was the section 11 point and then I go on to develop in the argument later that there are, indeed, such inherent and implied powers, and including common law powers but I'll come to that, but this is just trying to defeat the Commissioner's argument that prevents section 7 and 30. Then there's also – so even if you read down section 12 and say it's only a, where there's a true gap, there's no reason, even if you read section 12 down, to read section 11 down at the same time, and I note that other than reciting it, the Court of Appeal judgment doesn't even mention section 11 in its, in reaching the conclusion which it does.

Now then – and the interpretation argument around giving section 11 a broad, or at least not a narrow, interpretation is mentioned in paragraph 41 of the submissions, which is to say the Courts have always resisted a narrowing of their inherent jurisdiction and in particular the jurisdiction to prevent abuse of process, and rightly so. There needs, it's fundamental to the rule of law that abuse of process, that Courts can deal with abuse of process in appropriate ways and legislation that seeks to curtail that inherent fundamental power needs expressly to do so and will be resisted as a matter of interpretation unless it's expressed. So give, its natural then to give section 11 an appropriately beneficial interpretation and especially when you've got section 10, the interpretation section, backing you up. Again, this is in the written argument, but it's entirely appropriate to, when reading section 6 as well, section 6, the purpose provision, rules of evidence recognising the importance of rights affirmed by the Bill of Rights, and section 10 to adopt this interpretation of section 11 that I am urging, and the same is true in the alternative for section 12. As I argue, it is an independent source of power, and the argument there runs, of course, that section 30 does not deal with exclusion of evidence in civil cases. Therefore, there is plainly no provision in the Act or any other enactment regulating the admission of the evidence at issue in this case or, indeed, in civil cases mostly, that I'm aware of, so therefore, in terms of section 12, decisions about the admission of the evidence must be, et cetera, (a) and (b), and, again, it's only having regard to sections 6, 7 and 8, and if we were postulating a power to exclude evidence in this case based on section 12, 12A really invites the drawing of the analogy with the section 30 balancing exercise. Even though 12A doesn't refer to section 30, it's brought in via section 6. It's a natural progression to say, "Well, if you've got to make your admission decision having regard to section 6 and 7 and 8, then you have a very helpful and strong analogy which you draw when doing so from section 30, section 30 via section 6 in effect, and then (b) also having regard to the common law if appropriate.

So on a literal wording, section 12 confers its own power to make decisions about the admission of evidence triggered only by the absence of a provision

in the Act or any other enactment regulating the admission of that evidence. Now why should the Court not give those words a literal interpretation and conclude that there is a power to exclude, and I so submit. So I have summarised the position in para 46. Those are the three sources of power to exclude.

In the next section I deal with the common law position.

WILLIAM YOUNG J:

Can I just ask, does the case against Mr Marwood depend entirely on the evidence in question, in other words can the Commissioner go to trial without this evidence?

MR HARRISON QC:

The answer to that is if the other evidence which isn't the subject of this challenge is itself admissible, yes. There was the –

WILLIAM YOUNG J:

A lot of financial evidence.

MR HARRISON QC:

Well, no, there's more than that. I mean, you'll hear from my learned friend on this and I don't want to make any concessions as to admissibility. What you had is three groups of evidence. The search, they saw the physical evidence which I mentioned at the outset. Then there were immediately interviews where admissions were made. I mean, they're sort of, you know, "Well, I'm caught red-handed." They found the operation. "Yes, that's my operation." So there are admissions on the day, police station-type admissions. And then there was a separate later application for examination orders and then there were quite a lot of admissions obtained on examination. The affidavit summarises those admissions and, of course, what they say is, "Well, the admissions were less incriminating than the ones earlier on in the day," but they were incriminating nonetheless. So even if the search, physical search evidence went out there would be admissions on the statutory examination

but, obviously, Mr Marwood would be reserving his right to object to those depending –

WILLIAM YOUNG J:
But to some extent they're a function of the search.

MR HARRISON QC:
Yes. He'd object that they were downstream tainted admissions. There's obviously more of a problem with the statutory examination order as an intervening device but those arguments are for another day. The answer is if that evidence remains in but this evidence goes out, the Commissioner still has quite a lot to rely on.

All right, now, I don't want to take too much time up on this common law issue. Because these submissions were prepared before I had the joint bundle I don't have the tab references but if I could give them but equally just recourse of the index will show that almost all of the cases referred to are in the bundle. I make a little point at paragraph 1 of my two-page notes. When you look at the common law that the Commissioner relies on, it's about as useful as citing a pre-*Donoghue v Stevenson* [1932] AC 562 (HL) case in relation to duty of care in my submission. The common law and the development of human rights law, Bill of Rights law has gone ahead in leaps and bounds and for old common law cases in purely civil context to be relied on is really not much help. So that's – and the textbook approach in New Zealand, the Mathieson, the Dr Mathieson QC approach has really been at that high, bound by that.

The common law has not developed in three other comparable jurisdictions mainly because of statutory intervention. I deal with this at page 16 of my submissions. Just jumping around a little bit. In paragraph 58 I refer to the United Kingdom rule. That's at tab 2 of the supplementary bundle of authorities. Paragraph 59, in Australia there's now a section of the Evidence Act, which is at tab 3 of the supplementary bundle, and in Canada you've got section 24(2) of the *Canadian Charter of Rights and Freedoms*

that, at least in Bill of Rights cases, type cases, mandates exclusion of evidence and that provision is at tab 1.

And in footnote 50 I mention an Alberta Court of Queen's Bench decision on the Canadian *Charter* provision which, as I say, it's worthy of consideration even though it's relatively low level and I'd like to take Your Honour's to that in volume 2 of the supplementary bundle – volume 2, not the supplementary bundle, tab 29, the first item. Now the reason why this is interesting is that it's actually –

GLAZEBROOK J:
Supplementary bundle, sorry.

MR HARRISON QC:
Sorry, volume 2, not the supplementary, beg your pardon. This is as much relevant to a balancing exercise as the power to admit because it's been done under the *Charter* provisions, section 24(2) where we can see from paragraph 1, this is page 846, that this was a proceeds of crime type civil action.

ELIAS CJ:
Sorry, I've missed finding the reference. Can you just tell me again?

MR HARRISON QC:
Yes, tab 29, volume 2.

ELIAS CJ:
Yes, thank you.

MR HARRISON QC:
We're starting at page 846.

ELIAS CJ:
Thank you.

MR HARRISON QC:

So it's a proceeds of crime civil case but the reasoning of the Judge is, with respect, spot on in terms of the issues arising here. This was a case involving an unlawful search and seizure and detention, and at paragraph 59 there's discussion of some of the Canadian authority in the Supreme Court that I think was reviewed yesterday, the *R v Grant* [1993] 3 SCR 223 case. So [59], "The Crown argues that the factors considered under a s 24(2) analysis in a forfeiture proceeding do not apply with the same force when the respondent's liberty is not at risk." That's a submission advanced in this case for the Commissioner. Then there's a reference to *R v Daley*, [2001] ABCA 155, (2001) 281 AR 262 and *R v Grant*, and at [61] noting that *Grant* had shifted the analysis back to an earlier position. Then at [63], "Under the *Grant* paradigm it is difficult to accept the proposition that State conduct somehow becomes less egregious if the judicial context changes from criminal to civil, or where an individual's at-risk interest is something other than liberty. The State's conduct is fixed. The police did what they did and the past cannot be changed or undone. In my view the government should be held to a consistently high standard in respect of how it employs its considerable resources against its citizenry, and that standard should exist independent of the government's choice of how it wishes to proceed legally." And I adopt that wholeheartedly as part of my submissions.

Paragraph 64, "Similarly, an unreasonable search or an arbitrary detention is no less unreasonable and no less arbitrary simply because the government chooses one form of legal proceeding over another. This election is something the respondent/accused has no choice or control over. *Charter* protected interests are not an elastic concept that expand or contract based on the seriousness of the offence or nature of the judicial forum. *Charter* rights – and their underlying purpose – remain fixed, subject only to broad and liberal interpretations."

Then at [66], finally, "Within the context of this case, the seriousness of the *Charter* infringing conduct weighs in favour of excluding the evidence. While I do not find the police were particularly abusive," et cetera, et cetera. "In my view, this is a good example of where courts need to distance themselves from the fruits of unlawful conduct in order to give effect to the rule of law. Condoning the State's behaviour in this circumstance would serve the opposite purpose."

So back to the issue of the common law. The common law is not being developed in other jurisdictions, UK and Australia in particular, because there is a statute that occupies the field and consistent with the way New Zealand courts have diverged from the old English common law, in the criminal sphere, and developed abuse of process and discretions to exclude on the basis of fairness, there's no reason to treat the New Zealand common law in relation, in civil cases as somehow frozen back somewhere in the middle of last century. But, of course, as I go on to say, of course there's no reason to treat a Bill of Rights breach case as a mere common law ordinary civil case issue anyway.

So I've dealt with the cases, the existing cases that even here show that the door was being opened in civil cases to contemplate a power of exclusion at common law using that in its broadest sense. The first of the cases I address is at page 15, the *Queen Street Backpackers Ltd v Commerce Commission* (1994) 2 HRNZ 94 (CA) case, that's at tab 9. In that case, contrary to the way the Court of Appeal dealt with the case, which I criticise at paragraph 54, the Commerce Commission's claim was a purely civil claim being conducted under the then Rules of Civil Procedure, the High Court Rules, and although there was a concession – and it was an alleged breach of section 21 of the Bill of Rights, but the Court of Appeal held there was no breach of section 21 so there was no need to contemplate whether to exclude the evidence but the Court of Appeal accepted, as I've set out in [53], accepted a concession as rightly made so that there is a discretion to exclude evidence unfairly obtained in the sense understood in criminal matters.

