IN THE SUPREME COURT OF NEW ZEALAND

SC 50/2005
[2006] NZSC 33

	BETWEEN	ALAIN MICHAEL YVES MAFART AND DOMINIQUE ANGELA FRANCOISE PRIEUR Appellants
	AND	TELEVISION NEW ZEALAND LIMITED Respondent

Hearing: 22 November 2005

Court: Elias CJ, Blanchard, Tipping, McGrath and Eichelbaum JJ

Counsel: G P Curry and S L Cogan for Appellants
W Akel for Respondent

Judgment: 11 May 2006

JUDGMENT OF THE COURT

A. The Court of Appeal has jurisdiction under s 66 of the Judicature Act 1908 to hear an appeal from a determination of a Judge of the High Court on an application under the Criminal Proceedings (Search of Court Records) Rules 1974. The Court of Appeal was wrong to hold it had no jurisdiction and the appeal on this point is allowed.

B. The case is remitted to the Court of Appeal for determination of the appeal from the judgment of Simon France J dated 23 May 2005.

C. The respondent must pay the appellants $15,000 for their costs with disbursements to be fixed if necessary by the Registrar. Costs in the Court of Appeal are reversed in favour of the appellants.

REASONS

Para No

ELIAS CJ, BLANCHARD and McGRATH JJ

(Given by Elias CJ)

[1] Does the Court of Appeal have jurisdiction to hear an appeal from a High Court determination of an application under the Criminal Proceedings (Search of Court Records) Rules 1974? That is the single question addressed on the present appeal.

[2] Television New Zealand was successful in an application made to the High Court for authority to copy videotapes of committal proceedings held on a sentencing file in the Court.[1] The videotapes record pleas of guilty by Alain Mafart and Dominique Prieur to charges of manslaughter arising out of the 1985 sinking of the *Rainbow Warrior* in Auckland harbour.

[3] The video tapes had been held by the District Court Judge who heard the committal proceedings (and who had arranged for the recording to be made) and the Broadcasting Corporation of New Zealand (which had obtained a copy from the Judge). In judicial review proceedings brought by the appellants in 1987, Greig J made consent orders that the tapes "constitute documents within the meaning of s 182 of the Summary Proceedings Act 1957."[2] Greig J ordered, also by consent, that the tapes be transmitted to the Registrar of the High Court at Auckland as part of the record of the committal proceedings. Section 182 requires the Registrar of the District Court on a committal for trial or sentence to send any depositions, documents or exhibits to the Registrar of the High Court. The tapes had not originally been forwarded as part of the record transmitted under s 182 when Mafart

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1 *TVNZ v Mafart and Prieur* HC AK S89 and S90/85 23 May 2005 (Simon France J).
2 Order of Greig J in HC AK CP 261/86 15 October 1987.

and Prieur were committed for sentence to the High Court. But implementation of the consent orders meant that they joined the other deposition material required by s 353 of the Crimes Act 1961 to be preserved by the Registrar of the High Court. The terms of the consent orders required, "for the purposes of rule 2(4) and (5) of the Criminal Proceedings (Search of Court Records) Rules 1974", that notice be given to the appellants' solicitors of any application to search, inspect or copy any part of the record of the committal proceedings. Since 1987, three attempts to search and copy the video tapes have been successfully opposed by Mafart and Prieur.[3]

[4] Television New Zealand (TVNZ) applied in February 2005 for permission to copy the tapes, intending to use them in a documentary on the 20th anniversary of the sinking of the *Rainbow Warrior*. In accordance with the terms of the orders made by Greig J, notice of the application was served upon the solicitors for Mafart and Prieur, who opposed the orders sought. After a defended hearing, Simon France J was satisfied that it was appropriate to authorise the searching and copying of the videotapes. He considered that the public interest in access to the record was not outweighed by the privacy interests of Mafart and Prieur or by the circumstances in which the tape was created at the initiative of the District Court Judge hearing the committal proceedings.[4] The High Court order granting the TVNZ application has been stayed pending appeals to the Court of Appeal and to this Court by Mafart and Prieur.

[5] The Court of Appeal directed argument on the preliminary issue whether it had jurisdiction to entertain an appeal from a decision to grant access to court records in criminal proceedings. The question of jurisdiction has been left unresolved in other Court of Appeal decisions about the search of court records of criminal cases, where the appeals were in any event dismissed on the merits.[5]

[6] The Criminal Proceedings (Search of Court Records) Rules 1974, under which the TVNZ application was brought, were expressed to be made under the

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3 *Amery v Mafart (No 1)* [1988] 2 NZLR 747; *Amery v Mafart (No 2)* [1988] 2 NZLR 754; *Amery v Mafart* [2000] 3 NZLR 695.

4 *TVNZ v Mafart and Prieur* at [92].

5 *R v Mahanga* [2001] 1 NZLR 641 (where there is a discussion of relevant principles); *Jackson v Canwest TVWorks Ltd* [2005] NZAR 499.

authority of the Crimes Act 1961 and the Judicature Act 1908.[6] No specific or general appeal is authorised by the Crimes Act in respect of access to the records of criminal proceedings. It is common ground that any jurisdiction of the Court of Appeal to entertain an appeal must therefore be found in s 66 of the Judicature Act 1908. Section 66 provides the Court with power to hear and determine appeals from any "judgment, decree, or order … of the High Court". Since 1908, it has been held that the appeal right conferred by s 66 applies only to judgments, decrees and orders made by the High Court in civil proceedings.[7] All judges in the Court of Appeal in the present case were of the view that the order made by Simon France J could not be considered an order made in civil proceedings.[8] They held that there was no jurisdiction to hear the appeal, which was accordingly dismissed.[9] Mafart and Prieur appeal by leave to this Court against the decision that the Court of Appeal lacked jurisdiction to hear their appeal.

[7] Public access to court files, both in respect of current and completed cases, must be considered in the context of contemporary values and expectations in relation to freedom to seek, receive and impart information,[10] open justice,[11] access to official information,[12] protection of privacy interests,[13] and the orderly and fair administration of justice. The basis upon which access is permitted can raise important points of principle, the application of which may be deserving of appellate scrutiny, as is indicated by a number of recent court decisions.[14] Under s 66 of the Judicature Act, appeal to the Court of Appeal is available in respect of orders of the

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6 The Rules are expressed to be made under the statutory authority of s 409 of the Crimes Act 1961 (a general power to make rules regulating the practice and procedure of the High Court in proceedings under the Crimes Act) and s 51C of the Judicature Act 1908 (which empowers the Rules Committee to make rules for the High Court, Court of Appeal, and Supreme Court). In *Amery v Mafart (No 2)* [1988] 2 NZLR 754, Gault J held that proceedings under the Crimes Act include preliminary proceedings in the District Court and that the Rules properly applied to the record of committal proceedings transmitted to and held in the High Court. No issue as to the validity of the Rules arises on the present appeal.

7 *Ex parte Bouvy (No 3)* (1900) 18 NZLR 608 (CA).

8 A divergence in opinion in the Court of Appeal between the President and the other members of the Court related to the procedure available for application under the Rules.

9 *Mafart and Prieur v TVNZ* CA 92/05 4 August 2005 (Anderson P, Chambers and O'Regan JJ).

