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IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 23/2019
[2020] NZSC 16

BETWEEN	THE QUEEN Appellant
AND	MAURICE WILLIAM JOHN RETI First Respondent
	LOGAN AARON WOOD Second Respondent

Hearing:	23 July 2019
Court:	Winkelmann CJ, Glazebrook, O'Regan, Ellen France and Williams JJ
Counsel:	P D Marshall and K L Kensington for Appellant W D McKean for First Respondent A B Fairley and A M Harvey for Second Respondent
Judgment:	5 March 2020

JUDGMENT OF THE COURT

A **The appeal is dismissed.**

B **We make an order prohibiting publication of the judgment and any part of the proceedings (including the result) in news media or on the internet or other publicly available database until final disposition of trial. Publication in law report or law digest permitted.**

REASONS

Winkelmann CJ, O'Regan and Williams JJ	[1]
Glazebrook J	[101]
Ellen France J	[116]

WINKELMANN CJ, O'REGAN AND WILLIAMS JJ
(Given by Winkelmann CJ)

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Introduction

[1] In 2016 the first respondent was in custody awaiting trial on a number of charges including a charge of possessing methamphetamine for supply. While in custody the first respondent agreed with police that, in return for the delivery up of

firearms, the supply charge would be reduced to one of simple possession. The first respondent used a prison telephone to locate firearms and organise their delivery to police. The issue on appeal arises because police then relied upon the content of those calls, which had been monitored by the Department of Corrections, to obtain a production order for records of the first respondent's prison phone calls, citing the calls as giving reason to suspect the first respondent had committed the offence of unlawful possession of a firearm. The recorded calls supplied after the first respondent's release from prison, and pursuant to the production order, were then relied upon by police to obtain search warrants, including a search warrant of the first respondent's home. This in turn led to the discovery of evidence of more serious methamphetamine offending by the first respondent and others. The first respondent and his co-defendant, the second respondent, each now face multiple charges relating to the supply of methamphetamine.[1]

[2] The Crown appeals a judgment of the Court of Appeal,[2] that allowed an appeal from the District Court judgment of Judge McDonald.[3] The Court of Appeal ordered the exclusion of evidence of the first respondent's prison phone calls, and of other evidence discovered pursuant to the search warrant for his home. The Crown challenges the Court of Appeal's finding that the production order was invalid, and its ruling under s 30 of the Evidence Act 2006 that the evidence obtained pursuant to the production order and the subsequent search warrant should be excluded. This Court granted leave to appeal.[4]

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1 The first respondent faces two charges of possession of methamphetamine, seven charges of supplying methamphetamine, two charges of offering to supply methamphetamine and three charges of conspiracy to supply methamphetamine, all under the Misuse of Drugs Act 1975. He also faces one charge of possession of a restricted weapon, namely a taser, under s 45(1) of the Arms Act 1983. The second respondent faces three charges of supplying methamphetamine. The respondents are also jointly charged with a further three conspiracy to supply methamphetamine charges.

2 *Reti v R* [2019] NZCA 17 (Brown, Duffy and Peters JJ) [CA judgment].

3 *R v Reti* [2018] NZDC 8843 [DC judgment].

4 The approved question on appeal is "whether the Court of Appeal erred in determining that the evidence obtained pursuant to the production order of 4 August 2016 and pursuant to the execution of the search warrant on 1 November 2016 was inadmissible at the trial": *R v Reti* [2019] NZSC 36.

Factual background

The first respondent's arrest

[3] In the early hours of 12 March 2016, Constable Hall stopped a car being driven by the first respondent. That car was registered to Mr Tony Yan, who was flagged in the Police National Intelligence Application "for being of interest to Asian Organised Crime and being a drug manufacturer". Constable Hall issued the first respondent with an infringement notice in respect of minor matters.

[4] The next day Constable Hall went to the address the first respondent had supplied in the course of that engagement, but was told by the first respondent's brother that the first respondent did not live there.

[5] On 16 March 2016, Constable Hall saw the first respondent driving a different vehicle and again pulled him over. When the first respondent gave the same address, Constable Hall decided to arrest him for supplying false details. The first respondent refused to get out of his vehicle and accelerated away. He was stopped and his vehicle was searched as part of the arrest process. A methamphetamine pipe was found on the first respondent and a search of the vehicle revealed, amongst other things, 11 grams of methamphetamine, four large unused snap-lock bags, a small amount of cannabis, a scanner, electronic scales, two cell phones, five pre-paid SIM cards and two cash deposit slips for that day totalling $2,000.

[6] The first respondent was charged with the possession of methamphetamine for the purpose of supply, possession of methamphetamine utensils, escaping custody, possession of cannabis, providing false details and a number of driving-related offences. He was remanded in custody.

[7] The first respondent instructed Mr David Jones QC and Mr Colin Mitchell to represent him on those charges. Although Constable Hall was the officer in charge of the file, in early April Mr Mitchell made contact with Detective Inspector Burke. Although Detective Inspector Burke had no prior involvement with the charges against the first respondent, Mr Mitchell knew him. From this point in time, there were two

lines of police activity in connection with the first respondent, one involving Detective Inspector Burke and one involving Constable Hall.

Dealings with Detective Inspector Burke regarding firearms

[8] The following account of the critical events is taken from evidence at the pre-trial hearing in the District Court.[5] The Crown called Constable Hall to give evidence, and the defence called Detective Inspector Burke, Mr Mitchell and the first respondent. While there was some conflict in the accounts given by the witnesses, which will be apparent on the narrative we set out, these conflicts were seldom tested on cross-examination.[6] As the argument on this appeal has developed, however, we do not consider that anything turns upon the resolution of those conflicts.

[9] The first respondent's account of the arrangement or "deal" reached with police begins with the first respondent being approached by his counsel Mr Mitchell, to see if he could locate firearms in Northland. The first respondent understood there had been several instances of serious offending involving firearms in the Northland area, and that police were very interested in gathering firearms in the region. His counsel told him the police had offered to reduce the charge from possession for supply to simple possession if he could deliver firearms to them. The first respondent therefore made inquiries of people he knew, using the telephone system at the prison to ask them if they could source any firearms. As a result of those calls it was decided that nine firearms were to be delivered to police. The first respondent, again after making inquiries of people he knew, came up with three firearms. He understood the deal to be that as a sign of good faith he would hand over the three firearms and the police would not oppose bail, and then when on bail he would procure the remaining six firearms. Although he did not get bail when he next appeared, at the appearance after that (on 25 July 2016), the charges were reduced to one of simple possession. The first respondent was sentenced to three months in prison and immediately released from prison for time already served.

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5 DC judgment, above n 3.

6 This may be partly explained, at least in respect of the evidence of Detective Inspector Burke, by the fact that the Crown did not call the Detective Inspector, leaving it to the defence to do so, thus limiting the defence's ability to challenge his evidence on cross-examination. The situation was further complicated by the fact that one of the defence counsel felt unable to cross examine the Detective Inspector as he was representing him in another matter.

[10] Although the police reduced the supply charge to one of simple possession after receipt of only three firearms, the first respondent nevertheless carried through on the agreement. He surrendered a further five firearms and told the police of the location of a sixth.

[11] Mr Mitchell's evidence was broadly consistent with the first respondent's, although on his account the idea of doing a deal with the police involving firearms came from the first respondent. Mr Mitchell was not tested on this evidence during cross-examination, but it seems to us that on this narrow point, his is the more likely version of events, although nothing turns on it.

[12] Mr Mitchell said that he dealt with Detective Inspector Burke, with whom he had previously worked in an earlier career in the police, to hand the firearms over to him. However, it was Mr Jones who dealt with police over the reduction in charges.

[13] The first handover of firearms occurred on 30 May 2016. Mr Mitchell met Detective Inspector Burke in a supermarket car park and handed over three firearms. Then on 13 August, after the first respondent's release from prison, an associate of the first respondent left five firearms at Mr Mitchell's office. Mr Mitchell contacted another police officer, who collected the firearms to send them through to Detective Inspector Burke.