Then the *Attorney-General v Equiticorp Industries Group Ltd* [1995] 2 NZLR 135 (CA) case – again, a civil case, it's at tab 10 – was dealing with not unlawfully or unfairly obtained evidence but the comparable issue of excluding prejudicial evidence on the ground that the prejudice exceeds probative value and there again there was a willingness to analogise with criminal cases in a way that ought to be adopted.

And then finally you've got *W v Attorney-General* HC Wellington CIV-1999-485-85, 24 April 2007. Please just note in relation to that decision the wrong *W v Attorney-General* is inserted at tab 11. The correct report is at tab 10 of the supplementary bundle. So just ignore the tab 11 case completely. Tab 10 supplementary bundle, and I'm referring there to – I might just, in the minute or two that's available, I will take Your Honours to Justice Miller's judgment, tab 10, and I'm relying particularly on the discussion at paragraphs 31 and 37 to 39.

[31], His Honour refers to the view of the editors of *Cross on Evidence* that this is no residual discretion to exclude relevant evidence in civil proceedings. Well, yet again, we have a judicial rejection of that proposition but it's still being cited by my learned friend here. At [37] to [39], [37] Justice Miller notes that he can't rely on the 2006 Act because it's not in force yet. He relies on rule 425 of the High Court Rules and notes at the top of page 106, "The Court also has available it's inherent power to control its own processes." He then cites from Justice McGechan, an earlier case, where the learned Judge assumed the Court had discretion. He refers at [38] to Justice Fisher in *Cook v Evatt* [1992] 1 NZLR 673 (HC). So these are all instances of a power to exclude certain categories of otherwise relevant evidence, all fairly strong straws in the wind, and then at [39], "In my view the Court's inherent power extends to excluding evidence that is logically relevant where its probative value is outweighed by the risk that it will prolong the proceeding unnecessarily or cause undue delay, or where its admission may be unfairly prejudicial to the other party."

So all of this is a body of law in support of what I submit is a pretty obvious point, that whether you call it common law, inherent jurisdiction, or however you label it, the Courts necessarily have the power in question.

Is that a suitable time for the morning adjournment, Your Honour?

ELIAS CJ:
Yes, thank you. We'll take the morning adjournment now.

COURT ADJOURNS: 11.30 AM
COURT RESUMES: 11.51 AM

MR HARRISON QC:
Yes, Your Honours, I'm at page 16 of the written submissions and the next two sections I can cover pretty quickly dealing with abuse of process and Bill of Rights exclusion. The reliance on inherent jurisdiction and abuse of process obviously is separately emphasised because it plugs in, if I may put it that way, to section 11 of the Evidence Act and the arguments are running based on that. It may be open to debate whether there is a common law power on the one hand, and this power, this inherent jurisdiction power on the other, it maybe just different ways of expressing it, but plainly there is at least a power that's inherent and aimed at preventing abuse of process. Abuse of process in this context, I submit, does not mean separate free-standing abuse, separate from simply an attempt to benefit from illegally obtained evidence for example. That's the sense of abuse of process. That's how the pre-section 30 pre-Bill of Rights Act jurisprudence was developed in this country. I refer to it in my submissions earlier. Pre-Bill of Rights it was to prevent abuse of process, not to take an abuse of process that's already occurred, such as might be at issue in *Wilson v R* [2015] NZSC 189. It was to say we are stopping an abuse of process by not allowing this illegally or obtained, unfairly obtained evidence in, and that's the kind of abuse of process that's here, and I rely on page 17, submissions I rely on the discussion in *Wilson v R*, in the sense that it, as I put in paragraph 9 of my little two pager, it appears, in my respectful view, to be inherent in both the

majority judgment and Your Honour the Chief Justice's dissent that there's an overarching abuse of process principle, leaving aside the difference on how far it extends, which is capable of being remedied by stay or capable of being remedied by exclusion of evidence, and that is triggered by abuse of process and not merely a section 30 impropriety of obtaining of evidence. So that's, it's inherent in *Wilson* that there is such a power as I'm attempting to argue for, and of course in *Wilson* Your Honour Chief Justice referred to some English authority in turn, and I've footnoted that. So that's the submission in essence, that the power exists and the further point is made that the Crown argument that claims that section 30 is a complete codification of the power of exclusion of evidence. It really runs counter to the approach this Court adopted in *Wilson*. So that deals with that issue, otherwise the submissions there can be taken as read.

I move on to exclusion of evidence in civil proceedings as a remedy for breach of the Bill of Rights. Now the way the Court of Appeal argued this, or concluded that – rejected this argument I should say was by, as I say at paragraph 72, mischaracterising the nature of the Bill of Rights Act based on remedy of exclusion of evidence and, it probably won't surprise any of Your Honours to see that I go back to *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667 (CA) and the history of the matter, also, of course, reviewed in *R v Shaheed* [2002] 2 NZLR 377 (CA), where all of these cases recognise that once the Bill of Rights Act came into being, the exclusion of evidence remedy was developed by direct reference to that Act and it wasn't the same remedy as had pre-existed the Bill of Rights because in its first incarnation, it was a prima facie exclusion remedy. But as Your Honour, the Chief Justice, noted in *Shaheed*, it was never – even in criminal cases it was never an absolute exclusion remedy but it was prima facie, which was different from the pre-existing common law and it was derived from the notion most clearly articulated in *Baigent* that there was an implied remedial jurisdiction derived from the Bill of Rights itself.

Now if the Court of Appeal mischaracterised that in the way I argue it did, and there was a separate judicially crafted public law remedy as I argue in

paragraph 73, then it is a question of principle, providing I'm right in arguing that the Evidence Act cannot be seen to have excluded a Bill of Rights derived remedy. It's a question of principle. First principle to ask, is that remedy available in a civil case limited to someone bound by section 3 and someone who is relying on evidence derived from a breach of a right under the Bill of Rights? That question seems to have arisen in this case for the first time, although the *Queen Street Backpackers* was prepared to countenance in relation to its Commerce Commission case.

The answer, I suppose, rhetorically, is why not? Why would you draw the line at criminal exclusion, leaving aside the Evidence Act, when the evidence is relied on here by the Commissioner of Police in a case which is penal and quasi criminal in nature and results in forfeiture of the citizen's property in the way that is to occur under the CPR Act? Why would you read down the remedial power under the Bill of Rights when we know that, as *Baigent* famously declared under Article, I think it is, 2, sub-rule 3 of the International Covenant on Bill of Rights. The obligation is on Courts to develop remedies for breach of the human rights recognised in the International Covenant on Civil and Political Rights. Why would you read down the remedy? So the jurisdiction at the very least, I submit, based on *Baigent's* case in the history of the matter, the jurisdiction must be found to exist at least under the Bill of Rights and certainly there is nothing in the Evidence Act which sufficiently excludes it.

So that's the point there and I come to the final topic at page 20 which is should the challenged evidence have been excluded, and can I just add in that I approach this part of the argument really on the basis of what is summarised at paragraphs 16 and 60 of the High Court judgment, paras 16 and 50. Paragraph 16 is at page 15 and following of volume 1 of the case.

GLAZEBROOK J:

Sorry, page 16, was it?

MR HARRISON QC:

Page 15 to 16. Paragraph 16, "For present purposes the Commissioner does not seek to argue that the Judge's conclusions in the criminal proceeding were incorrect. That was clearly the appropriate stance to adopt, because the application for the search warrant was patently inadequate, based on anonymous hearsay, and there could be no assessment by the issuing officer of the reliability of the information. The present application therefore proceeds on the basis now sought to be relied on was improperly obtained because of the inadequacy of the application for the search warrant. Entry onto the property occupied by the respondents was unlawful, and execution of the warrant there constituted an unreasonable search in terms of section 21."

And the other paragraph at page 26, paragraph 50, "In this case, the right breached is of great importance," because this was a dwelling, a domestic home, occupied by the appellant, "great importance and there was a serious intrusion on it. Although the police did not act in bad faith and sought and obtained a search warrant, the application was very seriously deficient. The fact that this is a civil forfeiture proceeding does not diminish the importance of the right affirmed by section 21. These considerations in my view point strongly to exclusion of the disputed evidence."

So I begin by arguing under this heading that the approach adopted by Justice Cooper was correct in law and the Court of Appeal's criticisms of that approach as incorrect in law, in particular the criticism of His Honour's application section 30 by analogy, was misconceived, and as I note at para 77 applying the section 33 considerations by analogy and likewise the balancing exercise is an obvious step to take and in *Fan* the Court of Appeal did so and in *Wilson* the majority were prepared to consider the section 30 considerations by analogy. It's the way the law in this country works so I could cite any number of decisions of the Court of Appeal onwards where the applying non-statutory tests benefit has been derived from comparable statutory tests.

So, and as I noted earlier, almost first thing, there's also good justification for that given that section 11(2) and section 12(a) refer to section 6 and there's a route into the section 30 principles by that means.

At page 21 I criticise the Court of Appeal's starting point based on, firmly and predominantly on the Criminal Proceeds (Recovery) Act. For the reasons I advanced earlier that's not an appropriate start and, indeed, almost end point for an analysis of the exclusion decision assuming there is power to exclude. So I submit that that approach cannot be correct, simply saying, "Well, gosh, we're under an Act which aims to forfeit property derived from significant criminal activity therefore that means we don't have to do any real balancing exercise here." That cannot be correct, in my submission.

As I submit at [81], the CPR Act's purposes cannot be permitted to overwhelm due process and fundamental human rights of respondents. There needs to be a more balanced consideration. The usual public interest in having the matter dealt with on the basis of all available evidence versus competing considerations, including the defendant's rights and the nature of the invasion of those rights.