10 New Zealand Bill of Rights Act 1990, s 14.

11 As to which, see eg *Broadcasting Corporation of New Zealand v Attorney-General* [1982] 1 NZLR 120 (CA) at 122-124 per Woodhouse P, *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA).

12 See s 5 of the Official Information Act 1982 and s 3 of the Public Records Act 2005.

13 *Hosking v Runting* [2005] 1 NZLR 1.

14 See, for example, *Mahanga, Canwest TVWorks Ltd, R v Wharewaka* HC AK CRI-2004-092-004373, 8 April 2005 (Baragwanath J).

High Court in relation to the search of civil files undertaken under the High Court Rules.[15] It is not self-evident why there should be any difference in opportunity for appeal in respect of criminal files. Whether the Court of Appeal in the present case is right in the view that appeals are not available in respect of applications to search criminal files therefore raises a point of general importance in the administration of justice.

The appellate jurisdiction of the Court of Appeal

[8] The Court of Appeal has no appellate jurisdiction other than that conferred by statute. A general right of appeal is contained in s 66 of the Judicature Act:

> **66. Court may hear appeals from judgments and orders of the High Court**-The Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment, decree, or order, save as hereinafter mentioned, of the High Court, subject to the provisions of this Act and to such rules and orders for regulating the terms and conditions on which such appeals shall be allowed as may be made pursuant to this Act.

But it is clear from a consistent line of authority that this apparently ample language provides for appeals only from the exercise of the civil jurisdiction of the High Court.

[9] Section 66 of the Judicature Act is a re-enactment in identical terms of s 15 of the Court of Appeal Act 1882.[16] Both Acts dealt separately with the civil and criminal jurisdiction of the Court of Appeal under the consecutive headings "Civil Jurisdiction" and "Criminal Jurisdiction". Section 66 of the Judicature Act, like s 15 of the 1882 Act, is placed under the heading "Civil Jurisdiction". In both Acts, the saving ("as hereinafter mentioned") in s 15 and s 66 was originally referable to the subsequent provision for criminal appeals under the heading "Criminal Jurisdiction".[17] In *Ex parte Bouvy (No. 3)*,[18] the Court of Appeal pointed out that the distinct scheme for criminal appeals provided both by the Court of Appeal Act 1882 and the later Criminal Code Act 1893 would have been undermined if s 15 of the

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15 Rules 66-68, discussed at [25].

16 Itself a replacement of the Court of Appeal Act 1862.

17 Judicature Act, s 70; Court of Appeal Act 1882, ss 19 and 20 (which provided a general appeal from conviction under s 19 and an appeal by case stated under s 20 on any point of law reserved).

18 (1900) 18 NZLR 608.

1882 Act (which continued in force at the date of *Bouvy* in 1900) authorised a general right of appeal in criminal cases. In *Bouvy* it was admitted that a refusal to grant an order for habeas corpus was a judgment in a criminal matter.[19] The Court of Appeal held that, notwithstanding the breadth of the language of s 15, it was clear from the structure of the Act and the distinct provision for criminal appeals (which would have been unnecessary if s 15 was wide enough to cover both civil and criminal appeals) that s 15 was confined to civil proceedings and did not authorise appeals from judgments in criminal matters.

[10] The criminal jurisdiction of the Court of Appeal was progressively removed into separate criminal legislation from 1893.[20] The history of the changes is summarised in *R v Clarke*.[21] By 1958 no criminal appellate jurisdiction of the Court of Appeal remained in the Judicature Act.[22] The heading "Criminal Jurisdiction" remains in the Judicature Act but, with the repeal of the former s 70 by the Summary Proceedings Act, the only provision remaining in force under that heading relates to trial at bar. The removal of all criminal appeal provisions from the Judicature Act leaves the exception contemplated by s 66 ("save as hereinafter mentioned") without any continuing internal exception in the Judicature Act for criminal appeals. In *Clarke*, however, the Court of Appeal considered that the enactment of s 66 (in re-enactment of s 15 of the 1882 Act) had been effective endorsement by Parliament of the decision in *Bouvy*. It rejected as "plainly untenable" an argument that legislative change to the principles of interpretation under the Acts Interpretation Act 1924 had widened the meaning of s 66. It was "inconsistent with statutory patterns and New Zealand legal history" to interpret s 66 to permit appeals from decisions in criminal matters.[23]

[11] Today, the general provisions for appeals from the High Court in criminal proceedings are contained in the Crimes Act. They confer no rights of appeal other

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19 In *Flickinger v Hong Kong* [1991] 1 NZLR 439 at 440, Cooke P, delivering the judgment of the Court of Appeal observed, without deciding the point, that s 66 of the Judicature Act 1908 might require a wider interpretation "to give full measure to the rights specified in s 23(1)(c) [of the New Zealand Bill of Rights Act 1990]". In s 16(1) of the Habeas Corpus Act 2001, a right of appeal has been specifically granted.

20 Starting with the Criminal Code Act 1893, and continued in the Crimes Act 1908 and the Crimes Act 1961.

21 [1985] 2 NZLR 212.

22 With the enactment of s 214(1) of the Summary Proceedings Act 1957.

than on those accused or convicted of crimes and, in more limited circumstances, the Crown. Appeals may be taken with leave from pre-trial rulings,[24] as of right by an accused against conviction and sentence,[25] by the Solicitor-General with leave in respect of sentences,[26] and by reservation of a point of law ruled upon at trial.[27] Pre-trial appeal under s 379A is more circumscribed than the right of appeal following conviction because a pre-trial ruling can be re-visited at trial and challenged after trial on appeal against conviction or when a point of law has been reserved.[28] The criminal appeals provided for are all concerned with trial process and outcomes. They are not apt for appellate reconsideration of decisions about access to court records. Nor are they apt for appeals by third parties.

[12] There is no occasion to revisit the view that s 66 does not authorise appeals from decisions taken in the exercise of the criminal jurisdiction of the High Court. It is clearly right as a matter of proper construction and as a matter of legislative history and policy. The heading "Civil Jurisdiction" is properly an aid to the interpretation of s 66, as s 5(3) of the Interpretation Act 1999 makes clear.[29] The view that s 66 does not extend to appeals from the exercise of criminal jurisdiction is of long standing and has been consistently followed.[30] That settled authority was the basis upon which s 15 of the 1882 Act was re-enacted. The contrary view would undermine the careful provision for criminal appeals in the Crimes Act and the Summary Proceedings Act.