[14] Detective Inspector Burke's evidence was that in April 2016 he was contacted by Mr Mitchell who said he had a client who was looking for electronic monitoring on bail (EM bail) and could supply information on drug manufacture and, as a sign of goodwill, would arrange for the hand back of weapons. Detective Inspector Burke said that by 26 May 2016 he was discussing with Mr Jones the possibility of the supply charge being reduced to a charge of simple possession. While there was also discussion regarding EM bail, no agreement was reached. He confirmed that around 26 or 27 May he received three firearms from Mr Mitchell.

[15] As to how the charges came to be reduced, Detective Inspector Burke said he may have spoken to the prosecutor regarding the reduction of charges, but he had minimal dealings with Constable Hall, the officer in charge of the file. While he might

have spoken to him to understand the circumstances of the first respondent's offending, Detective Inspector Burke said Constable Hall would not have been aware of the arrangements with counsel, because "[w]ith the potential of [the first respondent] being an informant, clearly, we want to keep that close and in-house and so the only people that would be discussed would be the two members of the intelligence section".

Constable Hall's inquiries

[16] Constable Hall's evidence was that he did in fact discuss a "deal" with Detective Inspector Burke. His evidence was that he recalled Detective Inspector Burke telling him "there was a deal offered, or going to be offered, and that it would be a good one and one that we should take and that the supply charge should be down to a straight possession of Class A". Constable Hall was clear that Detective Inspector Burke did not direct him to amend the charge.

[17] Constable Hall could not be particular about the date of that conversation, but it appears he knew of "a possible plea being reached" as early as 11 May 2016, because he referred to this in an email to Mr Jones about ESR analysis of the methamphetamine recovered,[7] observing that the prosecution might be redundant.

[18] On 17 May 2016, the Department of Corrections began monitoring the first respondent's calls. Constable Hall said that at some time after that he was told by a colleague that in those calls the first respondent was "talking about things in prison" in relation to another case that the colleague was working on. In July Constable Hall called Mr Mills, a police liaison officer at the prison in which the first respondent was held. He followed that up, on 20 July, with an email to Mr Mills, telling him that "[t]he investigation is still underway into [the first respondent's] activities and I understand he has still [been] active from prison". Constable Hall asked for information in relation to people and numbers of people the first respondent had been in contact with.

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[7] ESR is the Crown Research Institute of Environmental Science and Research Ltd, which provides forensic analysis in New Zealand for the government.

[19] By email on 21 July 2016, Mr Mills replied that he had been monitoring the activities of the first respondent whilst he was in custody. He said most of the first respondent's calls used coded language when identifying people and that he appeared "to be moving quite a bit of money around buying and selling real estate and motor vehicles". Mr Mills continued "[h]e speaks of trying to do deals with police by giving them 'antiques' which I gather may be firearms in order to get a reduced sentence or bail". The email referred also to other suspicious activity that Mr Mills had picked up in monitoring the first respondent's communications. Mr Mills concluded the email with advice to Constable Hall that if he required copies of the calls he would need to provide a production order.

[20] Constable Hall replied on 23 July seeking further information from Mr Mills including the following request "[c]an you just email me a bit more detail about your suspicion/belief regarding the firearms offending as that will be the grounds I seek the production order under". On 25 July Mr Mills replied by email, providing further information that the first respondent had been speaking about "antiques" from the time that monitoring of his calls began, and repeated that the first respondent spoke of getting "antiques" to give to police to get a reduced sentence or bail.

[21] Following this, on 27 July Constable Hall again spoke to Mr Mills, who on this occasion expressed the opinion that the first respondent would have been speaking about "this stuff" prior to the date on which monitoring of his calls began.

[22] Constable Hall's evidence was that the reference in Mr Mills' reply email of 21 July 2016 to the first respondent trying to get a deal raised a question in his mind as to whether that related to the plea deal. He emailed Detective Inspector Burke in connection with Mr Mills' advice that there had been discussion of firearms and doing a deal with the police. He received no response. He also accessed the police database to identify if any firearms had been passed over, but he decided that line of inquiry was futile – he thought that since the first respondent resided in Northland, and both his lawyers in Auckland, if the firearms were passed over they could end up anywhere.

[23] On 4 August Constable Hall applied for a production order under s 71 of the Search and Surveillance Act 2012, for access to the records of the first respondent's

recorded conversations.[8] The suspected offence on which the application was based was stated to be unlawful possession of a firearm under s 45 of the Arms Act 1983. The application detailed the fact that the first respondent had been arrested on 16 March and charged with possession of methamphetamine for supply and other offences, had been remanded in custody, and then on 25 July had pleaded guilty to a number of charges including possession of methamphetamine.

[24] Constable Hall stated his belief that the first respondent had been using communications through the Corrections phone system "to source and discuss the procurement/possession of firearms". He set out the contents of Mr Mills' emails, stating his belief that an examination of the first respondent's prison phone communications would identify addresses and locations where the firearms were stored and held. The application referred to an earlier occasion on which the first respondent had been charged with unlawful possession of a firearm and ammunition, noting the circumstances in which those charges had not proceeded.

[25] A production order was issued on 4 August, authorising the production to Constable Hall of a data disc containing records of the first respondent's phone conversations during the time he was in custody. Corrections provided Constable Hall with recordings of the first respondent's phone calls on 1 September. The calls appeared to implicate the first respondent and others, including the second respondent, in methamphetamine offending.

[26] Following the receipt of the material from Corrections, the police made further inquiries. On 31 October 2016 Constable Hall applied for and obtained a search warrant for the first respondent's Paihia address on the grounds of suspected drug offending. Constable Hall relied upon the circumstances of the first respondent's original arrest on 16 March. He also relied upon the contents of the various phone calls made by the first respondent obtained pursuant to the production order, in which the first respondent appeared to discuss $58,000 that had been concealed in his car

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8 The application for production order provided to the Court contained redactions. However, counsel were in agreement that no information material to this appeal was contained in that redacted material.

when he was arrested on 16 March but which the police had not found. He also appeared to refer to past and future methamphetamine dealing in those calls.

[27] At the first respondent's address police found 44 grams of methamphetamine, two tick lists, a scanner, two cell phone jammers and a taser. They also obtained a search warrant in respect of the second respondent's address. At the second respondent's address they found about $3,000 in cash under the mattress of his bed. They also found two jet skis and a Toyota Hilux which on their case the second respondent had been instructed by the first respondent to obtain in exchange for two ounces of methamphetamine.

Lower Courts' decisions

District Court

[28] In the District Court, the challenge was to the admissibility of the evidence obtained through the production order and the search of the first respondent's home. The Judge found that Constable Hall should have disclosed, in the application for a production order, details of his conversation with Detective Inspector Burke "that it was a good deal the police were being offered, and advice to take that offer".[9] Importantly the Judge found that Constable Hall realised that the deal might relate to the firearms and that although he had made unanswered inquiries of Detective Inspector Burke, there was no reference to those inquiries in the application. The Judge said:[10]

> What Constable Hall should have done was include information as to whether it was his belief or not based on his limited conversation with the Detective Inspector that the Detective Inspector and [the first respondent] had reached an agreement that if he used his contacts to enable the surrender of firearms to the police then his charges would be reduced. The application was made after [the first respondent] had pleaded guilty to the greatly reduced charges. Had that information been included the issuing officer might have considered that [the first respondent] was only doing what the police invited him to do under the deal. If the issuing officer had come to that conclusion he may have not made a production order.

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9 DC judgment, above n 3, at [47].
10 At [47].

[29] The Judge concluded that the production order issued was invalid because of the deficiency in the processes outlined and therefore the issue of the production order was unlawful.[11] The Judge then undertook the balancing exercise required under s 30 of the Evidence Act. He took into account that the first respondent was aware that his calls were being monitored so that the invasion of privacy was not that serious. As to the nature of the impropriety, it was not deliberate, reckless or done in bad faith. He said the charges were serious. He concluded:[12]

> … given the limited breach of [the first respondent's] privacy, the seriousness of the offending, the nature and quality of the evidence obtained and the breach was not deliberate or made in bad faith, I consider the balancing exercise that it comes down in favour of admission of the evidence.