So I deal with all that and expand on all that, and in this context I invite Your Honours to pay regard to the case at tab 29 that I referred to, the *Alberta (Ministry of Justice and Attorney-General) v Squire* [2012] ABQB 194, the analysis there is helpful to counterbalance to the approach adopted by the Court of Appeal. So that covers off that aspect of the analysis.

I want to turn now to a matter at page 22 that the Commissioner places great weight on, the previous exclusion ruling and, of course, it was a theme of the debate in yesterday's case. Now first off, again, I'm going to take a little, if I may, a little digression back into what section 30 does in a criminal case in this area, and that involves me taking Your Honour to the two cases mentioned at page 23 of the submission, *Clark v R* [2013] NZCA 143, (2013) 26 CRNZ 214, and in the footnote, footnote 73, *JF v R* [2011] NZCA 645.

As I note at the top of page 23, the Court of Appeal in our case at paragraph 27 placed heavy reliance on the earlier exclusion of the challenged evidence, reasoning exclusion is the appropriate vindication of the breach. Mr Marwood's already enjoyed that vindication. He's got a discharge and that has returned him to the position he would've enjoyed but for the unreasonable search. And what I submit there is that that is incorrect, with respect. The earlier exclusion and discharge has not returned the appellant to the position he would have enjoyed but for the unreasonable search because he now faces the CPR Act application relying on the unlawfully obtained evidence. The position he would have been in had the unreasonable search not occurred at all is that that evidence would not be available to be relied on in the present forfeiture application. So it's quite erroneous to submit that it returned him to the position he would have enjoyed but for the unreasonable search.

Secondly, para 91, and I anticipate you'll hear from Mr Speed about this. The already vindicated approach takes no account of the position of the second and third respondents and their rights were, likewise, breached. So there is the entire dimension that, particularly where there's a trust involved or a spouse or partner with interest in the proper, or some of the seized property, who doesn't get vindicated, what do you do about that?

And thirdly, I submit that the decision in *Clark* is problematical, and I'm going to critique that decision despite the fact that two members of the Court in *Clark* in front of me, but I submit that the earlier decision of *JF v R* is actually correct and the *Clark* decisions, rejection of that. Its approach, with respect, is based on an incorrect interpretation of section 30.

Let's go to the section 30 and the comparable provision of subsection (3) which is (f) that we're concerned with. Now I just put to one side for the moment that it doesn't logically follow that subparagraph (f) is directly applicable to a civil case because literally it's not. At best it's available by analogy. But what (f) says in relation to – (f) is reached, along with

subsection (3), is reached when exercising, when engaging in the balancing exercise once there's been a finding in propriety and I think both *JF v R* and *Clark* accept that the exercise must occur in the context of the case that is before the Court. So it's a reassessment of admissibility. It's a fresh balancing in the context of the case that the Court is dealing with, which is quite plainly correct on the interpretation of section 30. So what (f) says is, "Where there are alternative remedies to exclusion of evidence which can adequately provide redress," so it's a present tense issue and it only looks at alternatives to the exclusion of evidence which can adequately provide redress. So it's not a question of saying, "You've had an exclusion," because a prior exclusion is not an alternative remedy to exclusion. So it's quite illogical and, with respect, wrong as a matter of interpretation to say that the previous exclusion can quality under (f) as an alternative remedy to exclusion to be seen as adequate and available redress to the defendant in the case then before the Court when it's applying the balancing under section 30.

So these points then are the reason why I submit that *Clark* is problematical. *Clark*, if we just go to *Clark* which is at tab 20 of volume 1, if we refer to paragraph 20, "In *JF v R* this Court held that, as a matter of principle, evidence ruled inadmissible in respect of one proceeding can be considered as propensity evidence in a subsequent trial. The Court rejected the 'once out, always out' argument and confirmed that in each case the Evidence Act calls for a fresh, proceeding-specific assessment of admissibility."

Then [21], "The Court in *JF* further held that because the assessment is proceeding-specific, the fact of the earlier exclusion is irrelevant and cannot be taken into account as a factor favouring admissibility in the later proceeding." And that is a correct statement and it's the point in which I am saying *JF* is actually correct and to be preferred.

[22], "We agree the analysis under section 30 is proceeding-specific," and so on, and then at 26, "Contrary to the view expressed in *JF* we consider that the fact of the earlier exclusion is also a relevant factor that may be taken into account. Section 30(3)(f) states that the Court may, in conducting a balancing

exercise," et cetera. "The earlier exclusion of the evidence is capable of being viewed as an alternative remedy within the meaning of those words. In this case, the earlier exclusion was a significant alternative remedy."

Now *JF* is the next tab, and the reference is there to paragraphs 19 and following. Page 655, under the heading "Once out always out", counsel for the defendant in that case argued that it was a "once out, always out" situation based, in fact, on section 7, she said. [19], "We reject this submission. It seeks to place an untenable interpretation on section 7," and I won't read the rest of that.

And then paragraph 20, "Section 30 applies." A fresh assessment of admissibility is required, proceeding-specific. There's the scheme of section 30 confirms that. I don't dispute that in terms of section 30 itself.

And then going on at 39, counsel for the defendant submitted that the prosecution's application to admit the propensity evidence is tantamount to a collateral attack on the prior ruling, contrary to the Bill of Rights, undermines the credibility of the justice system, points are largely answered by *Fenemor v R* [2011] NZSC 127, [2012] 1 NZLR 298, in this Court, fresh, proceeding specific assessment.

Then at [40], there's a summary of the Judge below's assessment which they agree with, and then at 40(f), this is the point at issue, "No alternative remedies are available: the proposed evidence is either admissible or inadmissible. However, Mr F has already been granted an appropriate and proportionate remedy in that the evidence was ruled inadmissible." Then they say, at [41], "We do not," a few lines down, "We do not agree with the Judge's reasoning on factor (f)," I have just read out. "The proceeding specific assessment mandated by *Fenemor* makes the earlier exclusion of the propensity evidence irrelevant. That earlier exclusion therefore cannot be weighed as a factor favouring admission in this proceeding."

WILLIAM YOUNG J:

They don't really engage with the point made in *Clark* that that could be seen as an alternative remedy. I mean, they obviously don't agree but they don't explain why it's not properly seen as an alternative remedy.

MR HARRISON QC:

Well, they don't, certainly they don't spell it out but the reason why they don't agree is the interpretation argument, I submit. The interpretation argument that I put forward when I went through (f) was that it –

ELIAS CJ:

So it's proceeding specific, as they say?

MR HARRISON QC:

Well, they say it's proceeding specific but also it's an alternative. Exclusion of evidence in a prior proceeding cannot be an alternative remedy to exclusion of evidence in this proceeding because it's a fait accompli and not within the contemplation. It can –

GLAZEBROOK J:

Well, does it matter, because the Court can take into account other matters.

ARNOLD J:

Exactly, yes.

GLAZEBROOK J:

And one matter might be taken into account is whether a remedy has already been given for the breach. Say the remedy wasn't exclusion of evidence but merely a declaration because that was thought to be sufficient vindication, because the idea is have you had sufficient vindication for the breach, and if sufficient vindication of the breach is not to face criminal proceedings then why can't that be taken into account, assuming that we're looking at these factors in any event? Whether it would be determinative would be –

MR HARRISON QC:

Yes, I understand the point. I understand the point. My point is that it cannot be taken into account under (f). Stage –

GLAZEBROOK J:

Well, I actually think that's probably right, I agree.

MR HARRISON QC:

There's several steps to the argument. One, it cannot be taken into account under (f). Two, yes, I accept that subsection (3) says, "Among other matters," but the fact that (f) expressly addresses the issue in the way it does makes it difficult to rely on something which fails to qualify in terms of (f), namely the earlier exclusion, under the "amongst other" –

WILLIAM YOUNG J:

That's because of the present tense. So that's because of the use of the present tense.

GLAZEBROOK J:

Yes.

WILLIAM YOUNG J:

The whole argument is, is – right.

MR HARRISON QC:

Yes, it's the present text but also the – the Court is saying, "Well, we're faced with the possibility of giving this defendant an exclusion remedy. Well, let's see, is there any other way of dealing with this now? Is there any other remedy currently available to him now which is an alternative to exclusion?" And you can't just say, well –

GLAZEBROOK J:

A declaration that it was illegal is adequate because of the previous vindication that's already been given.

MR HARRISON QC:

Yes. I don't go so far as –

GLAZEBROOK J:

You don't have damages all over and over again, so…

MR HARRISON QC:

Well my submission, the *JF* view is the better view but the fallback – and it's a little artificial because, of course, the section 30 analysis is only applicable, at best, by analogy here, so it's not as if I can – it's not a slam dunk –

GLAZEBROOK J:

Well a reduction – another remedy may be a reduction in the amount of compensation that would otherwise have been available.

MR HARRISON QC:

Under the Criminal Proceeds?

GLAZEBROOK J:

Effectively a *Baigent* damages.

MR HARRISON QC:

A *Baigent* set-off against the… Yes, whether that is a possibility against the express wording of the CPR Act as to the mandatory nature of the forfeiture order is probably problematical.

GLAZEBROOK J:

It would have to a *Baigent* damages claim which would then be offset but…

MR HARRISON QC:

Yes.

ELIAS CJ:

There is a danger in looking at things too much through the prism of the person whose rights are infringed because there is tainting of the court conceivably in some of these matters which bothers me a little bit in terms of saying you've had sufficient vindication. The courts, themselves, are bound by the Bill of Rights Act and if there has been an egregious breach, I'm not sure it all needs to be weighed in this sort of way.