[13] The appellants do not argue that the line of authority based on *Ex parte Bouvy (No. 3)* is wrong. They contend rather that an application to search court records is not itself a criminal proceeding simply because it is made in respect of the records of a criminal case. It is argued that the proper approach in determining whether applications to the court are to be treated as civil or criminal proceedings for

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23 *Clarke*, 214.
24 Section 379A.
25 Section 383(1).
26 Section 383(2).
27 Section 380(3).
28 *R v B* [1995] 2 NZLR 172 (CA).
29 A position to be contrasted with s 5(f) of the Acts Interpretation Act 1924, which applied in *Clarke.*
30 *Ex parte Bouvy (No. 3)* has been applied in *Hulston v Cameron* [1927] NZLR 382 (CA), *R v Geiringer* [1977] 1 NZLR 7 (CA), *R v Clarke* [1985] 2 NZLR 212 (CA), *R v B* [1995] 2 NZLR 172 (CA), *Re Victim X* [2003] 3 NZLR 220 (CA).

any purpose is to look to their effect: an application to search court records does not give rise to penal consequences; it does not directly affect criminal process; nor does an application to search a file 20 years after trial have any indirect effect on criminal process. On this approach, the appeal is properly to be seen as one from a stand-alone application for access to court records, which is rightly regarded as a civil matter. It is not to be treated as if it were an interlocutory application in the criminal case. The respondent however maintains that the Criminal Proceedings (Search of Court Records) Rules 1974 are rules of criminal practice and procedure and that an application to search made under them is itself a criminal proceeding.

The jurisdiction of the High Court

[14] The general jurisdiction of the High Court is found in s 16 of the Judicature Act 1908:[31]

> **16. General jurisdiction**
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> The Court shall continue to have all the jurisdiction which it had on the coming into operation of this Act and all judicial jurisdiction which may be necessary to administer the laws of New Zealand.

[15] The High Court itself is identified by s 3(1) of the Judicature Act, which provides:

> There shall continue to be in and for New Zealand a Court of record, for the administration of justice throughout New Zealand, henceforth to be called the High Court of New Zealand.

By s 4(1) of the Judicature Act, the High Court consists of its judges. The Court was given all the jurisdiction of the superior courts in England on the enactment of the Supreme Court Act 1860. No distinction was drawn between the civil and criminal jurisdiction of the Court. With the codification of criminal law in 1893, the substantive criminal jurisdiction of the High Court became entirely statutory. The general criminal jurisdiction of the Court is today contained in the Crimes Act. The Court's substantive civil jurisdiction continues to be derived both from common law

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[31] *Quality Pizzas Ltd v Canterbury Hotel Employees' Industrial Union* [1983] NZLR 612 at 615 (CA).

and statute. "Civil proceedings" in the High Court are defined in s 2 of the Judicature Act as:

> any proceedings in the Court, other than criminal proceedings.

[16] The adjectival jurisdiction and powers of the High Court, which enable it to give effect to its substantive jurisdiction, are part of the general jurisdiction recognised by s 16 of the Judicature Act. They were derived from the practice of the superior courts in England as at 1860, based on their inherent jurisdiction. Except to the extent modified by statute and rules, the Court continues to have inherent jurisdiction and powers to determine its own procedure. The inherent jurisdiction is not ousted by the adoption of rules, but is regulated by the rules, so far as they extend. To the extent that the rules do not cover a situation, the inherent jurisdiction supplies the deficiency. The inherent jurisdiction is:[32]

> … the authority of the judiciary to uphold, to protect, and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner.

[17] The procedure of the Court in civil proceedings is principally regulated by the High Court Rules, made under the authority of s 51C of the Judicature Act. Section 409(1) of the Crimes Act also authorises rules to be made under s 51C of the Judicature Act to regulate the procedure of the Court for indictable offences. The existing practice and procedure of the High Court is preserved by s 409(2) of the Crimes Act "until such rules are made, and so far as they do not extend". Where rules do not apply, the inherent jurisdiction can be invoked by a judge to regulate or adjust the procedure of the Court to give effect to the interests of justice.[33]

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[32] Jacob "The Inherent Jurisdiction of the Court"(1970) CLP 23, 27-28, cited in *Taylor v Attorney-General* [1975] 2 NZLR 675 at 682 per Richmond J, at 689 per Woodhouse J.

[33] So, for example, in *Attorney-General v Hawkins* [1992] 3 NZLR 664, discussed below at [33], Cooke P was of the view that the Court had to adapt its procedures to provide a mechanism to give effect to the rights provided by the Official Information Act. In *Gio Personal Investment Services v Liverpool and London Steamship Protection and Indemnity Association* [1999] 1 WLR 984 the inherent jurisdiction was relied upon to grant a non-party access to the written submissions of counsel.

Access to the records of the Court

[18] A court of record is under an obligation to maintain the record of its proceedings.[34] The fact that the High Court is a court of record, as s 3(1) of the Judicature Act recognises, means that the maintenance of the record is a significant ministerial obligation of the Court. The record is conclusive as to the matters formally entered and is notice to the world of them.[35] While the maintenance of the record is as a matter of practice carried out by the registrars of the Court,[36] they are acting for the Court in this ministerial work and under the supervision of the judges who comprise the Court.[37]

[19] The records to be maintained may in part be prescribed by statute or rules. So, for example, s 353(1) of the Crimes Act requires the Registrar of the High Court in "the proceedings on a trial for a crime" to "cause to be preserved all indictments and all depositions transmitted to him" and to maintain the Crown Book, containing a record of the course of the trial, which is "the property of the Court and shall be deemed a record thereof".[38] But to a substantial extent the content of the record is not prescribed by enactments and is a matter of the practice of the court. There is, for example, no prescription in legislation or in rules of the record required to be maintained for civil proceedings. And the Crimes Act does not directly require maintenance of the register known as the "Return of Prisoners Tried and Sentenced", which is the formal record of a sentence,[39] although the existence of the register is assumed in the Criminal Proceedings (Search of Court Records) Rules 1974.

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34 See, for example, *R v Walwyn* CA 6/98 15 June 1998 at 4 per Keith J. Black's Law Dictionary (8ed) 2004 defines a court of record as "a court that is required to keep a record of its proceedings."

35 *Halsbury's Laws of England* (4ed, Butterworths, London, 1980) vol 10, Courts, 123, para 308.

36 Registrars, by s 28(1) of the Judicature Act 1908, continue to have "all the powers and perform all the duties in respect of the Court…which [they] have had hitherto performed" … "in order that the Court may be enabled to exercise the jurisdiction conferred on it by this Act…".

37 So, while the Crown book is required by s 353(1) to be maintained by the registrar, any erroneous entry in it can be corrected only by a judge (s 353(6)).

38 A certificate of the matters entered into the Crown book is evidence as a matter of public record of any indictment, trial, conviction, or acquittal (s 353(5)) and may be referred to in any appeal (s 353(4)).

39 A Judge can alter the sentence until entry signed by the Judge in the "Return of Prisoners Tried and Sentenced", notwithstanding an entry made by the Registrar in the Crown Book following pronouncement of sentence, because the Return is the "book of record" of the sentence: *R v Davidson* [1966] NZLR 626 (CA), applying *Police v Hallmond* [1951] NZLR 432 and *R v Jorgensen* [1959] NZLR 740.

[20] Once created, the records remain under the control of the court by reason of its inherent power to control its processes and practices,[40] until disposed of either according to the practice of the court or under legislation. Where rules of court provide for access to court records, the inherent supervisory power is regulated by the rules.[41] Following the enactment of the Public Records Act 2005, the records of courts are ultimately transferred to the National Archives and may be disposed of under the Act.