Court of Appeal

[30] In the Court of Appeal the Crown argued that the Judge had been wrong to hold that the evidence was improperly obtained. It submitted the production order would have been made even if Constable Hall had disclosed the information to which the Judge referred because there were still reasonable grounds to suspect the commission of a qualifying offence. The Court of Appeal rejected that argument, agreeing that the production order had been invalidly issued. It said that it had "reservations about whether a defendant such as [the first respondent], who is arranging the surrender of firearms to the police, and doing so with police encouragement, can be said to be committing an offence".[13]

[31] The Court of Appeal then addressed s 30 of the Evidence Act. The essence of its reasoning in that regard is captured in the following paragraph of the judgment:

> [30] It is unnecessary for us to address counsel for the appellants' first submission, because we accept their second. The police, by Detective Burke, plainly considered the arrangement made with [the first respondent] to be in the public interest. Such an agreement must be honoured. It would be unfair to allow the prosecution to adduce the evidence that is in dispute at trial, given that such evidence was only discovered in reliance on the telephone calls [the first respondent] made pursuant to his agreement with the police. In conducting the balancing exercise under s 30(2), it is necessary to take proper account of the need for an effective and credible system of justice. In this

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11 At [48].
12 At [54].
13 CA judgment, above n 2, at [25].

> case, we consider that need best met by excluding the evidence obtained under the order and therefore the warrant.

The Court of Appeal ruled the evidence obtained under the production order and the search of the first respondent's home inadmissible.

Argument on appeal

[32] The Crown submits the Court of Appeal erred:

(a) In finding the production order was invalid. The Crown argues that any information omitted from the application for the production order was not material because its inclusion would not have undermined the basis on which the production order was made.

(b) In finding that the search warrant for the first respondent's home that followed on from the production order was invalid.

(c) In failing to undertake the mandatory balancing exercise in s 30 of the Evidence Act, and in proceeding upon the basis of factual errors in assessing the seriousness of the police conduct.

First ground of appeal: is the production order invalid?

[33] Section 30(2) of the Evidence Act provides that if evidence is found to have been improperly obtained, the judge must determine whether or not the exclusion of the evidence is proportionate to the impropriety by means of the balancing process prescribed in that section. Section 30(5) lists when evidence will have been improperly obtained. This includes evidence which is obtained in breach of any enactment or rule of law, or evidence which is obtained unfairly. It is necessary to determine whether the production order was invalid because if it was, evidence collected under it may have been improperly obtained. That, in turn, may lead to the conclusion that the evidence collected under the subsequent search warrant was also improperly obtained.

Was there material non-disclosure?

[34] The first issue under this ground of appeal is whether there was, as both the District Court and Court of Appeal found, a material omission in the information provided to the issuing officer in support of the application for a production order.

[35] An applicant for a production order seeks authority to access otherwise private information. In *R v Alsford* this Court explained, relying on the history of production orders, that they were intended to be a less intrusive alternative to search warrants.[14] For this reason, principles guiding the content of the application, developed in connection with the issue of search warrant applications, apply alongside the statutory framework.

Relevant principles

[36] Section 72 of the Search and Surveillance Act provides that the conditions for making a production order are that there are reasonable grounds:

(a) to suspect that a qualifying offence has, is, or will be committed;[15] and

(b) to believe that the documents sought by the proposed order constitute evidential material in respect of the offence and are, or will be, in the possession or under the control of the person against whom the order is sought.

[37] Section 71(1) states that an enforcement officer may apply to an issuing officer for a production order against a person if the enforcement officer is satisfied that the conditions set out in s 72 are met.

[38] The challenge to admissibility in this case was advanced on the basis that Constable Hall failed to comply with the duty to make full disclosure that exists when applying on a without notice basis for a production order or warrant.

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14 *R v Alsford* [2017] NZSC 42, [2017] 1 NZLR 710 at [20].

15 A qualifying offence is an offence in respect of which a search warrant could be obtained: Search and Surveillance Act 2012, s 72(a). See also s 6. There is no issue that unlawful possession of a firearm is a qualifying offence.

[39] The principal purpose of the information the applicant (the enforcement officer) provides in support of the application is to describe the existence of primary facts which satisfy the conditions for issue of the order, not to suggest the conclusions to be drawn from those facts.[16] It follows from this, and also by necessary implication from the statutory scheme, that the applicant should provide the issuing officer with all information that could reasonably be regarded as relevant to the decision the issuing officer must make (which is whether the grounds for issue are made out) and not a selective or incomplete version of the facts.[17]

[40] The requirement of full disclosure of relevant information follows also from the fact that production orders, like search warrants, are almost invariably sought and obtained without notice to others affected by the order, and in particular without notice to the target of the order. The without notice nature of the procedure imposes an obligation on the applicant to "make full and candid disclosure of all facts and circumstances relevant to the question whether the warrant should be issued".[18] The applicant is obliged to set out in the evidence supporting the application "all matters known to the applicant which might be relied on by the target of the warrant if that person had the opportunity to appear in opposition".[19] On the other hand it is also the case that the police "cannot be expected to refer to every single piece of evidence available to them when seeking a search warrant".[20]

[41] A failure to make full and candid disclosure in an application for a production order or warrant may result in the order or warrant being invalid.[21]

Analysis

[42] The Crown argues that while the application did not describe the agreement to reduce the methamphetamine supply charge in return for firearms, this was because

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16 *R v McColl* (1999) 17 CRNZ 136 (CA) at [19]. While *McColl* dealt with search warrants under s 198 of the Summary Proceedings Act 1957 (which now fall under the Search and Surveillance Act), we consider the same principles apply.

17 *McColl*, above n 16, at [20].

18 *Tranz Rail Ltd v Wellington District Court* [2002] 3 NZLR 780 (CA) at [21]. See also *McColl*, above n 16, at [17]–[22].

19 *Tranz Rail Ltd*, above n 18, at [22].

20 *R v Kissling* [2008] NZCA 559, [2009] 1 NZLR 641 at [32].

21 *Beckham v R* [2015] NZSC 98, [2016] 1 NZLR 505 at [127]. See also *Hager v Attorney-General* [2015] NZHC 3268, [2016] 2 NZLR 523 at [123].

Constable Hall was not party to that agreement. That being the case, he could not confirm either its existence or its terms. But as the District Court Judge held, by the time he had received the emails from Mr Mills, Constable Hall had clearly realised that the good offer that Detective Inspector Burke had referred to, and which had led to the reduction in charge, might relate to firearms. It was his own evidence that there was a question in his mind that the agreement Mr Mills referred to, and the "good deal" Detective Inspector Burke had told him of, were one and the same. Although he emailed Detective Inspector Burke to seek clarification on this point, that email went unanswered. He also made inquiries on the police database, but concluded that he was unlikely to find information regarding firearms that had been handed in.

[43] Constable Hall was therefore, at least, on inquiry that the first respondent's firearm phone calls were made by him to enable him to fulfil his side of a plea agreement. Given this state of knowledge on the part of Constable Hall, we consider that he was obliged to pursue his inquiries with Detective Inspector Burke to their conclusion before making an application for a production order. Failing that, we consider he was, at the very least, required to make full disclosure in his application, as we explain below at [46].

[44] The Crown argues that the law imposes no obligation upon police to make further inquiry, citing the Court of Appeal decision in *Hodgkinson v R*.[22] In that case, Arnold J, writing for the Court, rejected an argument that police should have further investigated an aspect of evidence relied upon in support of the warrant, stating that "[i]t must be remembered that a search warrant is an investigatory tool".[23] Whilst that is true as a general proposition, that observation does not apply in a circumstance such as this where the officer is on inquiry as to the existence of other information likely to undermine the basis upon which the production order is sought.

[45] In our view, whilst this issue of the content of the "good deal" remained outstanding, Constable Hall should not have applied for a production order. But he did, and the issue we address under this ground of appeal is whether the application was misleading. We consider it was. We are satisfied that on the information available

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22 *Hodgkinson v R* [2010] NZCA 457.
23 At [31].

to Constable Hall, there was a material non-disclosure. It is true, as the Crown argued, that through the inclusion of the text of Mr Mills' emails the application made clear that the first respondent appeared to be "trying to do deals with police … in order to get a reduced sentence or bail". The application also stated that the first respondent had originally been charged with possession for supply. Later in the application the charges he pleaded guilty to are listed. Whilst an astute reader might have gleaned that a plea had been accepted for a lesser charge, this fact was not explicitly drawn to the notice of the issuing officer. There was certainly no attempt by Constable Hall to link Mr Mills' reference to a deal with the fact that the first respondent was able to plead guilty to a reduced charge.