GLAZEBROOK J:

I wasn't –

ELIAS CJ:

No, I realise that.

GLAZEBROOK J:

This I don't see as a particular egregious breach, unlike the case yesterday. In fact, I'm not sure I would have seen it as a breach necessarily at all but…

MR HARRISON QC:

With respect, I'd quarrel with that. It's an illegal invasion of a dwelling and I'm not sure that there is a –

GLAZEBROOK J:

Well, that depends on whether you think there was adequate information in the warrant application and for myself, probably, the only deficiency I would think was of any moment is the fact that they didn't give the age of the convictions. But it is a bit of a coincidence that somebody thinks to ring up the police about somebody who lives – about an address who has had previous convictions.

MR HARRISON QC:

Well yes. Is there a meaningful distinction to be drawn from an ad hoc, in person warrant list entry on property and an entry on property pursuant to an invalid warrant, and a search warrant is either valid or invalid.

GLAZEBROOK J:

No, I'm suggesting that the warrant was not invalid.

MR HARRISON QC:

Well let's not go there, Your Honour. It's been conceded at every –

GLAZEBROOK J:

I understand that, so…

MR HARRISON QC:

– at every point and it's – there are not degrees of invalidity here.

GLAZEBROOK J:

But in any event if you have a warrant that could have been fixed up outside because the police did have information, that seems to me slightly different from a situation where there was an egregious breach as in yesterday's case.

MR HARRISON QC:

Well, we've got a system –

GLAZEBROOK J:

And you do look at the seriousness of the breach when you're looking at those factors.

MR HARRISON QC:

My recollection is that Your Honour authored the leading judgment in *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207, or certainly featured in it, about adequacy of information and checking anonymous information and, I mean, the Commissioner has not sought to challenge, at any stage of this proceeding, the assessment that the warrant was invalid and the search unlawful. But the warrant application, itself, is at – I may be just buying into a packet of trouble and debate that I shouldn't but the warrant application is at tab 8, volume 2 of the case and it's all on page 59 basically. You can ignore

page 60 which is simply the recital of a belief. That's the sum total of it, those 10 paragraphs and they were rightly criticised in the ruling of Judge Bouchier, which is at tab 9. She went through them. It's a very slim little set of assertions with no grounds for belief. It was insufficient basis for the warrant and the police must be taken to know the law as laid down in *Williams* and in that sense they are deemed to have knowingly fallen short by a large measure. So I don't accept –

ARNOLD J:

Well, I'm not sure "by a large measure". I think the District Court Judge accepted that they had reasonable grounds to suspect but not reasonable grounds to believe and, of course, there is a difference as *Williams* points out in those two concepts, suspicion and belief, but it's reasonably fine-grained, isn't it? Which is not to say they didn't fall short, in other words it wasn't a legal warrant, but the nature of the underlying error, I must say, seems to me to be much less significant than what occurred in yesterday's case.

MR HARRISON QC:

Well, it was a, with respect, in terms of the principles governing applications for warrants, and I think was to a local deputy registrar or something who wasn't going to, you know, the onus was on the police here, it was cleanness, in my submission. This application fell short by a clean and clear margin of error therefore the warrant's invalid and therefore the search was unlawful. There should not be a kind of…

WILLIAM YOUNG J:

You say that this is as good as a mile?

MR HARRISON QC:

Yes, in effect, for a search warrant for a dwelling.

GLAZEBROOK J:

But that's not how section 30 works because you look at the seriousness of the breach and if you just say, "Well, it doesn't matter if it missed by a hair or if

it missed by five miles or if the police didn’t care at all, the seriousness of the breach is the same because it was an illegal search.” That just doesn’t seem to me to fit within section 30 because that’s the whole point about the balancing act.

ELIAS CJ:
Unless section 30 is interpreted in terms of the type of breach rather than what lies under it. If you have an invalid search warrant, that might measure up more in the scale of seriousness if executed in the context of a home, I suppose?

MR HARRISON QC:
And taking that up, subsection (3)(a) refers to the importance of the right breached and the seriousness of the intrusion –

GLAZEBROOK J:
Well, exactly, which is why I don’t know that it actually, the seriousness of the breach can mean the same thing as the importance of the right. Obviously, the right breach was important.

MR HARRISON QC:
It’s the importance, as I was going to say, the importance of the right breached by the impropriety. The impropriety is the illegality of the warrant and the seriousness of the intrusion on it, being the right breached. So the focus is on the section 21 right and the intrusion is the intrusion of the dwelling, so it’s not really a direct focus, if a focus at all, on the degree of invalidity of the warrant that led to the illegality of the intrusion. It’s not – so I do not resile from submitting that it’s not appropriate to adopt the kind of approach to say that, “Well, it was only a near miss,” a near-miss warrant. That is relevant to the question whether the impropriety was deliberate, reckless or done in bad faith, that – under (b).

GLAZEBROOK J:

Well, I'm not sure, you could have a near miss done in bad faith, couldn't you? You could have a near miss done in bad faith.

MR HARRISON QC:

Well, I'm not suggesting there's bad faith here. I'm saying it's –

GLAZEBROOK J:

No, no, I understand that.

MR HARRISON QC:

If you look under (b) at the nature of the impropriety, deliberate recklessness, so it comes in under there, but the intrusion on the right which I'm emphasising is a different consideration again. All right, so anyway all of these has been in the context of section 30.

I just wanted to say, and I'm very nearly finished, I think, the – as much as I would like to, I don't argue this case on a "once out, always out" basis but, equally, I don't accept the way the Commissioner encapsulates the issue simplistically and, with respect, really by means of sloganeering as a substitute for real analysis. You can't just say Mr Marwood's rights have already been vindicated or impropriety should not operate to exclude evidence in perpetuity.

The position here is what is operating in perpetuity is the illegality of the search. Unless – I think it may be in *Clark* that the Court says the Crown could re-visit the earlier finding of illegality. It's not necessarily bound by the earlier finding and I don't want to go there, but that's not the case here. Unless there is a formal re-visiting, the illegality exists in perpetuity, and nor is it true to say that an exclusion in this case means the evidence is excluded in perpetuity, or what's that lovely phrase, something about sacred and something or other.

ELIAS CJ:
Inviolable.

MR HARRISON QC:
Sacred and in excess by – I suspect that's right, and I quote out of context but –

ELIAS CJ:
The US context.

MR HARRISON QC:
Yes, and from one of Your Honour's judgments.

ELIAS CJ:
That's fruit of the poison tree stuff I think.

MR HARRISON QC:
Yes. My point is that I only say that to proceedings specific assessment and it may be that – it's not in law inaccessible and perpetuity. It's been excluded once. If it's excluded in this proceeding, it doesn't mean that it's excluded in perpetuity, other than maybe in practice, but not in law. But the reasoning in that *Alberta* case, I submit is, is strong and valid in rebuttal of this kind of argument. It's not "once out, always out" in law but in practice, when the Crown wants to re-introduce the evidence in this context, it may boil down to that.

All right, so I think that's probably everything. I did have something to say about the Law Commission history but I might let my learned friend get on with his submissions and, obviously, I have a right of reply.

WILLIAM YOUNG J:
Can I ask you a question which you may want to deal with in reply? Say there was a single hearing in relation to the exclusion of the evidence in the criminal proceedings and a strike out application or something similar in relation to the

forfeiture proceedings, might it have been open to the Judge to say, well the remedy, I think, is one or other but not both?

ELIAS CJ:

Too much vindication?

WILLIAM YOUNG J:

Yes, yes. Enough vindication is to exclude the criminal, or enough vindication is to exclude the civil proceedings.

MR HARRISON QC:

Well, I submit this has to be looked at from the defendant's perspective in the sense that the defendant can't control in order in which the Crown –

WILLIAM YOUNG J:

No.

MR HARRISON QC:

– comes at, him or her. At the end of the day the hypothetical Your Honour's posed seems to me to be unlikely and, with respect, highly unworkable that you'd have a criminal proceeding and a civil proceeding being addressed jointly. The problem is that in practice one or the other proceeding will proceed and the Judge here, it was a criminal proceeding but only against Mr Marwood and we now have a civil proceeding against more defendants than Mr Marwood and the Court has to grapple with the balancing exercise if there's a power to exclude on that basis.

ELIAS CJ:

You could have serial criminal proceedings, too, based on the same evidence. Perhaps if death intervenes and a subsequent murder charge is preferred but there's been an earlier charge, it's not very attractive to think that the sequence in terms of the seriousness of the offending might mean that in one context exclusion would be – I suppose that's available on the legislation but anyway. But you could have serial criminal prosecutions.

MR HARRISON QC:

You could, and my submission is that the *Fenemor* approach applicable to propensity evidence where the fact that it was excluded earlier on is not appropriately applied to, by analogy, to where you've had an earlier exclusion of improperly obtained evidence, is that there are different factors in play when the original, the original exclusion was a Bill of Rights breach, say, as against merely an exclusion for some other reason. That's a distinction which ought to be made in this kind of sequential case scenario.

In any event, unless Your Honours have any further questions I'll conclude my submission.

ELIAS CJ:

No, thank you. Now, Mr Speed, are we going to hear from you?

MR SPEED:

Yes, but I'm the second respondent so I was anticipating being heard after Mr Downs.

ELIAS CJ:

I would have thought that you go because yours is the same case as the appellant's case. I think it would be more appropriate to take that sequence, thank you.