[21] There is a difference between the entries in the books and registers and documents maintained by a court which are formal steps in proceedings and other material received by it during the course of the proceedings and held on the court file.[42] Such records are conclusive as to essential court processes and the outcome of the proceedings. They constitute the formal record. The file will also include documents, exhibits (which may remain the property of the parties),[43] and other material which constitute an archive generated by the proceedings, but which are not the formal record of the court. It was this distinction that caused Simon France J in the present case to note that the video tape of entry of pleas was not the "true record".[44]

[22] The difference between the formal record and other material maintained in the court file is reflected in the regimes for search of the court records provided by the Criminal Proceedings (Search of Court Records) Rules 1974 and under Rules 66 to 68 of the High Court Rules. Matters of formal record of the essential steps in proceedings and the outcome are generally available to be searched freely (subject only to such restrictions and fees as may be imposed by enactments[45] or by the judge

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40 "Every Court has supervisory power over its own records and files": *Nixon v Warner Communications Inc* 435 US 589 at 597 per Powell J. See also *AG of Nova Scotia v MacIntyre* ((1982) 132 DLR (3d) 385, *R v Philpott* HC WN T 74/90 14 February 1991 (Eichelbaum CJ), *Gio Personal Investment Services*.

41 *R v Philpott*; *Re Guardian Newspapers Ltd* [2005] 3 All ER 155.

42 The distinction is discussed by the Supreme Court of Canada in *Re Vickery and Prothonotary of Supreme Court of Nova Scotia* (1991) 64 CCC (3d) 65, 92 per Stevenson J.

43 *Re Vickery and Prothonotary of Supreme Court of Nova Scotia*, 92 per Stevenson J.

44 *TVNZ v Mafart and Prieur* at [91].

45 For restrictions imposed by enactment, see eg Criminal Justice Act 1985, ss 139 and 139A; Adoption Act 1955, s 22; Care of Children Act 2004, s 139; Children, Young Persons and Their Families Act 1989, s 438; Child Support Act 1991, s 124; Property (Relationships) Act 1976, s 35A; Family Proceedings Act 1980, s 169; Domestic Violence Act 1995, s 125; Mental Health (Compulsory Assessment and Treatment) Act 1992, s 25; High Court Rules, r 66(5); District

in a particular case) because they are evidence of the exercise of judicial authority. Access to other material provided to the court and maintained by the registrar is subject to the approval of the court. No general right of public access to such material not constituting the formal record of the court is given by any enactment or has been recognised by the authorities.[46]

[23] A general right of access would be inconsistent with the scheme of the rules adopted to regulate access. As the Court of Appeal said in *R v Mahanga* at para 35:

> The conferment of a broad judicial discretion plainly excludes the application of arguments based on a common law right of access to judicial records, as Gault J held in *Amery v Mafart (No 2)* [1988] 2 NZLR 754 at 757. Such a common law right has been the basis of the approach of the North American Courts (in particular in *Nixon v Warner Communications Inc* 435 US 589 (1978) and *Vickery v Nova Scotia Supreme Court* (1991) 64 CCC (3rd) 65 at p 94). In *Nixon v Warner Communications* the United States Supreme Court recognised that the common law of the United States in this area had moved in a different direction from that of other countries. It is clear however that a right of access to judicial records does not form part of the common law of New Zealand.

[24] Before the adoption of the civil and criminal search rules, in 1973 and 1974 respectively, no rules made under the Judicature Act or the Crimes Act regulated the inherent judicial control of access to court records. Eichelbaum CJ in *R v Philpott*, in a passage approved by the Court of Appeal in *R v Mahanga*, expressed the view that the principal purpose of the rules was:[47]

> to confirm and enhance the court's supervisory powers over such material, and to rationalise the basis for dealing with the not infrequent requests for access to it.

[25] The Rules in respect of criminal and civil proceedings are broadly comparable.

- Under the High Court Rules, any person, on payment of a fee, can search, inspect and copy all registers and indexes of the Court and any document which

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Court Rules, r 69(4); Family Court Rules, r 428(1). Fees for search of court records in the High Court are prescribed in the Schedules to the High Court Fees Regulations 2001 and the Criminal Proceedings (Search Fees) Regulations 1997.

46 *R v Mahanga*; *Amery v Mafart (No 2)* at 757 per Gault J.

47 *R v Philpott*, at 3.

constitutes notice of its contents to the public.[48] The parties or their solicitors are entitled, without payment of fee, to search, inspect or copy the file unless there is any direction of a judge restricting access.[49] Others, on payment of fee, have the right to search, inspect or copy any document on a file once the proceeding has been determined, but not before (except with leave).[50] Permission of the registrar (with appeal to a judge) is required for those able to show a "genuine or proper interest" for proceedings under a number of specified Acts (including family law statutes), related to specified causes of action (including defamation and breach of promise), or after six years from completion of the file.[51] All rights of access to the file are subject to any restriction imposed by a judge in the particular case.[52] At the end of 60 years, more open access is provided, on payment of the prescribed fee.[53] Unless any restriction is imposed by court order at that stage copies can be taken of documents on the file, including the notes of oral evidence and any exhibits, but not the judge's notes.[54]

- Under the Criminal Proceedings (Search of Court Records) Rules 1974, registers and documents constituting notice to the public can be searched and copied by any person on payment of the prescribed fee.[55] A person who is a party to criminal proceedings or his solicitor can search and copy the file without payment of fee unless there is more than one defendant, in which case the leave of a judge is required.[56] A judge may direct that a document shall not be searched without leave.[57] Members of the public require leave of a judge or a registrar to search the Crown book or to search and copy documents on the file which do not constitute notice to the public.[58] A refusal to grant access by a registrar can be appealed to a judge in certain circumstances.[59] (Although the rule only provides an appeal to an applicant who is refused access by the

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48 Rule 66(1).
49 Rule 66(2).
50 Rule 66(3).
51 Rule 66(9).
52 Rule 66(7).
53 Rule 66(12).
54 Rule 66(13).
55 Rule 2(1).
56 Rules 2(2) and 2(3).
57 Rule 2(4).
58 Rule 2(5).
59 Rule 2(7).

registrar, judicial review could be sought by others affected). Apart from the judge's personal notes, all documents (including exhibits produced in evidence and the record of oral evidence) can be searched after 60 years from their filing or lodgment with the Court, on payment of the fee prescribed.[60] The search rules are subject to orders made under an enactment restricting the publication of the name of any person[61] and are subject to any express provision made in any enactment or rule.[62]

[26] The two sets of rules therefore permit access as of right for registers and documents constituting public notice. They limit access in respect of other material until 60 years have passed. After 60 years, only access to the judge's personal notes and information protected by statute remains completely prohibited.[63] The parties have favoured access, subject to particular direction by a judge and subject to protection of the interests of co-offenders in criminal proceedings through judicial supervision. Non-parties who show a particular interest have readier access to civil files than to criminal files after completion of the proceedings but before six years have elapsed, perhaps better to accommodate related litigation.[64] The more restricted access between six years and 60 years may reflect a concern for the privacy of parties and witnesses,[65] but the protection provided is one of court supervision and the privacy of those involved is one only of a range of considerations to be taken into account.[66]