[46] The Judge said that Constable Hall should have included information as to whether or not it was his belief, based on his limited conversation with Detective Inspector Burke, that Detective Inspector Burke and the first respondent had reached an agreement that if the first respondent used his contacts to enable the surrender of firearms to the police then his charges would be reduced. We consider that the disclosure should have gone further and included the following information:

(a) Detective Inspector Burke's advice to Constable Hall that the first respondent had offered the police a "good deal" in exchange for reducing the charges he faced;

(b) Constable Hall's belief that a deal of some sort had been struck, and that the first respondent's calls from prison might have been about that deal;

(c) Constable Hall's email to Detective Inspector Burke to clarify whether the provision of firearms from associates was the "good deal", leading to the reduction in charge; and

(d) Detective Inspector Burke's failure to respond to that email.

[47] This was all information relevant to the issuing officer's decision; information that the target of the production order would wish to point to, had he had the opportunity. It was information which should have been included.

[48] The Crown argues that any omissions were immaterial because, even if the material had been included, the s 72 grounds would have been made out as reasonable grounds remained to suspect those from whom the first respondent sought firearms, or the first respondent himself, did not lawfully possess those weapons. As to the first respondent's associates, the Crown argues that the production order was not limited to the first respondent's suspected offending as the factual narrative implicated others in the offending – those who possessed the firearms the first respondent was trying to collect.

[49] We have no difficulty in concluding that the non-disclosure in this case was material. If the issuing officer had been advised of the likely link between the deal done resulting in a reduction of charge, and the inquiries regarding firearms, the issuing officer was very unlikely to have issued a production order. At the very least the issuing officer would have sought more information as to why it was that the police were relying upon conduct that, as seemed likely, police had themselves encouraged. The issuing officer would have been concerned to understand whether the police were acting in good faith in relying upon these communications to obtain a production order, whether their actions might constitute an entrapment in respect of the offence relied upon, and whether the first respondent had, in terms of s 45(1) of the Arms Act, a "lawful, proper, and sufficient purpose" for possession of the firearms.

[50] That would remain true even if the application was addressed to offending by the first respondent's associates. But we do not consider that the application was for the purpose of investigating offending by the first respondent's associates. That was not suggested in evidence by Constable Hall and it is not apparent on the face of the application.

[51] We heard argument as to whether, when addressing the disclosure obligation, it was appropriate to assess only information available to Constable Hall, or to also consider Detective Inspector Burke's knowledge on the basis that the knowledge of

the police should be grouped for these purposes. In *R v Williams* the Court of Appeal noted that in assessing the extent of the illegality of a search, the police "must be regarded as a body".[24] However, the facts of that case were very different.[25] On this appeal we consider that the issue is best addressed in terms of the steps that Constable Hall as the applicant was required to take and information he was required to provide. It is therefore not necessary to resolve this broader issue.

Does the non-disclosure invalidate the production order?

[52] The next issue that arises is the significance of the failure by Constable Hall to make full disclosure of all material facts.

[53] There is a preliminary issue here as to whether s 107 of the Search and Surveillance Act governs the Court's consideration of this issue, as argued by Mr Fairley for the second respondent. Section 107 describes the circumstances in which a search warrant issued under that Act is invalid. By reason of s 77 of the Search and Surveillance Act, s 107 applies to production orders.[26] Section 107(1) provides:

> **107 When search warrant invalid**
>
> (1) A search warrant is invalid—
>
> (a) if, having regard to the information contained in the application, the grounds or conditions for lawful issue of a warrant set out in section 6 or, if applicable, the relevant enactment specified in column 2 of the Schedule to which this section applies were not satisfied at the time the search warrant was issued:
>
> (b) if the warrant contains a defect, irregularity, omission, or want of form that is likely to mislead anyone executing or affected by the warrant as to its purpose or scope.

[54] Mr Fairley's argument as to the application of s 107(1)(b) can be shortly dealt with. Section 107(1)(b) is concerned with a defect in the warrant itself that is likely

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24 *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [121].

25 In *Williams*, the Court addressed whether the fact that officers executing the warrant had no knowledge of the deficiency in the application was relevant to assessing the existence and extent of police misconduct. The Court held that it was not: at [121].

26 Section 77 stipulates that any reference to a search warrant in s 107 is to be read as a reference to a production order.

to mislead. That is not at issue on this appeal. Instead, we are concerned with the information contained in, or omitted from, the application for the production order.

[55] As to s 107(1)(a), the learned authors of *Adams on Criminal Law – Rights and Powers* say it is arguable that it applies in the case of material non-disclosure in the application. *Adams* states:[27]

> Where an application for a search warrant does not provide sufficient information to meet the statutory threshold, it will be invalid in terms of subs (1)(a). … Such a defect goes to the substance of the warrant and the defect cannot be cured through the application of s 379 of the Criminal Procedure Act 2011 … .
>
> Prior to the enactment of this section, search warrants had been held to be invalid when they were issued on the basis of incomplete or selective information contained in the application directed to supporting the desired conclusion: see *R v McColl* … Arguably, such warrants will now need to be considered in terms of subs (1)(a) and will only be invalid if, in the absence of the misleading information, the required threshold would not have been met.

[56] We see issues with the argument the learned authors identify. Section 107(1)(a) addresses the circumstance in which a warrant (or, as in this case, a production order) is issued in reliance upon an application which, on its face, does not make out the grounds or conditions for lawful issue of the order. That is not the situation argued to exist here. Under s 107(1)(a) the court is directed, when considering whether there were adequate grounds, to have "regard to the information contained in the application". That is to say, to the content of the application, not to what the application could or should have said.

[57] The issue for us is the effect of the non-disclosure. Where there is, as in this case, "a clear breach of the requirement for the applicant to be candid with the judicial officer to whom the application for the warrant was made", a production order (or warrant) will be invalid and any seizures made under them unlawful.[28] The breach is clear in this case because there was material non-disclosure. As we have said, had full disclosure been made, the issuing officer would probably not have issued the production order.

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27 Simon France (ed) *Adams on Criminal Law – Rights and Powers* (online ed, Thomson Reuters) at [SS107.02(1)] (citation omitted).

28 *Beckham*, above n 21, at [127].

[58] We also address the effect of s 379 of the Criminal Procedure Act 2011 on the validity of the production order. Section 379 provides:

> No charging document, summons, conviction, sentence, order, bond, warrant, or other document, and no process or proceeding may be dismissed, set aside, or held invalid by any court by reason only of any defect, irregularity, omission, or want of form unless the court is satisfied that there has been a miscarriage of justice.

[59] In light of our conclusion that the issuing officer was very unlikely to have issued a production order if proper disclosure had been made, we have no hesitation in concluding that a miscarriage of justice has occurred.

[60] We therefore agree with the assessment of the District Court Judge and the Court of Appeal that the production order was invalid. For the purposes of s 30 of the Evidence Act, it follows that the production order did not provide lawful authority for the police to access the first respondent's prison calls. Whether or not the reliance on the telephone calls in the later application for the search warrant resulted in unlawful searches is something we return to shortly.

[61] It was also put to us by the first respondent that the production order was overly broad, supporting the conclusion that the order was invalid. Given our conclusion on non-disclosure, and the fact that this argument was very much peripheral to the argument presented to us, it is unnecessary for us to address it.

[62] There is a further issue as to whether the evidence of the telephone calls was unfairly obtained.[29] The Court of Appeal said:[30]

> The police, by Detective Burke, plainly considered the arrangement made with [the first respondent] to be in the public interest. Such an agreement must be honoured. It would be unfair to allow the prosecution to adduce the evidence that is in dispute at trial, given that such evidence was only discovered in reliance on the telephone calls [the first respondent] made pursuant to his agreement with the police.