MR SPEED:

Yes, I'm entirely happy to do that, yes. May it please Your Honours, as counsel for Ms King, who was the partner of Mr Marwood and was present during the unlawful search by the police, I would – the position from her point of view is that she has suffered an equal if not greater wrong at the hands of the police by the exercise of the unlawful warrant and the unreasonable search, but she received no remedy. She received no remedy from Her Honour, Judge Bouchier, because, of course, she wasn't charged in the offending, but as a result of these proceedings her right under the Bill of Rights Act still remains and it is a distinguishing feature, if you like, is that she

has had no remedy, and so that needs to be – wasn't really mentioned at all in the Court of Appeal decision, no mention at all of her rights or even any recognition of her rights. She's hardly, if anything, I don't think she's even mentioned in the Court of Appeal decision yet we appeared as a party and sought the same – and responded to the Crown appeal on the same grounds. So that's, from her point of view, the distinguishing feature on the facts.

So the extent that you've heard argument from my learned friend, Mr Harrison, I don't really want to add anything more to the substantive arguments that he's already advanced. So unless there's something – I've obviously made some points which I hope might assist the Court in considering the arguments advanced by Mr Harrison on behalf of the appellant, but I didn't really want to add anything else to the discussion that's already been advanced, except possibly – well, I was going to say something about the warrant and the arguments which have been advanced perhaps in terms of section 30, but having opened my mouth I think I possibly should just leave the argument there and not try and take that point any further, unless there's anything that – any questions?

ELIAS CJ:
No, thank you, Mr Speed. Mr Ryan, did you have anything to add for the Perrin Trust?

MR RYAN:
With respect to the Crown, the Court of Appeal noted at paragraph 17, and that's at page 43 of the casebook, that the Commissioner's application was deficient. The Commissioner sued the Perrin Trust. It's not a legal entity and the beneficiaries of the Trust have an interest.

I've spoken to my friend from the Crown. No actual re-pleading has taken place, however, on behalf of the beneficiaries of the Trust, we rely and support the submissions made by Dr Harrison. As the Court pleases.

ELIAS CJ:

Thank you very much. Is it all right to go ahead now Mr Downs?

MR DOWNS:

If Your Honour pleases? If I might just have a moment just to establish myself?

ELIAS CJ:

Yes, organise yourself.

MR DOWNS:

Yes, may it please the Court. This case raises, with respect, a difficult issue as to whether there is a jurisdiction to exclude evidence in a civil proceeding and, if so what that jurisdiction is and then, of course, if there is, whether it should be exercised in relation to the appellant and the other respondents.

Now I propose to deal with the first issue for most of the respondent's because that's the significant one as to principle. And as to that, the starting point, to borrow Your Honour, the Chief Justice's phrase, and we respectfully submit, "The end point is the Evidence Act itself."

WILLIAM YOUNG J:

Can I just ask you whether that is necessarily so? If there's a breach of the Bill of Rights and the Courts have the ability to provide a remedy, couldn't they just do so directly by saying well, to the extent to which this proceeding relies on the search, it can't proceed without engaging with the Evidence Act and the interpretive issues that we've dealing with?

MR DOWNS:

Forgive me, Your Honour means stay the case?

WILLIAM YOUNG J:

Yes, stay the case or give a direction as to how it's to be conducted.

MR DOWNS:

Yes, well, there's no contest that Courts obviously maintain their inherent powers and by virtue of those they necessarily maintain the ability to stay a case and that's criminal or civil, but the difficulty as we apprehend it, is that Parliament appears to have intended that improperly obtained evidence would be admissible in civil proceedings and that there wouldn't be a jurisdiction to exclude it.

WILLIAM YOUNG J:

That's not necessarily addressed to a situation where the plaintiff is the Crown. I mean it's one thing for the Courts to say well, litigation between private parties, we're not that interested in how the evidence came to be here. We're really interested in the evidence, but it's not entirely clear to me that that's so where the Crown is the plaintiff.

MR DOWNS:

Yes. May I address this question, hopefully, helpfully but by reference to what His Honour, Justice Simon France, has said, at least on this broad topic by reference to the supplementary bundle which is described as such?

ELIAS CJ:

Could I just flag two things? One, to push the Courts to exercise a stay jurisdiction when they could exercise a lesser, a less intrusive jurisdiction, an exclusion of evidence is a bit odd. The second thing is surely there is some case law in purely civil cases where the Crown isn't a party, where perhaps evidence has been obtained in breach of confidence as to use of that evidence without staying the whole proceeding because it's not significant enough in the overall scheme.

MR DOWNS:

I do propose to address Your Honour's concern. I wonder if I might deal with Justice Young's –

ELIAS CJ:

Yes, that's fine. I just wanted to flag it. Yes.

MR DOWNS:

I'm obliged. So at page 77 of the supplementary bundle we find a case called *R v Foreman* HC Napier CRI-2006-041-1363, 13 April 2008. I should express at the outset it's a criminal case, so it's utterly familiar territory, but it's post-Evidence Act, and in that particular case there was evidence that the Crown wanted to adduce that the defendant challenged, and he contended that that should be excluded as an abuse of process, and that's encapsulated at paragraph 27 of the case which is at page 77 of the supplementary bundle, and this is His Honour, Justice Simon France, at paragraph 28. "As I indicated to counsel, I doubt that there is any longer a capacity to exclude evidence because its admission would be an abuse of process. No such residual discretion is accorded to a trial Judge by the Evidence Act 2006, or to my knowledge any other Act. The circumstances that might make admission of evidence an abuse may well engage another exclusionary rule, such as the unreliability or the improperly obtained evidence rule. But a statutory basis for exclusion is required. Of course, the point should not be overstated. If an abuse of process truly arises, the capacity to stay a trial still exists. And as noted, there may well be overlap with recognised bases for exclusion." So –

GLAZEBROOK J:

That's just an assertion, isn't it? I mean, why does there have to be a statutory basis for abuse of process? It's the Courts controlling their own processes, isn't it?

O'REGAN J:

I don't think he is saying that though, is he? He's saying there's a statutory basis for exclusion but not for abuse of process, I think.

MR DOWNS:

Yes. It's what we apprehend the Judge has –

GLAZEBROOK J:
But why – well, I understand that but why if – it's really coming to the Chief Justice's point, why do you have to stay it rather than merely saying that that evidence cannot be relied upon, or in the case of, say, *Tranz Rail*, Commerce Commission. You must return that, so then you're not going to be able to rely on it.

MR DOWNS:
Well, there are two responses. One is a practical response which perhaps I'll advance very briefly, but the second is concerned with the statute itself and if we look at that, perhaps the relevant starting point here is section 11 of the Evidence Act.

GLAZEBROOK J:
No, no, but sorry, I thought you were saying – obviously you've got your whole argument is based on the Evidence Act being a code in this so I understand that argument.

MR DOWNS:
Yes, mmm.

ELIAS CJ:
But you're acknowledging that there still retains an inherent jurisdiction to stay proceedings as abuses of process.

MR DOWNS:
Yes, and to the extent that our written case could have been construed as suggesting otherwise I –

ELIAS CJ:
No, no, I think that it was quite clear that it was but my question is, well, why? What's the reason that there would be the greater power preserved, more intrusive power, and not the lesser?

MR DOWNS:

Well, I appreciate that this may not find favour but it appears that Parliament has presupposed that there isn't a need to exercise that power in relation to the civil jurisdiction and that's why there's no provision in the Evidence Act for it, and I respectfully advance the point that the choice appears to have been utterly deliberate. I mean, if we look at the Law Commission's materials, for example, it is clear that the Commission considered that improperly obtained evidence would be admissible in a civil case because it said so itself at page 1008 of the bundle. I should add by way of context, the Law Commission's report, or one of its two reports in relation to the draft Code that became the Evidence Act, and there's this observation at –

ELIAS CJ:

Sorry, what page of the bundle?

MR DOWNS:

Forgive me, Your Honour, it's page 1008.

ELIAS CJ:

That's volume 2 is it?

MR DOWNS:

No, it's the joint –

GLAZEBROOK J:

Tabs are easier if you could –

MR DOWNS:

I'm sorry.

WILLIAM YOUNG J:

Tab 37.

O'REGAN J:
Tab 37.

ELIAS CJ:
It's volume 2. Thank you, tab 37.

MR DOWNS:
Yes, tab 37, and we'll find there at [C152] this observation, "Improperly obtained evidence is admissible in civil proceedings subject to relevance and the general exclusion rule in section 8." And if we look at the like commentary in relation to section 8, what we'll find is that the Law Commission concluded that section 8 should operate in civil cases and to that extent it considered that it was clarifying what was the otherwise equivocal position of common law.

So to return to the entirely understandable concern emanating from the Bench as to why couldn't we exercise a jurisdiction that is necessarily available to Courts in order to preserve the interests of justice? The answer on the respondent's case necessarily is that Parliament appears to have considered that there would be no need for the exercise of that jurisdiction in relation to the exclusion of evidence but that, obviously, if there was an extreme case – I think my learned friend postulated, I think, a plaintiff using torture and then seeking to adduce evidence in a civil proceeding. The, of course –

ELIAS CJ:
So why is that an exemption on your argument?

GLAZEBROOK J:
That would be a stay then.

ELIAS CJ:
There'd be a stay.

MR DOWNS:

There would be a stay.

GLAZEBROOK J:

But if the case is otherwise sound without that evidence or, at least, why would you stay it?

MR DOWNS:

Well, again I acknowledge the concern –

GLAZEBROOK J:

I mean you may stay it if it was the state torture because you may say, well, look I'm sorry. I don't care what your case is like but if you, state, try and – but I'm not sure that you would necessarily do that in the case of an individual.

MR DOWNS:

I can't help but wonder, and this is the second point I foreshadowed, is to whether the problem is, perhaps, more practical than real. I mean, obviously, in approaching this case, we sought to identify reported instances in which Judges in the civil jurisdiction were confronted with applications to exclude improperly obtained evidence and were moved to so do. We came up empty-handed.