[27] It is not clear to what extent the scheme of these Rules is affected by the Public Records Act 2005. The policy of the Act is that public records should generally be transferred to the public archive and be available for public access after 25 years. There is no difference in the treatment of civil and criminal files once archived under the Public Records Act. Under s 14 of the repealed Archives Act 1957 no public archives of any Court of Record could be deposited in the National Archives or disposed of under the Act, except with the prior approval of a judge and

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60 Rules 2(8) and 2(9).
61 Rule 2(12).
62 Rule 2(11).
63 High Court Rules, r 66(13)(c); Criminal Proceedings (Search of Court Records) Rules, r 2(9)(c).
64 As suggested by Eichelbaum CJ in *R v Philpott*, 3.
65 As Thorp J in *Amery v Mafart (No 1)* at 749 considered likely.
66 *R v Mahanga* at [31]-[32], approving *R v Philpott.*

subject to any conditions imposed. No equivalent judicial control is provided by the Public Records Act. Instead, transfer of court records to the public archive can be deferred by agreement of "the administrative head of the controlling public office" and the Chief Archivist[67] or if a responsible Minister certifies that, among other criteria, the public record contains information, the release of which would "prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial".[68] Whether or not court files are transferred to Archives after 25 years, the general policy the new Act follows of openness after 25 years is part of the context in which applications for leave to access court files now fall to be determined, in the same way that the Official Information Act 1982 is part of the context in which such applications are considered, even though the courts are formally exempt from its provisions.[69]

Is an application for access to the court records in criminal proceedings a civil or criminal proceeding?

[28] Unless the application for access to the court file is a criminal proceeding, s 2 of the Judicature Act makes it clear that it is a civil proceeding. If a civil proceeding, appeal lies under s 66 to the Court of Appeal from any judgment or order made by the High Court in determining the application. The essential question on the appeal is therefore whether the application by TVNZ is a criminal proceeding.

[29] If proceedings can result in conviction for a crime or punishment of an offender, they are clearly criminal. So, for example, in *Black v R*,[70] the Court of Appeal held that applications for forfeiture orders under the Proceeds of Crime Act 1991, though civil in form (a procedure the Court thought to be one of "convenience"), were criminal proceedings not able to be further appealed to the Privy Council. Similar emphasis on the substantive effect of the application led the

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67 Section 22(1)(b).
68 Section 22(6)(c).
69 *R v Mahanga* at [33]–[34].
70 (1997) 15 CRNZ 278 (CA). And for other examples see *Chiu v Richardson (No. 2)* [1983] NZLR 522 (right to elect trial by jury on charge of overstaying under an immigration statute) and *Edwards v United States of America* CA 6/02 22 August 2002 (eligibility to surrender under s 24 of the Extradition Act 1999), in both of which the proceedings although civil in form were held to be criminal proceedings.

House of Lords in *R (McCann) v Crown Court at Manchester*[71] to conclude that applications for anti-social behaviour orders under the Crime and Disorder Act 1998 (UK), which lead to no criminal liability or penalty, are civil proceedings.

[30] Applications necessarily linked to determinations of crime or punishment are also properly regarded as criminal proceedings. So, for example, in *R v B*[72] it was held that a pre-trial application that the complainant in a sexual crime be ordered to submit to a medical examination was an application in a criminal proceeding, not able to be appealed by the accused pre-trial under s 66 of the Judicature Act. Important to the reasoning of the Court was the fact that the point could be reconsidered on post-conviction appeal and might also be the subject of a reserved question of law under s 383 of the Crimes Act. Nor is it necessary for someone to be in jeopardy of conviction or facing sentence for an application to be properly viewed as criminal, if it is inextricably linked with criminal process.[73] So, for example, in *R v Geiringer*,[74] the Court of Appeal held it had no jurisdiction to entertain an appeal from a refusal of an order of costs following a not guilty verdict. The question of costs was "so closely linked with the trial" that it was properly regarded as made in criminal proceedings, even though the accused person was no longer at risk of conviction.[75]

[31] In all cases it is necessary to look to the substance of the application and the order sought under it. The underlying proceedings, which provide the occasion for the application, are not determinative. In *Govt of USA* v *Montgomery*, the House of Lords considered whether an appeal to the Court of Appeal from a restraining order against third parties in respect of property which was the subject of confiscation orders under the Criminal Justice Act 1988 (UK) was precluded by s 18(1)(a) of the Supreme Court Act 1981 (UK). Section 18(1)(a) provides that "no appeal shall lie to

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71 [2002] 3 WLR 1313.

72 [1995] 2 NZLR 172.

73 In *Amand v Home Secretary and Minister of Defence of Royal Netherlands Government* [1943] AC 147 (HL) Viscount Simon LC at 156 placed reliance on whether "the matter is one the direct outcome of which may be trial of the applicant and his possible punishment for an alleged offence by a court claiming jurisdiction to do so…". But, as Lord Hoffmann in *Govt of USA v Montgomery* [2001] 1 WLR 196 (HL) at 202 has pointed out, Lord Simon was not suggesting a test but illustrating a case in which the nature and character of the proceedings were regarded as clearly criminal.

74 [1977] 1 NZLR 7.

75 *R v Geiringer*, 9.

the Court of Appeal …. from any judgment of the High Court in any criminal cause or matter". Lord Hoffmann, with whom the other members agreed on the point, rejected the suggestion that the criminal proceedings in which the original confiscation order was made determined that the restraining order was a criminal cause or matter:

> 19. My Lords, it may be right, and possibly in most cases would be right, to regard orders made by way of enforcement of orders made or to be made in criminal proceedings as part and parcel of those proceedings. This was certainly the case in *R v Steel* 2 QBD 37 [a case concerning taxation of the defendant's costs in a failed prosecution for criminal libel]. But I would not accept what I regard as the extreme proposition of Mr Alun Jones that the nature of the proceedings in which the original order was made will necessarily determine whether the machinery of enforcement through the courts is a criminal cause or matter. Modern legislation, of which Part VI of the 1988 Act is a good example, confers powers upon criminal courts to make orders which may affect rights of property, create civil debts or disqualify people from pursuing occupations or holding office. Such orders may affect the property or obligations not only of the person against whom they are made but of third parties as well. Thus the consequences of an order in criminal proceedings may be a claim or dispute which is essentially civil in character. There is no reason why the nature of the order which gave rise to the claim or dispute should necessarily determine the nature of the proceedings in which the claim is enforced or the dispute determined.

[32] That approach, which requires consideration of substance rather than form, is consistent with the approach of the New Zealand Court of Appeal in such cases as *Hulston v Cameron,*[76] *R v Geiringer, R v B,* and *Attorney-General v Hawkins.* There are statements in *Re Victim X*[77] which may indicate a different view. The case was one where news media organisations sought to have set aside an order made by a trial judge under s 140 of the Criminal Justice Act 1985 suppressing the identity of the intended victim of an attempted kidnapping. The intended victim was acknowledged to have standing to oppose the lifting of the suppression order. When it was lifted by the High Court, he tried to appeal to the Court of Appeal. The Court held it had no jurisdiction under s 66 of the Judicature Act to entertain the appeal, although it went on to indicate that the appeal failed on the merits in any event. The Court expressed the view that it was impracticable in the context to draw a distinction between orders "relating to" and "in" criminal proceedings. It considered that, because "the order could not have been made but for the bringing of the

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[76] Order under the Gaming Act 1908 declaring premises to be a common gaming house a civil proceeding.

criminal proceeding", it was made in criminal proceedings.[78] The determination under s 140 on any view in that case was closely connected with the trial and it is unnecessary to express any view on the correctness of the conclusion reached. It is unlikely that the Court was suggesting a general test for the purposes of s 66 based on whether an order sought to be appealed "could not have been made but for the bringing of the criminal proceeding". As indicated, any such general test would be inconsistent with the necessary consideration of the substance of the matter.