[63] We do not see there is any issue of honouring the agreement. The police honoured the agreement by reducing the charge. Nevertheless we do agree that these

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29 Evidence Act 2006, s 30(5)(c).
30 CA judgment, above n 2, at [30].

facts give rise to an unfairness, such that it could be said that the evidence has been unfairly obtained. This unfairness arises from the combined effect of Detective Inspector Burke's and Constable Hall's actions. It is unfair in the sense that conduct of the first respondent implicitly encouraged by one officer has been characterised as unlawful by another when seeking authority under the Search and Surveillance Act to obtain information about the first respondent not otherwise available to the police.[31]

Second ground of appeal: is the search warrant invalid?

[64] The Crown also argues that even if the production order was invalid, if the prison telephone calls were excised from the applications for the warrant, there was nevertheless sufficient evidence to obtain the search warrant. If that were so, it is arguable that the search warrant was not invalidly issued.

[65] As to the other grounds available to support the search warrant's validity, the Crown relies upon the following:

(a) On 18 August 2016, the police conducted a bail check at the first respondent's address in Paihia. Furniture from the house was outside on the lawn. There was a chemical smell in the air. Cars registered to Mr Yan and the second respondent were parked at the address.

(b) At about 9.30 pm on 31 August 2016, Constable Hall and a colleague carried out visual surveillance of the first respondent's bail address. After about an hour, a vehicle left the house. They observed it driving erratically. The officers pulled over the car. The driver was Mr Yan. A glass pipe and a small amount of methamphetamine were found on him. He admitted smoking methamphetamine about five hours earlier. He said he had been visiting a friend in Paihia who had given him the drug.

(c) On 1 September 2016, a further bail check was carried out at the first respondent's address. A CCTV camera and a grill door had been

31 We note that the Court of Appeal in *R v Rock* [2008] NZCA 81 at [47] held material non-disclosure in an application for a warrant could lead to a finding that the evidence thereby gathered was unfairly obtained.

installed. Mr Yan's vehicle was again present. On 7 September Constable Hall noted two vehicles registered to Mr Yan at the address.

(d) Checks on the police database revealed that the owner of the first respondent's bail address had convictions related to planning and attempting to manufacture methamphetamine.

[66] The issue that arises as to the validity of the search warrant is, in a sense, one step removed from that concerning the production order. In terms of s 30(5)(a) of the Evidence Act, the issue is whether the evidence was obtained "in consequence" of an unlawful search.

[67] We do not discount the Crown argument that there was other evidential material to support the issue of the search warrant which was independent of the prison calls. Nevertheless we are satisfied that this argument of the Crown should be rejected. In his evidence in the District Court, Constable Hall accepted that the application relied "largely" upon the material obtained under the production order. In addition, the obligation to make disclosure was continuing. Constable Hall should have made disclosure in the application for a search warrant of the very same matters he should have disclosed in the production order application. Had he done so, we are satisfied that the judicial officer would have caused further inquiry to be made, because such a disclosure would have highlighted the possibility that the earlier production order had been improperly obtained. There was, then, a clear causal connection between the initial non-disclosure and the evidential material relied upon to obtain the search warrant.

[68] These are sufficient grounds to find the search warrant invalid, rendering the evidence obtained thereunder improperly obtained for the purposes of s 30 of the Evidence Act.

Third ground of appeal: was the Court of Appeal wrong to exclude the evidence?

[69] If evidence is found to be improperly obtained, as it was in the Court of Appeal,[32] and as we have found, the court must assess whether or not the exclusion of the evidence is proportionate to the impropriety found by means of a balancing process.[33] Any improperly obtained evidence must be excluded if it is determined that its exclusion is proportionate to the impropriety.[34]

[70] The Crown argues that the Court of Appeal erred in failing to undertake the balancing exercise contemplated by s 30(2)(b). In particular, it contends that the Court of Appeal proceeded immediately from erroneous factual findings that the first respondent had made the phone calls to obtain firearms at the police's "behest" and that police had failed to honour an agreement reached with the first respondent, to a conclusion that exclusion of the evidence is necessary to take proper account of the need for an effective and credible system of justice.

[71] As noted above, we agree with the Crown that the evidence does not suggest that police failed to honour the agreement with the first respondent.[35] But nothing turns upon that, given our findings that the evidence was improperly obtained. We also see nothing in the Crown's point that the first respondent was not making the phone calls at the behest of the police. The evidence is unclear as to when the first respondent made the calls and obtained the firearms – whether before or after a deal was entered into with police. However, as noted, by agreeing to the deal with the first respondent, the police implicitly encouraged the first respondent's communications (from custody) with third parties to secure the handover of firearms.

[72] There is more in the Crown's next point, that the Court of Appeal has not squarely addressed the balancing exercise mandated by s 30(2). Section 30(2)(b) requires that the balancing process is one that "gives appropriate weight to the impropriety and takes proper account of the need for an effective and credible system

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[32] CA judgment, above n 2, at [23]–[25].
[33] Evidence Act, s 30(2)(b).
[34] Section 30(4).
[35] See above at [63].

of justice". Section 30(3) contains a non-exclusive list of matters a judge may take into account in making the s 30(2) determination:

> (3) For the purposes of subsection (2), the court may, among any other matters, have regard to the following:
>
> (a) the importance of any right breached by the impropriety and the seriousness of the intrusion on it:
>
> (b) the nature of the impropriety, in particular, whether it was deliberate, reckless, or done in bad faith:
>
> (c) the nature and quality of the improperly obtained evidence:
>
> (d) the seriousness of the offence with which the defendant is charged:
>
> (e) whether there were any other investigatory techniques not involving any breach of the rights that were known to be available but were not used:
>
> (f) whether there are alternative remedies to exclusion of the evidence that can adequately provide redress to the defendant:
>
> (g) whether the impropriety was necessary to avoid apprehended physical danger to the Police or others:
>
> (h) whether there was any urgency in obtaining the improperly obtained evidence.

[73] While the s 30(2) determination does not require the court to proceed through all of those matters listed in s 30(3)(a)–(h), it is necessary to identify the factors that the court has weighed both for and against the exclusion of evidence. As was said by Elias CJ in *Hamed v R*, transparency of the reasoning employed in making the s 30(2) determination is required:[36]

> … the "balancing" required ensures that the reasoning of the court is transparent. What is called for is conscientious disclosure of the full reasons for decision. The section recognises that contextual assessment of proportionality is multi-faceted and entails consideration of factors that may be difficult to compare. A court applying s 30 must explain how the factors relied on bear on a determination that exclusion is proportionate to the impropriety.

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[36] *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [59].

[74] In the absence of any record in the judgment as to what factors the Court of Appeal has weighed, it is necessary for us to make the s 30(2) determination afresh having regard to the submissions that have been addressed to us.

Importance of any right breached and the seriousness of intrusion

[75] We have already concluded that police actions in obtaining the recorded phone calls, in reliance upon an invalid production order, constituted an unlawful and unreasonable search of that material, in breach of the first respondent's rights. The Crown nevertheless argues that any privacy intrusion is minimal. It says the first respondent did not have a subjective expectation that his calls from prison would be private. He knew they could be listened into: he explained that he used the word "antiques" as code for "guns" because others around him could hear his conversations and so that Corrections did not find out what he was doing. The District Court Judge was therefore correct to find, says the Crown, that the first respondent knew his calls were subject to monitoring.

[76] Secondly, the Crown argues, even if he did have a subjective expectation of privacy, that could not have been objectively reasonable. That is because the Corrections Act 2004 provides for the comprehensive monitoring of prisoners' calls (with certain limited exceptions which did not apply in this case). Section 112(1) provides that the principal purpose of monitoring is to "increase the safety of the community" by making it easier to prevent, discourage, detect, investigate, prosecute, convict and punish criminal offending. Moreover, s 117 provides a list of circumstances in which an authorised person may disclose the content of those calls, which includes for any of the s 112 purposes, and where there are reasonable grounds to believe that disclosure "is necessary to avoid prejudice to the maintenance of the law by a public sector agency (within the meaning of the Privacy Act 1993), including the prevention, detection, investigation, prosecution, and punishment of offences".[37]

[77] The Crown says that it follows from these two factors that the first respondent's privacy interests in the calls were minimal.

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37 Corrections Act 2004, s 117(1) and (2)(a).