ELIAS CJ:

That's why I raised breach of confidence because that seems to me the more likely area in which that would arise in civil proceedings, but why it's so acute here is we're getting a number of legislative provisions which are labelled civil.

MR DOWNS:

Yes.

ELIAS CJ:

So it's going to cut closer to the sort of case in which these things have arisen more regularly.

MR DOWNS:

And as to that, although it's not in the bundle because it's of some peripheral relevance, we respectfully observe that the Law Commission has completed an exhaustive survey of the civil pecuniary penalty regime and it's concluded that what is available within that area should remain civil, and concludes that there have been no difficulties such as to justify approaching the issue by reference to making matters such as this a criminal proceeding. That's the New Zealand Law Commission Report 133 –

GLAZEBROOK J:

Well, more than deal with this particular point in terms of improperly obtained evidence, because they may not because they may assume, like in *Tranz Rail* that it wouldn't be able to be used because the Commission had been told to send it back.

MR DOWNS:

They deal with it to this extent, Your Honour, in that they conclude that there should be what they call a pecuniary privilege which they see as being analogous to the privilege against self-incrimination. In other words, so that the Commission has recognised that given the possible penalties in this area, a defendant who might otherwise have to pay a very large sum of money to the Crown should be entitled to decline to answer a question on the basis of what the Commission promulgates as a pecuniary privilege.

ELIAS CJ:

Sorry, what are we to make of that?

MR DOWNS:

Well, I was making the observation that to the extent that this case is seen to give rise to features that may be draconian, we could have reference to the analogous work of the Law Commission in the civil pecuniary penalty area. And the Commission has expressly concluded that that area is working satisfactorily in the main.

GLAZEBROOK J:

Well, what about my point about *Tranz Rail* because they may well have assumed that if there was an invalid search warrant, as there was in *Tranz Rail*, that it wouldn't be able to be used in a pecuniary penalty because *Tranz Rail* would suggest that.

MR DOWNS:

Well, I can only repeat that we obviously considered the reports with reference to the issue of improperly obtained evidence and couldn't find anything other than the promulgation of a pecuniary, forgive me, a penalty privilege that it considered ought to be applicable.

GLAZEBROOK J:

So you didn't find they'd actually considered it and they may have been under the misapprehension that it wouldn't be admissible on the *Tranz Rail* basis because it would have been taken out of prosecuting in the wider sense the – because obviously it's a civil proceeding but the prosecuting agency's hands.

MR DOWNS:

Well it's always possible that a commission or body is under a misapprehension. It's just that if we come back to the Law Commission report in relation to this Act, it's clear by reference to the paragraph I read earlier –

ELIAS CJ:

It's a pretty elliptical and slight reference to a very significant matter.

MR DOWNS:

Well, I'm bound to observe that if we just pause for a moment and imagine we were not seized of the Evidence Act but trying to approach the case by reference to antecedent common law, we'd be having, I regret, very much the same conversation in which everyone would be searching frantically for cases in which a jurisdiction to exclude improperly obtained evidence had been exercised –

ELIAS CJ:

But we would really simply be looking for a principle, and the principle would be, surely, that the Court must be able to respond to control its own processes, unless you're right that the Evidence Act occupies the field, and I'm not really sure how useful it is to roam around, particularly in this area of the legislative materials to the Evidence Act, except in so far as they actually do provide substantive explanations for lines, unmistakably, picked up by Parliament, but you know that the process that was followed in enactment of the Evidence Act makes all that really quite problematical because there was such development. So aren't we really stuck with the Act and really this argument should principally be addressed to us by reference to the provision of the Act?

MR DOWNS:

And we certainly propose to venture into that territory, but I would observe that when issues of admissibility have arisen to this point, this Court and Courts below have considered that they've received considerable assistance from looking at what the Law Commission intended in relation to a particular issue –

ELIAS CJ:

Well, I think it's because sometimes it is illuminating but if you're simply – the submission that I was hearing is that we need to be guided by the intention that the Law Commission was operating under and I'm not sure that that's right really.

Anyway, we should probably take the lunch adjournment and resume at 2.15, thank you.

MR DOWNS:

Yes, as the Court pleases.

COURT ADJOURNS: 1.00 PM
COURT RESUMES: 2.17 PM

ELIAS CJ:
Yes, thank you, Mr Downs.

MR DOWNS:
Yes, may it please the Court, just prior to the luncheon adjournment the respondent was invited to turn to the applicable provisions of the Evidence Act and so we do that now. The most important of these, I respectfully suggest, is section 7 itself which, as it announces, contains the fundamental principle that relevant evidence is admissible and subsection (1) is of significance for it provides that, "All relevant evidence is admissible in a proceeding except evidence that is inadmissible under this Act or any other Act, or excluded under this Act or any other Act," and then it goes on to provide that –

ELIAS CJ:
Well, that's interesting. I haven't sort of focused on this but this really does draw a distinction between inadmissibility and exclusion, the argument that was being put to us by Mr Harrison.

MR DOWNS:
Well, I have to confess that I was venturing it for another reason and, Your Honour, that is because it appears at least to the respondent's side to make the issue of admissibility a statutory concern.

ELIAS CJ:
Statutory. No, I understand that submission but the other – although if there is a distinction between inadmissibility and exclusion, you could have evidence that is not inadmissible under this Act or that is admissible under statute which may nevertheless be excluded.

MR DOWNS:

Well, except – yes, I understand the issue in theory except that the enactment appears to provide that if it's to be excluded it's to be excluded under this Act or another.

ARNOLD J:

Except if you were acting under section 11, an inherent or implied power, that is provided for in the Act.

MR DOWNS:

Yes, and I appreciate the issue here. With respect, it's a difficult one because it –

ELIAS CJ:

Sorry, can I just – concluding on the admissibility exclusion thing, there is some evidence that is excluded by operation of legislation. That's not to say that you cannot exclude by legislation. So it's admissible, it remains admissible if it's, unless it's inadmissible under legislation or excluded under legislation, leaving open the, on this argument, leaving open the fact that the evidence is admissible but may nevertheless be excluded through perhaps judicial determination, not by statute.

MR DOWNS:

Yes, well, I suppose it's that particular issue that's the vexing one because the question then becomes is section 7 to have pre-eminence? Is it to be understood as creating or essentially providing that hitherto the common law power of exclusion is now to be regarded as a statutory jurisdiction?

ELIAS CJ:

No, well, that's not what I was saying, but –

MR DOWNS:

No, no, I appreciate, I understand Your Honour's position is not that.

ELIAS CJ:

Well, and also why wouldn't you read the section like that if it has the effect otherwise on your interpretation of removing the inherent ability to exclude evidence?

MR DOWNS:

Well, that, of course, it of course is our submission that section –

ELIAS CJ:

But it's such an extreme position really.

MR DOWNS:

Well, it does leave open, I appreciate we're chasing our tail a little bit with this analysis, but it does leave open the ability of Courts to stay a case for extreme impropriety, so it's not as if we're contending that –

WILLIAM YOUNG J:

Why can't they stay part of a case?

MR DOWNS:

Well…

ELIAS CJ:

By excluding.

WILLIAM YOUNG J:

Well, it's just, I mean, they're just different ways of achieving a particular result.

ELIAS CJ:

Yes, getting to the same thing.

GLAZEBROOK J:

Also you can't rely on the evidence and therefore there's no point calling it, ie, a sort of – perhaps in the case of torture, yes, it's not excluded under

section 29 but if you put it in the Court can't rely on it and therefore there's no point in putting it in. It's not that it's excluded, it's that the Court by virtue of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment can't rely on evidence given by torture, therefore it might be admissible but the Court can't rely on it so we're not going to hear it.

MR DOWNS:
Well, I understand the concern but I venture that we'd struggle to find a single example of this thing being exercised and no such –

GLAZEBROOK J:
Well, because, possibly because nobody has put forward evidence or we've just become a bit more attuned to torture in any event.

MR DOWNS:
So I was referring to the observation of His Honour, Justice Young, about whether there might be what was described as a partial stay –

GLAZEBROOK J:
A partial – no, no, sorry, I understand that.

MR DOWNS:
– and I was simply making the observation that whilst perhaps that exists in the realm of theory I venture that we can't readily think of an example in which that's occurred in practice, and the difficulty as we apprehend it is that section 7 is very much directed at the issue to which we're concerned, namely, is evidence admissible in the proceeding? It goes to the heart of the particular issue and so when we come to ask ourselves, as perhaps we must have to, does section 11 take precedence over section 7, there might be thought to be two difficulties. The first is that section 7 is expressed as being a fundamental principle that obviously touches upon all proceedings and secondly, section 11(1) provides that, "The inherent and implied powers of a Court are not affected by this Act, except to the extent that this Act provides

otherwise," and it may be thought that section 7 is a clear expression of when the Act provides otherwise.

GLAZEBROOK J:

But that can't be right, can it, because it says you take account of the purposes and principles set out in section 7. Well, if section, in subsection (2), so if section 7 says it's admissible anyway then I don't know why it's there.

MR DOWNS:

I have to push back a little for this reason. If we look at subsection (2), if we look at subsection (2) it says, "Despite subsection (1), a Court must have regard to the purposes and principles when exercising its inherent or implied powers," that is, those which are still available to a Court.

ELIAS CJ:

Well, what inherent or implied powers concerned with admissibility of evidence which is the whole burden of the Evidence Act could remain on your interpretation of section 7?

MR DOWNS:

Your Honour, forgive me, I missed the first part of your question.

ELIAS CJ:

Well, what inherent and implied powers in connection with admissibility can remain on your interpretation of section 7?

MR DOWNS:

Yes, well, we acknowledge, we acknowledge none.