[33] As *Hawkins* illustrates, the assessment of substance may be difficult in a particular case. Although not necessary for disposal of the appeal, the members of the Court there expressed different views on the question whether an application under the Official Information Act 1982 was a stand-alone application. The motive of the applicant was to obtain information, held by the New Zealand Serious Fraud Office, which might be of use to him in his trial. Cooke P and Hardie Boys J considered that the Official Information Act was not criminal discovery legislation but a new and important civil right to obtain personal information. In their view the application was a self-contained proceeding, not properly to be regarded as criminal and properly the subject of appeal under s 66. The other member of the Court, McKay J, expressed reservations about the question of jurisdiction, preferring to leave it for decision in a case where it could be given more detailed consideration.

[34] "Pragmatic considerations", as mentioned by Lord Steyn in *McCann*,[79] may have influenced classification of proceedings as criminal or civil in some of the cases. One such consideration may be the risk of disruption to criminal trials by appeals if applications are treated as stand-alone civil proceedings, although arising in the course of criminal proceedings. Any such risk should not be overstated. It can be directly addressed by the trial judge or Court of Appeal. In the case of an application by third parties to have access to court files pre-trial or during trial, the interests of fair trial will usually be decisive and, if expediting an appeal would risk disruption, an appeal is unlikely to be heard pre-trial. Similarly, where access is granted, an affected party may obtain a stay until after the trial, if expediting the

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77 [2003] 3 NZLR 220.
78 *Re Victim X*, 236.
79 At [21].

appeal before the conclusion of the trial would distract from its orderly conduct and where no irremediable harm would be caused by deferral of access to the information. Where the parties in a criminal trial apply to search court files, they will have rights of appeal either upon conviction in the case of the accused, or through reservation of the point. In those circumstances, it will not normally be necessary in the interests of those parties to expedite an appeal which may be disruptive to the trial.

[35] Perceptions of the appropriate characterisation of proceedings as civil or criminal may shift over time, especially in response to changing contextual legislation. In *Clarke* the Court of Appeal felt constrained by long-standing authority to hold that an application for bail pending trial was a criminal proceeding, but indicated some doubts about the result. In *Flickinger* and again in *R v B*, Cooke P expressed the view that the New Zealand Bill of Rights Act 1990 might well prompt reconsideration of whether habeas corpus applications should continue to be classified (as they were, for example, in *Amand*) as criminal or civil according to whether the applicant was awaiting trial on a criminal charge.

[36] In the case of bail and habeas corpus, legislation has removed any need for judicial reconsideration, by provision of direct appeal. But the wider context provided by contemporary legislation such as the New Zealand Bill of Rights Act is relevant to an assessment whether other applications, including those for access to court records, are properly civil proceedings under s 2 which permit appeal under s 66. If there is no right of appeal, there may be no opportunity to correct significant damage to interests recognised by law. That consideration weighed with Hardie Boys J in *Attorney-General v Hawkins*:[80]

> …I tend to the view that an application to the Court under the Official Information Act 1982 should be regarded as a self-contained matter or proceeding, so that even if it occurs in the course of a criminal trial there is an appeal to this Court by virtue of s 66 of the Judicature Act 1908. This approach is I think necessary in order to give the statute practical effect in such a setting. Otherwise, for example, an erroneous ruling in the course of a trial, allowing disclosure, could result in irremediable harm.

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[80] At 669.

Although in *Hawkins* the right in issue was the civil right to information provided by the Official Information Act, privacy interests and freedom of information interests in public records may also be in issue in an application for access to court files. If no appeal is available, irremediable harm may be done to such interests.

[37] The system of appeals provided by the Judicature Act and the Crimes Act together is relatively comprehensive. Section 66 is framed in wide terms. And the parties to criminal proceedings on indictment under the Crimes Act have, in addition to the rights of appeal post conviction and on reservation of a point under s 383, expedited appeals available under s 379A pre-trial in appropriate cases. Where the court file to which access is sought is created in criminal proceedings, non-parties who are affected would be in an anomalous position in the general scheme of appeals if applications for access which affect their interests in information or in privacy are regarded as criminal proceedings. If affected in matters of great significance to them, recognised by New Zealand law as important rights and interests, they would have no ability to appeal. Such result is not attractive. It engages the New Zealand Bill of Rights Act, as Cooke P suggested in *R v B.*[81]

[38] The outcome of treating access to criminal files as criminal proceedings would also be uneven in application. If a third party is affected by an order about access to court files made in the course of criminal proceedings in the District Court (whether summary or on indictment), he will be able to seek judicial review of the determination in the High Court, and then may further appeal under s 66 to the Court of Appeal. In *Re Victim X* the Court of Appeal did not think such unevenness required an order under s 140 of the Criminal Justice Act to be treated as a civil proceeding. But it is highly material to the question whether an application to search a file in criminal proceedings is properly to be regarded as a civil or criminal proceeding. The definition of "civil proceedings" in s 2 of the Judicature Act should be interpreted if reasonably possible to avoid such unevenness.

[39] Whether information is available under legislation such as the Official Information Act or is information available at common law only under the supervision of the court, does not affect the nature of the application for access.

Both applications are properly to be regarded as stand-alone, because they are brought under independent civil rights to apply for such information, the importance of which is affirmed by s 14 of the New Zealand Bill of Rights Act. Distinct regulation of the manner of access to criminal and civil files under the rules may be convenient as a matter of court administration (although the treatment under the rules is broadly comparable), but it cannot determine the application of s 66. Nor can the fact that the criminal search rules are expressed to be made under s 409 of the Crimes Act (reliance that may well have been unnecessary on the view taken here). The function of the registrar or judge in determining an application is principally to adjudicate between competing civil interests and to take into account any particular interest of justice, which may arise equally in civil or criminal cases. There is no reason why appeal should be available in respect of an application to search a civil file, but not in relation to an application to search a criminal file. The principles in issue are the same.

[40] For these reasons, we conclude that an application for access to court records, whether of criminal or civil proceedings, is a civil proceeding. The Court of Appeal was wrong to find that it had no jurisdiction to entertain the appeal. The appellants had a statutory right of appeal under s 66. The appeal to this Court on the question of jurisdiction must therefore be allowed. Since we determined at the hearing that the case is not suitable for direct appeal to this Court under s 14 of the Supreme Court Act 2003, the case is remitted to the Court of Appeal for its determination of the appeal from the order in the High Court.