[78] We see no reason to differ from the District Court Judge's finding that the first respondent knew that his calls might be monitored; his subjective understanding was that they were not private, at least to the extent of monitoring by Corrections. Nor would it be reasonable, in all the circumstances, for a prisoner to expect that his calls would be free from monitoring by Corrections. The Corrections Act requires that the Chief Executive take all practicable steps to bring the fact of monitoring to the notice of prisoners.[38] The application for the production order detailed the extent of the notice provided. This included notices placed prominently near every prison telephone and an oral warning at the start of every monitored outward prisoner call, which is audible to the prisoner.

[79] That evidence bears upon the monitoring of the telephone calls. But that is not at issue in this case. Rather the issue is the release by Corrections to police of a record of the content of the calls. In this case we consider there was a breach of the first respondent's privacy in the sense that while he was aware of the risk that Corrections would monitor his calls, he was entitled to proceed upon the basis that those who would have access to the calls were those authorised under the legislation. That was a reasonable expectation given the statutory framework which tightly constrains just who within Corrections may listen to the calls (s 115), and when and to whom the content of the calls may be disclosed beyond Corrections personnel (ss 117 and 118).

[80] We do accept, however, that the first respondent's knowledge that his calls might be listened to by designated Corrections personnel means that the privacy interest in the calls was less than if the calls had been truly private between him and the other person on the call.

[81] As to the argument that Corrections could have released the information under s 117, we see that as beside the point. For whatever reason it did not. The Corrections representative, Mr Mills, required a production order.

[82] The breach of privacy entailed in the release of the content of the phone calls therefore weighs in favour of exclusion, if only to a limited extent.

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[38] Section 116.

[83] Because of our finding regarding the search warrant, there are other rights to be weighed here, namely the first respondent's right to privacy in his home. We have held that the search warrant was invalid by reason of the same non-disclosure that affected the production order.[39] That means that the search of the first respondent's home was made without lawful authority. There is a high privacy interest in a person's home.[40] This weighs heavily in favour of exclusion.

The nature of the impropriety

[84] We do not accept the Crown's submission that any impropriety was not serious. In this case the non-disclosure was serious; material which was highly relevant to the issuing officer was omitted from the application. This had the effect of misleading the issuing officer as to the circumstances in which the production order and warrant were issued. Moreover, as we have found, police conduct was unfair in the sense that police sought to rely upon conduct they had implicitly approved, as evidence of wrongdoing on the first respondent's part.[41] The impropriety was therefore toward the more serious end of the spectrum. This weighs firmly in favour of exclusion.

The nature and quality of the improperly obtained evidence

[85] The Crown submits the evidence obtained here is both reliable and highly probative of the offending that the respondents and Mr Yan are charged with. It is of fundamental importance to the Crown case. The Crown says that without it the charges will be dismissed.

[86] We accept that characterisation of the evidence. There is nothing in the right breached which impugns the quality of the evidence. This factor weighs in favour of admission of the evidence.

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39 Above at [68].

40 See for example *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 at [11] per Elias CJ, [60] per Blanchard J, [122]–[129] per McGrath J and [256]–[259] per Thomas J; and *Alsford*, above n 14, at [67].

41 Above at [63].

The seriousness of the offence

[87] The Crown argues that the offending is inherently serious as it involved the commercial supply of methamphetamine, a Class A drug. The amount of methamphetamine involved, nearly half a kilogram, would attract a lengthy sentence of imprisonment. It submits that the fact the first respondent was orchestrating the supply from prison is a significant aggravating factor. All of these factors favour the admission of the evidence.

[88] Mr Fairley for the second respondent submits that a distinction is to be drawn between the first and second respondents, as the second respondent faces charges in respect of a far lesser amount of methamphetamine – at most 54 grams – and in terms of the Crown case he is more akin to a courier than an organiser or initiator of the offending.

Relevant principles

[89] Class A drug offending is at the more serious end of the drug offending spectrum, a fact made clear by the maximum sentence for it. Proceeding on the basis of the summary of facts, the first respondent's offending can be characterised as a commercial level offending. Whilst by no means within the category of the most serious offending of its type, it would be fair to place it closer to the serious than the moderate end of the spectrum. The second respondent's alleged offending is, as Mr Fairley submits, different than that of the first respondent and can fairly be characterised as toward the less serious end of the spectrum of moderate offending.

[90] What does this mean in terms of the balancing exercise? As has been noted on many previous occasions, the seriousness of the offending is "apt to cut both ways".[42] If the offending is serious, that favours admission. However, if the offending is serious and the nature of the impropriety raises issues as to the quality of the evidence, that will tend to favour exclusion. That consideration does not apply in this case. But even where the nature of the impropriety does not impugn the quality of the evidence, there remains public interest in the careful and lawful investigation of offences, particularly

[42] *Hamed*, above n 36, at [230] and [244] per Tipping J. See also *R v Chetty* [2016] NZSC 68, [2018] 1 NZLR 26 at [67]; and *Underwood v R* [2016] NZCA 312, [2017] 2 NZLR 433 at [38]–[41].

serious offences.[43] As Tipping J said in *Hamed*, citing the Supreme Court of Canada in *R v Grant*:[44]

> … while the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, it also has a vital interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high.

[91] The latter consideration is weighed in the balancing exercise set out below.

Analysis

[92] Addressing, then, the weight to be applied to the seriousness of the offending, in this case there is a public interest in seeing those who distribute methamphetamine held to account for their conduct. This is serious offending, and that weighs in favour of admission. We note that it weighs more heavily in favour of admission against the first respondent than it does the second respondent (given the more serious allegations against the first respondent).

Other factors

[93] We touch on the other relevant factors listed in s 30(3) only briefly. It is not suggested that there are alternative remedies to exclusion.[45] There was no evidence of physical danger to police or others,[46] or other urgency necessitating that Constable Hall apply for the production order before he had concluded his inquiries of Detective Inspector Burke, or that he proceed in the way that he did, providing incomplete material in support of the application.[47]

Conclusion on the balancing exercise

[94] The allegations against both respondents involve serious offending, a factor which favours admission. However, the nature and seriousness of the breach strongly favours exclusion of the evidence. It involved a serious omission in utilising processes under the Search and Surveillance Act. It entailed police conduct in collecting the

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[43] *Underwood*, above n 42, at [38]–[41].
[44] *Hamed*, above n 36, at [230], citing *R v Grant* 2009 SCC 32, [2009] 2 SCR 353 at [84].
[45] Evidence Act, s 30(3)(f).
[46] Section 30(3)(g).
[47] Section 30(3)(h).

evidence which is properly characterised as unfair. The nature of the rights breached also favours exclusion, particularly the invasion of privacy in the first respondent's home when it was searched pursuant to the invalid warrant. Therefore, we consider that the balance comes down in favour of exclusion of the evidence. That is a proportionate response to the deficiency and unfairness in process here, taking into account the long term interest there is in the maintenance of an effective and credible system of justice.

Name suppression

[95] Counsel for the first respondent also submitted:

> Up until this point [the first respondent] has not had name suppression. But this appeal has brought into focus the circumstances under which he assisted the police and being a Supreme Court case is likely to [receive] wide publicity. His safety is at risk if it becomes known that he was providing assistance and information to the police. It is submitted that it is in the interests of justice that details leading to his identity are not disclosed in the [judgment] issued by the Court.

[96] Mr McKean for the first respondent asks that the judgment be written so that the first respondent's details are not disclosed in the judgment. What Mr McKean seeks is name suppression. But no formal application for name suppression has been made in this, or any other court, to date, and no evidential basis for suppression has been provided.

[97] In the absence of an application for name suppression, we are not prepared to make such an order. Nevertheless, we do consider it appropriate to refer throughout the judgment to the respondents without naming them and, for fair trial reasons, to make the usual pre-trial order prohibiting the publication of this judgment and any part of the proceedings (including the result) in news media or on the internet or other publicly available database until final disposition of the trial. Publication in a law report or law digest is permitted. If the first respondent wishes to pursue name suppression, then he may make an application to the District Court. Our pre-trial order preserves his position in the meantime.[48]

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[48] Glazebrook and Ellen France JJ also agree with the position as to not making a name suppression order but instead making a pre-trial non-publication order.