ELIAS CJ:

But the whole Act is about admissibility, isn't it?

MR DOWNS:

Yes, and I suppose that's our point.

ELIAS CJ:
Well, then why –

GLAZEBROOK J:
Well, that's –

ELIAS CJ:
– section 11?

GLAZEBROOK J:
Yes.

MR DOWNS:
Well, we've already identified the issue which we see as being a serious one as to which of these provisions takes precedent.

GLAZEBROOK J:
Well, they're both there so normally both, if you have a provision in an Act, it has some meaning, and if section 11 on your interpretation has no meaning then that's a pretty good pointer to Dr Harrison's interpretation, I would have thought.

MR DOWNS:
I don't know that it's fair to characterise, as I say, and section 11 has no effect. What we have respectfully advanced is that section 11(1) makes it clear that the inherent and implied powers of a Court may be affected by this Act and if they are the Act prevails but to the extent that's not the position when they are exercised sections 6, 7 and 8 must affect their exercise. That appears to us to be what section 11 commands. But it's also to be read against section 7 which does appear to enshrine a fundamental principle that all relevant evidence is admissible.

ELIAS CJ:
I can't help thinking that reducing the principles of evidence in this way into an exercise in statutory interpretation misses a beat in terms of the response of law to do the fair thing in terms of adjectival law but it really is not very – it's not a very attractive argument, Mr Downs.

MR DOWNS:
Well, I have to confess it won't be the first occasion that's been said of me, and I doubt it will be the last either, but I should observe with more seriousness that the way of the common law world is to approach questions of the admissibility of evidence by reference to a code or a partial code, and necessarily that can mean that there is change from the antecedent common law position. I don't think there's anything controversial or antagonistic about that. And it just appears to us that section 7 enshrines a principle that evidence will be admissible unless it's excluded by this Act or any other and if we can't identify the requisite statutory provision then we're left with the proposition that the evidence is admissible.

ELIAS CJ:
And on the argument for the appellant, admissible but able to be excluded in the inherent jurisdiction of the Court?

MR DOWNS:
Well, yes, although I understand the appellant to say that he's agnostic as to whether we're concerned with sections 10, 11 or 12 and I think he advances them, any or each of them essentially in the round, and it's to that perhaps we might usefully now turn.

The second issue for consideration, of course, is if there is a jurisdiction how might it be exercised? But there then is an antecedent question as to what that jurisdiction looks like, or in other words what is it shaped by? Now I know that that might sound somewhat obstruse but it has significance because if the jurisdiction is, for example, to be seen as an extension of the Court's inherent power to deal with illegality, that may mean one thing. If on the other hand

this is a case in which the Evidence Act is seen as having a gap, a genuine gap, that may mean another. Put another way, the root by which we consider whether there is a jurisdiction to exclude evidence in a civil case may very well affect what that jurisdiction is like and how it operates in practice. So to hopefully explain that a little better, if, for example, the Court were of the opinion that this is a case involving a genuine omission and that it conceives that there should be a broad jurisdiction to exclude evidence, improperly obtained evidence, in a civil case, then it would appear to follow that the field is relatively open as to how that jurisdiction is exercised. If, on the other hand –

ELIAS CJ:
Sorry, the gap-filling jurisdiction?

MR DOWNS:
Yes. If, on the other hand, the Court –

ELIAS CJ:
Well, it couldn't be that open because it would have to be really no more than is necessary to plug the gap in the statute.

MR DOWNS:
Yes. I suppose the point I was hoping to make is that if we look at section 11, for example, the obvious example in which there might remain a jurisdiction to exclude evidence is when there has been an abuse of process and because of that it is, of course, open to the Court to conclude that abuse of process concerns should shape the way in which the jurisdiction is exercised so that, for example, if a court is confronted by what it considers, or finds, to be impropriety, there may be a distinction to be drawn between impropriety which has given rise to an abuse, an impropriety which is not so that the latter, for example, may not be seen as falling with inside of the jurisdiction of exclusion, whereas the formal would.

Now all of that is a very long-winded way of saying that if the jurisdiction is a broad one because the Act is seen as having a gap, it's more likely to be exercisable by reference to lesser impropriety as opposed to an abuse jurisdiction or a reserve power.

GLAZEBROOK J:

Where do you slot the Bill of Rights into that?

MR DOWNS:

Yes, well, unquestionably it's of significance, and we say that because the Evidence Act, apart from anything else, tells us that. We know, from both sections 11 and 12, that the purposes and principles expressed in section 6 have significance and, of course, section 6(b) says that we must concern ourselves with rules of evidence that recognise the importance of the rights affirmed by the New Zealand Bill of Rights 1990. So it's unquestionably part of the scheme but we do, respectfully, advance the position that we also know from both sections 11 and 12, and also because of section 10, which refers to the application of the rule in section 12 and thereby imports, albeit indirectly, sections 6, 7 and 8, that sections 7 and 8 must assume significance.

GLAZEBROOK J:

I was really asking – I think you were putting forward a sort of a back up position as I apprehend it in saying – well, trying to steer us away from an idea there's a whole gap there and therefore you have an open texture to say there might be something that is less open-textured and just related to abuse of process. So I was asking you about the Bill of Rights in that context.

MR DOWNS:

Yes, I see.

GLAZEBROOK J:

I mean I quite understand your main argument, or the one that you're maintaining that the highest level is the Evidence Act excludes it for civil, but if – or did I misapprehend what your –

MR DOWNS:

No, not at all. It's just that I should make clear that the respondent isn't seeking to advance either the section 10 approach or the section 1 approach, one over the other. I'm just trying to assist the Court –

GLAZEBROOK J:

No, I totally understand, but that was the context of the question.

MR DOWNS:

Yes. Well, one would have thought if the route is an abuse of process route, then we're probably concerned with the more serious breaches of the Bill of Rights.

GLAZEBROOK J:

Well, I was putting that to your friend this morning basically in terms of not seeing this. Obviously it is a serious intrusion.

MR DOWNS:

Yes, of course.

GLAZEBROOK J:

But not necessarily the most serious of breaches. Your friend, I note, was resisting that, and there are other ways of reading section 30 but, of course, it wouldn't be directly applicable, even if there was this jurisdiction.

MR DOWNS:

No. Well, to deal with this case just for a moment perhaps to illustrate the point, of course the breach was serious because any infraction of the Bill of Rights is by definition. But in so far as breaches go, it may be thought to be one of lesser seriousness. I mean the police had a warrant and I acknowledge a pre-*Williams* warrant in the sense of what's expected of them, but they had a warrant and if we stand back for a moment, and in another jurisdiction that would actually have operated to render the evidence

admissible in criminal proceedings. In the *United States v Leon* (1984) 468 US 897 tells us that good faith reliance on an ultimately defective warrant does not operate to exclude otherwise admissible evidence. And it's a useful reminder perhaps of the distinction between those cases in which there is a warrant and those cases in which there isn't.

ARNOLD J:
But just on the abuse of process, I think the Chief Justice commented earlier in the day that abuse of process sometimes is a description of the means by which the evidence was acquired. Sometimes it refers to, effectively, the court processes being the integrity often being suborned by the use of the material, and when you talk about abuse of process, are you talking about one or the other or both or does it matter?

MR DOWNS:
Well, I'm really talking about both and in the round. I'm not seeking to draw a distinction one as to the other.

ARNOLD J:
Right.

MR DOWNS:
But the reason for suggesting that there may be a difference as to what this jurisdiction looks like is that if we went to antecedent common law, we would tend to find that the abusive process jurisdiction tended to operate for the exclusion of evidence in cases of more serious illegality. It was seen, I venture, as a reserve power not to be exercised lightly but as necessary.

ELIAS CJ:
Does abuse of process, do those words appear in this statute at all?

MR DOWNS:
In the Evidence Act?

ELIAS CJ:
Yes.

MR DOWNS:
No they don't. Now that probably, albeit by a somewhat different route than I had anticipated, brings us to the second question, that is the exercise of the jurisdiction in this case.

As to that we've already made the observation that whilst the breach was serious, as any breach of the Bill of Rights is, it's a lesser example of its kind. We venture, too, it must be relevant, it must be relevant that Mr Marwood's rights in relation to section 21 have already been vindicated. Now that is, admittedly, not true of Ms King because, of course, she wasn't charged with any criminal offence and, hence, she's never been discharged either. But if we imagine Ms King bringing a *Baigent* action on the basis that her rights under section 21 had been infringed, it's possible that she might receive an award of damages as against a declaration, but it wouldn't be controversial to submit that any award of damages would be modest. It would in all probability be a case of the award being less than $10,000 and that has significance when we're talking about a statute which seeks to disgorge the proceeds of criminal offending because, of course, the Crown has acted in this case to do just that.

Now whilst I don't want to detain anybody with discussion as to whether the statute that is the Criminal Proceeds (Recovery) Act is civil or criminal or some hybrid creature, it is relevant that the Act expressly provides that these proceedings are civil and that it draws a distinction between criminal instrument forfeiture proceedings and profit forfeiture proceedings, the latter of which are civil and the former of which are criminal, and the reason why that assumes some significance is that in this particular case, although it's true that the Crown is in one sense seeking to be the beneficiary of its own illegality, there is the public interest in the effective enforcement of the Act and more particularly the removal of criminal benefits that the person ought not to have had in the very first place.

ELIAS CJ:

So what criminal benefits?

MR DOWNS:

Well, the allegation, of course, in this case that's yet to be tried is that Mr Marwood and Ms King had unlawfully benefited to the extent of some $334,000 from significant criminal activity.

ELIAS CJ:

I see.

MR DOWNS:

And so when we come to exercise –

ELIAS CJ:

Sorry, is that ever – all right, it's okay. I think I understand now.