TIPPING J

[41] The issue in this appeal is whether the appellants, Mafart and Prieur, have a right of appeal to the Court of Appeal from an order made by Simon France J. The Judge allowed the respondent, Television New Zealand Limited, to copy videotapes of Mafart and Prieur pleading guilty to the charges of manslaughter they faced for their part in the bombing of the Rainbow Warrior in July 1985. The Court of Appeal held there was no right of appeal because s 66 of the Judicature Act 1908, upon

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[81] At 179.

which Mafart and Prieur relied, did not apply. This was because the proceeding which Simon France J had determined was of a criminal rather than a civil kind.

[42] The essential question is therefore whether an application made under the Criminal Proceedings (Search of Court Records) Rules 1974 is criminal or civil in character. If it is civil, an appeal lies under s 66. If it is criminal, s 66 does not apply and no other statutory right of appeal can be invoked. There is no right of appeal from the High Court to the Court of Appeal except pursuant to some statutory provision giving that right.

[43] The application in issue in the present case was made by TVNZ and properly named Mafart and Prieur as respondents. Although applications under the Criminal Search Rules may be made informally,[82] the judicial officer who determines them must be careful to ensure that any person who might be detrimentally affected is given an opportunity to be heard; and in this case earlier proceedings had ensured that Mafart and Prieur had that right. The Chief Justice has explained this and other background matters in her reasons which I have had the advantage of reading in draft.

[44] The criminal proceedings involving Mafart and Prieur came to an end 20 years ago. It is necessary, however, to take account of the fact that the nature of an application under the Criminal Search Rules can hardly change according to whether the underlying criminal proceeding is pending, is currently being heard, or has been concluded. Proceedings under the Criminal Search Rules must be regarded as either civil or criminal, irrespective of the stage reached by the underlying criminal proceeding; and, irrespective of the degree to which the particular application may touch that proceeding. If that were not so, there would be considerable potential for uncertainty as to whether individual applications were criminal or civil in nature. That would be most undesirable. The issue is a general not an individual one. The best that can be done is to look at what is involved in the generality of cases and be guided accordingly.

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[82] Rule 2(6).

[45] It is therefore important when assessing the general nature of a criminal search application to consider what interests will normally be at stake. Such an application will usually be made by a person who is not a party to the underlying criminal proceedings. For that person there is absolutely nothing "criminal" at issue. Parties to the underlying proceedings generally have access to the file as of right, except where there is more than one accused.[83] The applicant may well, as here, be a member of the news media. Freedom to receive and impart information will often compete with claims to privacy. Other competing interests may be involved. It follows that an application to search and copy material which forms part of the record of criminal proceedings, cannot itself necessarily be regarded as being a criminal proceeding.

[46] Normally a criminal search application is likely to engage competing civil issues. It is possible to think of criminal search applications which might affect the course of the trial and perhaps even the result of it. Fair trial issues may arise, albeit indirectly. This aspect will probably be at its most significant when an application is made by one of two or more co-accused. But, by and large, it is much more likely that search applications, whether made before, during or after the trial, will be designed to obtain information for some form of public dissemination rather than for the purpose of forensic use. The interests of the news media may be in conflict with the interests of the person accused, convicted or acquitted who wishes to avoid public dissemination of the material at issue. This, of course, is very much the situation in the present case. TVNZ wishes to use extracts from the videotapes in its documentary about the Rainbow Warrior case. Mafart and Prieur wish to prevent that from happening.

[47] Obviously an application under the Criminal Search Rules will always be made against the background that someone has at least been charged with an offence. Sometimes they will have been convicted, sometimes acquitted. Sometimes the proceedings may be pending or in progress. Applications which are made after conviction and sentence may be made close in time to those events or remote in time from them. But the competing interests will still be of an essentially civil kind. The fact that there will inevitably be a criminal backdrop to the search application is

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83 Rules 2(2) and 2(3).

self-evident. But in substance the necessary adjudication will be of a civil kind. The Judge was not here exercising the criminal jurisdiction of the Court in any substantive or sensible use of that concept. He was deciding where the balance lay between the civil interests of TVNZ and the civil interests of Mafart and Prieur. Those interests arose out of criminal proceedings; but, in no sense, were they themselves of a criminal nature.

[48] Any exercise of judicial authority should generally be susceptible to examination on appeal. Judges always strive to reach correct decisions but inevitably errors do occur. Unless the issue is of little moment, most systems of justice recognise the importance of providing at least one appeal. The issues which can arise on an application under the Criminal Search Rules, indeed under search rules generally, may involve matters of considerable private as well as public importance. It is not easy to see why an appeal should be available in cases involving the search of civil files but not in those involving a search of criminal files. The difference lies in the nature of the underlying proceedings. The focus should rather be on the nature of the issues presented by the search application itself.

[49] There are, generally speaking, two statutory sources of appeal rights from the High Court to the Court of Appeal. The first is s 66 of the Judicature Act 1908. The second is Part 13 of the Crimes Act 1961. They reflect the conventional civil/criminal dichotomy. The Court of Appeal's decision, if it stands, would mean that neither source is available in respect of the determination by a Judge of an application under the Criminal Search Rules. They are said to give the High Court a jurisdiction which is immune from appeal. This result derives from the conventional classification of the underlying proceeding rather than on any more substantive basis.

[50] In earlier times an appeal lay under the Crimes Act only following conviction and sentence. But Parliament has recognised the utility of pre-trial appeals by leave in the enactment of s 379A, there being no general right of pre-trial appeal. I recognise that if an application under the Criminal Search Rules is regarded as civil in nature, an appeal would lie to the Court of Appeal in the case of an application made before or during the trial and that could be said to subvert in part the express

limits of s 379A. Any such concern is, to my mind, more apparent than real. And it is, in any event, a lesser potential problem than having no appeal right at all. The potential for the orderly progress of criminal trials to be disrupted by appeals from orders determining search applications is relatively small and can be dealt with by appropriate action in the High Court or the Court of Appeal. Orders for stay of execution will be available to ensure justice is done to accused persons pending appeal, and the Court of Appeal is well capable of making sure that appeal rights do not distract from the due processes of criminal justice.

[51] As the Chief Justice has demonstrated, s 66 of the Judicature Act applies only to orders, judgments and decrees made by the High Court in its civil jurisdiction; that is, in civil proceedings. The expression "civil proceedings" is defined in the Act as meaning any proceedings in the High Court other than criminal proceedings. A proceeding is a process commenced by a party desirous of achieving a certain outcome. In the case of a search application that outcome is an ability to access material on the file in question. Even if that file is of a criminal kind, the essence of the proceeding in question, ie the search application, is not criminal in nature. The application is not a criminal proceeding. That can be said even if it is made by one of several accused persons, that being the acknowledged high water mark of the case for regarding some, if not all, applications to search criminal records as themselves of a criminal nature. I accept that this example may be said to strain the boundary a little, but the case of an application by a co-accused under Rule 2(3) is most uncommon. I have never experienced one, or heard of one being made during my time on the bench.

[52] For these various reasons I would hold that the order which Simon France J made in this case was made in a civil proceeding and hence came within the compass of s 66 of the Judicature Act. The Court of Appeal was wrong to decide that it had no jurisdiction to entertain Mafart and Prieur's appeal from the Judge's order. The appeal should be allowed and the case remitted to the Court of Appeal to enable the appeal to be determined on its merits. I agree with the orders proposed by the Chief Justice.