Result

[98] The evidence obtained pursuant to the production order and the subsequent search warrant for the first respondent's home was improperly obtained. On balance, the exclusion of the evidence is proportionate to the impropriety. The Court of Appeal was correct to exclude it.

[99] The appeal is accordingly dismissed.

[100] We make an order prohibiting publication of the judgment and any part of the proceedings (including the result) in news media or on the internet or other publicly available database until final disposition of trial. Publication in law report or law digest permitted.

GLAZEBROOK J

[101] I agree with the majority and with Ellen France J that there was material non-disclosure in the application for a production order. I doubt, however, that there would have been a legal impediment to prosecuting the first respondent for firearms charges,[49] at least in relation to the first contingent of firearms delivered on 30 May. I do not consider there is any issue with entrapment. The first respondent, it appears, had been sourcing firearms before any "deal" was discussed with the police.[50] Further, in my view, a wish to do a deal cannot provide a lawful excuse for possession of firearms under s 45 of the Arms Act 1983, although it might be a relevant factor for sentencing. I do accept, however, that once the first delivery of firearms had been made the police would rightly have considered it inappropriate as a matter of fairness to prosecute the first respondent with regard to any firearms offences.

[102] I do not consider the same considerations would necessarily apply to the people from whom the first respondent sourced the firearms, but I agree with the other Judges that was not the basis of the application by Constable Hall.[51] Because of the link that can exist between firearms and other offending, such as drug manufacture and supply,

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49 See above at [49] where some possible legal impediments are discussed.
50 I am not to be taken as commenting on the appropriateness or otherwise of any deal.
51 Above at [50] per Winkelmann CJ for the majority (with whom Ellen France J also agrees: at [116]).

it may have been appropriate to apply for a production order on the basis that, even if a prosecution was not in contemplation for firearms charges, the existence of firearms could be seen as linked to other suspected offending by the first respondent or others. Again, however, that was not the basis of the application in this case.

[103] I therefore agree with the other Judges that the non-disclosure meant that the evidence obtained pursuant to the application for a production order was improperly obtained on the basis that, had full disclosure been made, the issuing officer would probably not have issued the production order, at least not without further inquiry.[52] I agree with Ellen France J that, read purposively in the light of the legislative history and the scheme of the Search and Surveillance Act 2012, s 107(1)(a) of the Act applies where there is material non-disclosure.[53] The reference to "the information contained in the application" in s 107(1)(a) should in my view be read as applying not only to the information actually contained in the application but also to the information that should have been contained within it and in particular in terms of s 71(2)(d).[54] The consequence is that, as Ellen France J notes,[55] the evidence was obtained in breach of an enactment by a person to whom s 3 of the New Zealand Bill of Rights Act 1990 applies and was thus improperly obtained under s 30(5)(a) of the Evidence Act 2006.

[104] A production order may not have been necessary.[56] But that fact is not in my view relevant to the assessment of whether the evidence was improperly obtained. If a production order is sought, the Search and Surveillance Act must be complied with.

[105] I would prefer to express no view on the application or otherwise of s 379 of the Criminal Procedure Act 2011 in cases of material non-disclosure[57] or on whether the evidence was unfairly obtained.[58] However, I agree with the majority that the

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52 Above at [49] and [60] per Winkelmann CJ for the majority (with whom Ellen France J also agrees: at [116]).
53 Below at [121].
54 The facts relied on to show reasonable grounds to suspect that an offence has been committed, or is being committed, or will be committed.
55 Below at [122].
56 As discussed below at [110].
57 Above at [58]–[59] per Winkelmann CJ for the majority; contrast below at [121] per Ellen France J.
58 Above at [62]–[63] per Winkelmann CJ for the majority and below at [117] and [122] per Ellen France J.

police honoured the agreement made with the first respondent[59] and that the Court of Appeal failed to conduct the required balancing exercise under s 30 of the Evidence Act.[60]

[106] Turning to the search warrant, I agree that the application for that warrant was largely based on the information gathered under the invalid production order.[61] I would, however, have accepted the Crown submission that, if the information directly related to the prison telephone calls is excised, there would have been other grounds that would have justified the search warrant.[62] Therefore, even if the issuing officer had been made aware that the production order was invalid, the warrant would likely have been issued. This because, in particular, it was not in fact necessary to obtain a production order.[63] As a consequence, I would have held that the evidence obtained from the searches was not improperly obtained.

[107] Moving now to whether the evidence from the production order should be admitted under s 30 of the Evidence Act, I take a different view from the majority. As to the factors set out in s 30(3)(a) and (b), I agree with Ellen France J that there is a minimal expectation of privacy with regard to telephone calls made from prison.[64] Section 113(1) of the Corrections Act 2004 allows prisoner calls to be monitored.[65] In accordance with s 116 of the Corrections Act, prisoners are informed in writing on entering prison that calls may be monitored and the purposes for which the information obtained from monitoring may be used, with prominent signs near telephones to the same effect. The same message is conveyed at the start of each call.[66]

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59 Above at [63] per Winkelmann CJ for the majority.
60 Above at [74] per Winkelmann CJ for the majority.
61 This was accepted by Constable Hall in the District Court. However, I do not consider this carries the weight the majority considers it does: above at [67] per Winkelmann CJ for the majority.
62 As set out above at [65].
63 As discussed below at [110].
64 Below at [123]. I consider the Corrections Act 2004 provisions also relevant to s 30(3)(e) of the Evidence Act 2006.
65 Under s 114 there are certain calls which are exempt from monitoring, including calls to barristers or solicitors in relation to a prisoner's legal affairs. None of the exemptions apply to the calls at issue in this case.
66 Corrections Act, s 116(c).

[108] Section 112(1) provides in relevant part that the principal purpose of monitoring calls is to increase the safety of the community by making it easier to:

> (a) prevent and discourage the commission of offences by, for the benefit of, or with the help or encouragement of, prisoners; and
>
> (b) detect and investigate offences committed by, for the benefit of, or with the help or encouragement of, prisoners; and
>
> (c) prosecute, convict, and punish—
>
> > (i) prisoners who commit offences, or who help or encourage other people to commit offences; and
> >
> > (ii) people who commit offences for the benefit of, or with the help or encouragement of, prisoners;

[109] It seems to me that this means that, where a prison telephone system is used for conducting criminal offending, there can in fact be no expectation of privacy. This weighs in favour of admission of the evidence obtained as a result of the production order in this case, despite the material non-disclosure in the application for that order. I agree with Ellen France J's comments as to the nature of that impropriety.[67]

[110] It is also highly relevant that a production order was not in fact necessary.[68] In this case, even assuming there was no question of the first respondent being prosecuted for firearms offences, the content of the calls was relevant to the detection and investigation of drug offences. Under s 117(1) of the Corrections Act, an authorised person may disclose a call for a purpose set out in s 112,[69] which includes the detection and investigation of offending by prisoners.[70] Further, an authorised person may disclose a prisoner's call if he or she believes on reasonable grounds that disclosure is "necessary to avoid prejudice to the maintenance of the law by a public sector

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67 Below at [124].

68 There is an analogue in this Court's decision in *R v Alsford* [2017] NZSC 42, [2017] 1 NZLR 710 (Elias CJ, William Young, Glazebrook, Arnold and O'Regan JJ). I do not, however, intend my comment that the production order was unnecessary to be construed as a criticism of Mr Mills for being cautious by requiring a production order.

69 There is no suggestion that Mr Mills was not an authorised person in relation to monitoring the calls.

70 Corrections Act, s 112(1)(b).

agency … including the prevention, detection, investigation, prosecution, and punishment of offences”.[71]

[111] In addition, there was in fact information contained in the application that could have justified the issue of the production order. The email from Mr Mills, set out in the application for the production order, said that he had been monitoring the first respondent’s calls while he was in custody. As well as the comments on “antiques” (firearms), Mr Mills said:[72]

> Most of his calls use coded language when identifying people and he appears to be moving quite a bit of money around buying and selling real estate and motor vehicles.
>
> …
>
> Recent activity also includes an attempt to deliver $10,000 to an Auckland address linked to the King Cobra’s. We are not sure whether this is a criminal enterprise, whether he was buying a patch with them or whether he is being stood over.