MR DOWNS:

And my proposition is that when we come to exercise the jurisdiction that we assume exists for the sake of this argument, it is right to look at what the purpose of the application is just in the same way as if it were a truly criminal case we would say, "Well, Mr Marwood stands to be imprisoned. His liberty is at stake," and that's relevant to the remedy which he is granted by a Court.

Now my learned friend referred to a first instance Canadian decision called *Squire* but we would note that there is a different authority called *R v Daley* at tab 30, and that will be in the second volume of the joint bundle. The reason for referring to *Daley*, quite apart from it's the counterpoint to *Squire*, and we note from a higher Court, Canadian Court, is that it was seen there as being highly significant to the exercise required by section 24(2) of the *Charter* as to the appropriate remedy, that Mr Daley was not in jeopardy of conviction and that the Crown was seeking to do no more than to remove the proceeds of alleged drug-dealing offending from Mr Daley as against imprison him for that wrongdoing. That's expressed at page 879 of the bundle, "Another

circumstance to be considered is, as discussed above, no one's liberty is at risk in these proceedings. The outcome of these proceedings will not affect anyone's legal personal rights. The harm to Daley, if the evidence is admitted, would not be the potential loss of his liberty, but the failure to receive monies which the evidence shows have accrued as a result of criminal activity," and we respectfully exhort that reasoning as being applicable here.

Now the final issue that arises is what factors are relevant in this exercise. The submissions that the respondent has advanced thus far presuppose that section 30 of the Evidence Act could more or less be lifted into the civil proceeding at least when the civil proceeding is of this nature, that is one which in substance alleges the commission of a crime and necessarily the plaintiff, if one likes, is the Crown and a defendant is the defendant. But, of course, whilst that's an available response in a case such as the present, I wouldn't wish to necessarily suggest that section 30 is going to be apposite for other forms of impropriety involving wholly private litigants. It may be that there are other considerations that would need to be assessed as being relevant and appropriate, and I suppose to complete the circle that in turn comes back to what the jurisdiction is shaped by. If it's an extension of the abuse of process doctrine, it's possible that it might look a little different from a more broader set of criteria which treats this area as essentially one of legislative omission.

GLAZEBROOK J:
Although the abuse of process, possibly the section 30 factors might be more relevant, although it's hard to know because of abuse of process can be quite wide.

MR DOWNS:
Where we ended up in *Wilson*, I think I'm right to say, is that there was considerable agreement that factors such as identified in section 30 are relevant. They aren't necessarily exhaustive of the inquiry but a useful checklist of how that jurisdiction is exercised.

Unless there are further questions for the respondent, those are its submissions.

ELIAS CJ:

Thank you, Mr Downs. When there's room…

MR HARRISON QC:

I just want to briefly respond in relation to the second issue, the exclusion point. I think on the jurisdiction power to exclude point, enough has been said on both sides. So I'm really looking at my learned friend's written submissions from page 25 on, and I won't repeat what I have previously have said, I hope. I'll try to avoid that. But just looking at paragraph 62 where it's suggested that vindication has occurred already the exclusion of evidence in the criminal proceeding and dismissal of the charges. I mean, why is that so? Is that such an obvious proposition? There has been a remedy in one context but the mere fact that there's a remedy in one context should not automatically be assumed to be a vindication, an entire vindication of the breach in all contexts. So that's why I really, that point is part of why I was perhaps arguing that to look at it in terms of already vindicated is a substitute for analysis. It's not a really particularly helpful approach.

GLAZEBROOK J:

Although in *Clark* it's made clear it's only one factor and obviously if there hasn't been enough vindication then you would have more vindication in the current case.

MR HARRISON QC:

Yes, well, again there's always going to be two sides to that. The defendant to the civil proceedings in the position, Mr Marwood, is going to say, well, the invasion of my rights will only have been vindicated when the fruits of the unlawful search of my home are not being used against me by the very agency, the Crown that committed the wrong.

GLAZEBROOK J:

And that might the complete answer. There hasn't been enough vindication but to say it's totally irrelevant, what has already been given.

MR HARRISON QC:

No, I would like to argue that but all I'm submitting is that conceptually, as a tool of analysis of what should be the right or just result, to say sufficient vindication is an unhelpful exercise, I mean how long is a vindication? How big or wide is a vindication? You don't have – it's really not a useful concept to say sufficient vindication is only this much and any more is more than enough. To label the issue in that way isn't definitive.

The submission at paragraph 64 in terms of what's proportionate and the argument, in effect, is that it's disproportionate to exclude in civil proceedings and there is a more useful reliance on the availability of alternative remedies in a civil proceeding which is supposedly illustrated by the case law. I don't accept that, and one of the reasons why I don't accept it is the analysis of the CPR Act, which I engaged in at the outset. We still have a situation where it is the state attempting to take advantage of its own wrongful act and seeking criminal forfeiture. So this isn't just an ordinary civil action between private citizens and it is – the reliance at para 65 on *Solicitor-General of New Zealand v Cheng* CIV-2005-404-003834, 19 September 2007, and the reasoning of Justice Harrison there at [95] quoted, "Mr Cheng has other remedies. He may be entitled to take a civil action against the police. Whether or not he wants to avail himself is not material. The point is he is entitled to pursue a remedy."

That, with the greatest of respect, is a form of cynicism really, or it is a cynical proposition. If the remedy is unlikely to be availed of and is unlikely, as my learned friend seems to accept in this case, to produce any real result, he mentioned at $10,000 damages aware if you're lucky, that's cynical and it's not a meaningful, effective remedy to point to the possibility of a civil action and in my submission Justice Cooper was quite right in the approach he took to that.

So *Jones v University of Warwick* [2003] EWCA Civ 151, [2003] 1 WLR 954, not a state action, quite a different case, no Bill of Rights type breach, but nonetheless the English Court of Appeal came very close to excluding the evidence. That was under the express power under the UK Rules to exclude evidence.

GLAZEBROOK J:
Sorry, which case was the –

MR HARRISON QC:
This is *Jones v University of Warwick*.

GLAZEBROOK J:
Okay, yes, that's right, I remember the case.

MR HARRISON QC:
Yes, so that was under express power, a civil case and the facts are there. Agent poses as a market researcher and films the plaintiff who is suing the insurance company.

Right, now the only other point I think I want to make is the – no, there's slightly more than one. The suggestion at the top of page 29 is that the purpose of the profit forfeiture application is the withdrawal of ill gotten gains from respondents returning them to the position they would have been in. Now I don't want to get too technical about the CPR Act here but that is not what a profit forfeiture order application does, or not all that it necessarily does.

The Act deals with two types of civil forfeiture order as I understand it. There's the profit forfeiture order, which I have described in my submissions. There's the assets forfeiture order, which deals with tainted property. That's section 49. So recovering ill gotten gains, actually getting hold of the tainted property, that is the proceeds of crime, can be done and it should be

done under section 50, assets forfeiture order. And I just mention that because if you're looking at the balancing exercise in relation to a profit forfeiture order with the features I have identified, it's loose talk, with respect, to say that the evidence should be admitted because the purpose of the application is to recover ill gotten gains. That is not true of a profit forfeiture order, certainly not in terms of its direct application. It could have the indirect consequence of producing a result in relation to what is literally tainted property but that is not the mechanism under the Act for recovery of tainted property.

GLAZEBROOK J:

Well, money is fungible, though, and profit must be tainted if it's profit from crime isn't it? And just because you don't get the actual cash that was handed over, that's because money's fungible and you could never know what actual cash – although in some cases, of course, in Mr Daly's case it probably was the actual cash looking at – maybe I've missed your point.

MR HARRISON QC:

I mean I don't suggest it takes me too far but the point is it's not a direct mechanism. If cash is found and able to be shown to be the proceeds of sale of illegal drugs, that's tainted property and you can say that, if you apply for an assets forfeiture order in respect of that property, you are directly pouring back the substantial profits of the offending. Under a profit forfeiture order –

WILLIAM YOUNG J:

There may be more than the profits mightn't it? The drug dealer is found with $5000. He just affected the sale. Well that's, as it were, gross.

MR HARRISON QC:

Gross profits, yes, indeed, Sir, but the profit forfeiture order is, as I have tried to demonstrate, where you've got the substantial criminal activity. You show that the defendant has benefited from that activity and then the police specify a figure which the defendant then has to disprove, and it doesn't have to have increased the value of the property which they're trying to get their hands on.

So it's a slightly different calculus when you come to argue the balancing and it's not sufficient to say, as the Crown does in paragraph 72, that it's one thing for Mr Marwood to escape punishment. It's another thing for him to retain the substantial profits of his offending.

And it then – I'm very nearly finished. At [73], it's not true that the appellant's case presupposes that once exclude, always excluded, but nor is the converse proposition that once excluded, thereafter admissible, which the Crown appears to contend, fall true. So neither of those absolute propositions are, or ought to be, contended for.

And as I noted earlier, what does exist in perpetuity is the illegality and the illegal status of the original state action, and that's a constant.

And in terms of the Bill of Rights I just submit as strongly as I can that with Bill of Rights exclusion remedies, there should be no notion that they are finite, so you only get one shot at them. It's not like a turnstile where you pass through once with getting a remedy and that's it, and no matter what happens, no matter what the Crown throws at you after that, you never can do better than your original turn style remedy. In my submission that's the wrong way to approach it.

Now that is all I wish to say unless I can be of any further assistance.

ELIAS CJ:
No. Thank you Mr Harrison. I assume that other counsel have not got anymore. Thank you. Well thank you, counsel, for your help in this. We will reserve our decision.

COURT ADJOURNS: 3.01 PM