EICHELBAUM J

[53] The background is set out in the judgment of the Chief Justice. For the reasons which follow I agree the appeal should be allowed with the consequences proposed by the Chief Justice.

[54] The issue is whether the High Court order, which under the Criminal Proceedings (Search of Court Records) Rules 1974 gave leave to copy the videotapes, is to be categorised as made in the civil or the criminal jurisdiction of the High Court. Given the legislative history and the settled case law commencing with *Ex parte Bouvy (No.3)*[84] s 66 of the Judicature Act 1908 relates only to civil proceedings as clearly as if those words were incorporated. The only relevant definition in the Act is that "civil proceedings" means any proceedings in the Court, other than criminal proceedings. Generally criminal proceedings are defined as proceedings instituted to determine a person's guilt or innocence, or to sentence a convicted person.[85] In confining the classification of all proceedings to which the Judicature Act was relevant to either civil or criminal, Parliament must have been conscious of the many interlocutory or incidental steps available under both headings. In the criminal field such steps, viewed alone, do not fall within the classical definition. The legislature could hardly have intended them all to attract the appeal rights conferred by s 66. So for present purposes I would regard criminal proceedings as including applications so related to a criminal proceeding as to be subject to the same appellate limitations,[86] or (these may just be different ways of expressing the same concept) wholly ancillary to determinations of guilt or punishment, or inextricably linked with a criminal process.[87] The issue in this case, and in any similar case where the right of appeal is under question, is whether the decision sought to be appealed was made in criminal proceedings so defined. The initial matter for examination will always be the relevant facts of the particular proceedings, which will vary from case to case; and the issue may even yield different answers depending on the stage at which the application was brought.

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84 (1900) 18 NZLR 608 (CA).
85 eg *Black's Law Dictionary*, (8ed 2004).
86 *R v B* [1995] 2 NZLR 172, 179.
87 *R v Geiringer* [1977] 1 NZLR 7, 8.

So defined the issue does not involve interpretation of s 66.

[55] In practice, generally the courts have regarded interlocutory steps in criminal proceedings as falling within the criminal category. At first sight it may seem a strange proposition that what ostensibly is an intermediate step in a criminal proceeding may be classified as civil in nature, but excluding that possibility would promote form over substance. In most instances the answer will be obvious but in arguable cases, the outcome will depend on the particular fact situation. That the proceedings to which access is sought were criminal is not decisive. Factors to be taken into account in determining the substantive nature of the application include the strength of the connection between the application and the proceedings to which access is sought (for convenience I refer to these as the head proceedings); whether the head proceedings are extant; if they have concluded, how long ago and whether there is any realistic prospect that there may yet be further steps such as an appeal; the extent to which the parties in the application and the head proceedings are the same; and whether the outcome of the application can bear in any way on the head proceedings. The nature of the particular application will give rise to further considerations, such as, in the case of applications under the Search Rules, the nature of the materials to which access is sought.

[56] On the peculiar facts of the present case, and with deference to the view of the Court of Appeal to the contrary and to Mr Akel's argument to this Court, the answer that these are not criminal proceedings is irresistible. Indeed, but for the fact that in form, the application was made in the matter of the 1985 sentencing files, it is difficult to find any pointers to the application being other than civil in substance. The application itself is not concerned with guilt or innocence, or a sentence. The criminal proceedings with which it is linked ended 20 years ago; the outcome cannot have any bearing on those proceedings. Not only are factors supporting the contrary conclusion slight, there are strong indications that the character of the proceedings is civil. They concern access to personal property, and the protection of the privacy of individuals, competing interests which classically are the subject matter of civil litigation. The contest is between private parties, the Crown not being involved. Partly because of the directions given by the High Court in 1987 in proceedings brought by the appellants to prevent access to the tapes at that time, the present

application even has the appearance of civil litigation: the appellants were served, service being mandated because of the consent order made in 1987.

[57] In the Court of Appeal, Anderson P regarded the critical point to be that the application was in the nature of an interlocutory application in the sentencing files. As Chambers and O'Regan JJ recognised in their joint judgment, the form alone cannot be determinative. However, they saw no basis for categorising the High Court decision as made under the civil jurisdiction. They considered that since it related to part of a file in criminal proceedings, it could not be regarded as a decision within the civil jurisdiction (reliance was placed on *Re Victim X*)[88] but again, such an approach does not enable sufficient weight to be given to the substance of the application.[89]

[58] The combination of circumstances of the present case is unusual. If one attempts to apply the result to other, more commonplace situations, the answer may not be as obvious. Rule 2(2) of the Rules enables accused persons to inspect the file relating to their case as of right; but under r 2(3), where there are co-accused, an accused can only access documents on the file by leave. The effect of r 2(5) is that convicted persons wishing to access the sentencing file of another prisoner of relevance to their own case has to obtain leave. Likewise, accused seeking to search another criminal file for information relevant to their case require leave. I do not see how one can describe the first of these examples as other than in the criminal jurisdiction. In the other two cases, while the position may be arguable I would regard such applications as wholly ancillary to determinations of guilt or punishment, or inextricably linked with a criminal process. No doubt there are other instances of applications and decisions which should be so described.

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[88] [2003] 3 NZLR 220. The CA judgment does not identify any specific passage but at [28] the Court in *Re Victim X* said:

> "The order could not have been made but for the bringing of the criminal proceeding. Does it not follow that it was made in those proceedings? We cannot in any event see that there is a meaningful difference in this context between an order relating to, or in, criminal proceedings."

I agree with the Chief Justice's comment that if the judgment intended to suggest a general test, that would be inconsistent with the need to identify the substance of the decision.

[89] *Govt of USA v Montgomery* [2001] 1 WLR 196 (HL); see [19].

[59] For these reasons I do not consider it is possible to determine, in advance, that all applications under the Rules are to be categorised as civil. I accept it is most unlikely that those responsible for the Rules envisaged each application to access a file would require examination and classification to determine whether there was a right of appeal. Nor can one see any sensible reason why applications which, on such an analysis, turned out to be civil should have a succession of appeals available (three, in the extreme case) while other similar applications had one at most, or none if the initial application was to a Judge. Obviously these consequences are unsatisfactory: so far as the right to search is concerned the only meaningful distinction I can see between appeals in civil cases on the one hand and criminal on the other is that in the latter an appeal may prejudice the trial, or impact unduly on its progress; but as the Chief Justice has pointed out, those situations are susceptible to judicial management. But the reason there is a distinction is simply that the law governing civil and criminal appeals has developed separately. Equally, before 1966[90] one might have complained there was no good reason why civil litigants had a right of appeal in interlocutory matters in general, even where the issue was trivial, whereas in crime there was no such provision, even where the subject matter was significant and an error in a pre trial ruling might miscarry the trial. That anomaly was corrected legislatively, as the one exposed by the present litigation ought to be.

There would be merit in an amendment ensuring a right of appeal in all cases relating to both sets of Search Rules. However, in my respectful opinion that is a matter for the legislature.

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[90] The Crimes Amendment Act 1966 inserted s 379A, giving a right of appeal in some pre-trial applications.