[112] Given that the first respondent was in custody with regard to drug offences and that he had previous convictions for drug offences, the above information could in my view, coupled with the seeming ability of the first respondent to source firearms (which as noted above are often associated with drug offending), have led to a reasonable suspicion that he was committing further drug offending from prison.

[113] I agree with Ellen France J that the seriousness of the offending also weighs in favour of admission of the evidence in this case.[73] The quality of the evidence is also high, which weighs in favour of admission.[74]

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71 Section 117(2)(a). The Police is a “public sector agency” within the meaning of the Privacy Act 1993 because they are an “organisation” (s 2 of the Privacy Act defines “organisation” as those named in pt 2 of sch 1 of the Ombudsmen Act 1975; Police is in that Part).

72 Mr Mills also suggested that a property belonging to the first respondent may have been put in the name of a “druggie” associate in order to avoid the “ARU”. I assume the “ARU” is a reference to the Asset Recovery Unit of the New Zealand Police (dealing with proceeds of crime and investigations into financial and organising crime): New Zealand Police “Financial Crime Group” <www.police.govt.nz>.

73 Evidence Act, s 30(3)(d). See also below at [125] per Ellen France J. I accept that the seriousness of the offending with which the second respondent is charged is not as great as for the first respondent but it is still serious offending, being related to the commercial supply of Class A drugs.

74 Section 30(3)(c).

[114] It follows from all of the above that the exclusion of the evidence from the prison telephone calls would not be a proportionate response to the impropriety. I accept the Crown submission that it would not accord with the need for an effective and credible system of justice to exclude highly probative evidence that is crucial to the Crown's case. This is particularly so in the context of serious offending where the impropriety resulted in (at most) a minor intrusion into the first respondent's expectations of privacy.

[115] For completeness, I note that, even if I had taken the view that the evidence obtained pursuant to the search warrant was improperly obtained, I would have held that the exclusion of the evidence arising from the search warrant was disproportionate to the impropriety and so would have admitted that evidence. Although there is a high expectation of privacy with regard to searches of a person's home, the other factors outlined above would have outweighed this, in particular that the search warrant application depended in large part on the information from the prison telephone calls and that information could have been received without a production order.

ELLEN FRANCE J

Introduction

[116] I agree, for the reasons given by Winkelmann CJ, that the failure to disclose the information about the "good deal" the first respondent offered police was material non-disclosure.[75] I agree also that the non-disclosure invalidated the production order.[76] I am also in agreement with the majority that, given the causal connection between the initial non-disclosure and the evidential material relied upon to obtain the search warrant, the search warrant was invalid.[77] I take a different view, however, on the basis for invalidity of the search warrant. In particular, I consider that questions about non-disclosure in the application for the production order can be addressed under s 107(1)(a) of the Search and Surveillance Act 2012.

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75 Above at [45] per Winkelmann CJ for the majority.
76 Above at [57] and [60] per Winkelmann CJ for the majority.
77 Above at [67]–[68] per Winkelmann CJ for the majority; contrast above at [106] per Glazebrook J.

[117] I agree that the facts give rise to an unfairness such that the evidence has been unfairly obtained.[78] I take a different view on the balancing exercise required by s 30 of the Evidence Act 2006. I would admit the evidence as regards both respondents.

Section 107(1)(a)

[118] Section 107 sets out when a search warrant will be invalid.[79] For present purposes, s 107(1)(a) is relevant. That paragraph provides that a warrant is invalid if:

> … having regard to the information contained in the application, the grounds or conditions for lawful issue of a warrant set out in section 6 … were not satisfied at the time the search warrant was issued:

[119] Section 107(2) provides that if a warrant is invalid under s 107(1), then neither s 204 of the Summary Proceedings Act 1957 nor s 379 of the Criminal Procedure Act 2011 applies to the warrant.

[120] Section 107 reflects the recommendation of the Law Commission in its report *Search and Surveillance Powers* as to the circumstances in which a search warrant should be declared invalid and incapable of being saved by s 204 of the Summary Proceedings Act (and, now, s 379 of the Criminal Procedure Act).[80] The Commission considered this would avoid the "recurring problems that have been a matter of frustration in the courts".[81] The Commission referred in this respect to the observations of the Court of Appeal in *R v Burns*[82] and *R v Pineaha*.[83] In *Burns*, Tipping J for the Court said that it was "yet another case involving an issue about the adequacy of information supplied in support of an application for a search warrant".[84] In *Pineaha*, Tipping J for the Court expressed similar concerns.[85]

[121] Given that background, and with a purposive approach, s 107(1)(a) should be interpreted to deal with the situation where the information contained in or omitted

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78 Above at [63] per Winkelmann CJ for the majority.
79 I refer here for ease of reference to a search warrant although for these purposes the document in issue is the production order. Section 77 provides that s 107 applies equally to production orders.
80 Law Commission *Search and Surveillance Powers* (NZLC R97, 2007) at 128.
81 At [4.169], n 150.
82 *R v Burns* [2002] 1 NZLR 204 (CA).
83 *R v Pineaha* (2001) 19 CRNZ 149 (CA).
84 *Burns*, above n 82, at [17].
85 *Pineaha*, above n 83, at [6].

from the application is deficient as well as that where on its face the warrant did not make out the basis for lawful issue. The other, more literal, approach adopted by the majority does not seem to me to meet the concerns prompting the statutory provision. Accordingly, I agree with the argument advanced by the authors of *Adams on Criminal Law – Rights and Powers* set out in the judgment of Winkelmann CJ.[86] On this approach, it would not be necessary to address the effect of s 379 of the Criminal Procedure Act.

Unfairness

[122] I consider the question of impropriety could have been addressed solely on the basis of s 107(1)(a). On that approach, the evidence would have been improperly obtained under s 30(5)(a) of the Evidence Act being evidence obtained "in consequence of a breach of [an] enactment … by a person to whom section 3 of the New Zealand Bill of Rights Act 1990 applies". That said, I would agree that the evidence was obtained unfairly in terms of s 30(5)(c) of the Evidence Act because the conduct forming the basis of the application for the production order was the very conduct encouraged by a police officer.[87]

Exclusion under s 30 of the Evidence Act

[123] As indicated, I take a different view on the outcome of the balancing exercise in this case. In reaching that conclusion I assess the weight of two of the s 30 factors differently, namely, the importance of the right and seriousness of intrusion on that right,[88] and the nature of the impropriety.[89] In terms of the first factor, I consider the breach of privacy involved in the release of the content of the telephone calls was minimal. I say that because the Corrections Act 2004 envisages that telephone calls will be monitored and imposes associated requirements on the Department of Corrections to ensure those in prison are aware of the monitoring regime.[90] I accept,

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86 See above at [55] per Winkelmann CJ for the majority, citing Simon France (ed) *Adams on Criminal Law – Rights and Powers* (online ed, Thomson Reuters) at [SS107.02(1)].
87 Above at [63] per Winkelmann CJ for the majority.
88 Evidence Act, s 30(3)(a).
89 Section 30(3)(b).
90 Corrections Act 2004, ss 111–122. I add that I consider there is force in the view of Glazebrook J that a production order was not necessary for the reasons given at [110].

however, that, against this aspect, the fact the first respondent's home was searched unlawfully weighs strongly in favour of exclusion.

[124] As to the second factor, the nature of the impropriety, the finding in the District Court was that the breach "was not deliberate, reckless or done in bad faith".[91] It is the case that Constable Hall had worked out that there must have been a "deal" and he had made the connection between that and the surrender of firearms. To that extent at least his conduct was deliberate and undoubtedly slack. But he did make some inquiries and his failure to follow up on them was not intended to mislead nor as a result of any bad faith on his part. The Constable was not assisted by the fact his more senior officer was not forthcoming. Detective Inspector Burke's explanation for that is not compelling but does go to support the notion there was no deliberate misleading of the issuing officer.

[125] In these circumstances, I would give greater weight to the pivotal nature and the quality of the evidence which was obtained as a result of the search and to the seriousness of the offending. In my view, exclusion of the evidence would be disproportionate particularly where there was some information provided in support of the application for the search warrant which was not derived directly from the production order.

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[91] *R v Reti* [2018] NZDC 8843 (Judge McDonald) at [53(b)].