



Supreme Court of New Zealand | Te Kōti Mana Nui o Aotearoa

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MEDIA RELEASE

DAVID CHARLES RAE v COMMISSIONER OF POLICE

(SC 33/2023) [2023] NZSC 156

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest: www.courtsofnz.govt.nz.

What this judgment is about

This judgment concerns how the Supreme Court should deal with appeals arising from factual errors made by the Court of Appeal. In doing so, this judgment deals with the Supreme Court's jurisdiction to hear appeals against a decision of the Court of Appeal declining to recall a substantive judgment in a civil proceeding.

The appeal

Mr Rae applied to this Court for leave to appeal against a decision of the Court of Appeal declining to recall its earlier substantive judgment in which it dismissed Mr Rae's appeal against a High Court judgment. The application raised the issue of whether this Court has jurisdiction to hear and determine an application for leave to appeal against a decision of the Court of Appeal declining to recall a judgment in a civil proceeding. This Court decided to have an oral hearing to determine the following issues:

- (1) whether the Court has jurisdiction to hear such an appeal;
- (2) if it did not have that jurisdiction, whether the Court could treat Mr Rae's application as an application for leave to appeal (out of time) from the Court of Appeal's substantive judgment;
- (3) if the extension of time was granted, whether the leave criteria were met; and
- (4) if leave to appeal was granted, whether the appeal should be allowed.

Background and lower Courts

In February 2020, the Commissioner of Police applied to the High Court on a “without notice” basis (that is, without notice of the application to Mr Rae being required) under the Criminal Proceeds (Recovery) Act 2009 for a restraining order over funds held in certain New Zealand bank accounts of two companies associated with Mr Rae, R Ltd (with three accounts) and S Ltd (with two accounts). The Commissioner alleged the funds were associated with criminal activity, such as money laundering, that Mr Rae had benefitted from. Part of the evidence the Commissioner provided in support of the without notice restraining order was information about money laundering charges to which that Mr Rae pleaded guilty in the United States. The High Court granted the order.

As is the usual process, an “on notice” application was then made by the Commissioner, and notice of this was given to Mr Rae. In response, Mr Rae filed an affidavit in which he alleged that the Commissioner had not made full disclosures to the High Court when seeking the without notice order. One of the issues raised by Mr Rae was that the Commissioner had not disclosed to the Court, in the material placed before the Court in support of the without notice application, that Mr Rae had a plea agreement with the United States authorities which did not include any of the R Ltd accounts. The Commissioner had not initially known about the plea agreement but, after being informed of it, delayed providing the correcting information to the Court. As a result, the High Court Judge accepted the Court arguably may have been misled and as a result varied the without notice restraining order by removing one of the R Ltd accounts from its scope.

In October 2020, the High Court Judge conducted a hearing to deal with the Commissioner’s on notice application. At this hearing, Mr Rae argued that the material non-disclosure in relation to the without notice application was so serious that it should result in the entire restraining order being discharged. The Judge disagreed and found that the grounds for an on notice order were established. Mr Rae unsuccessfully appealed against that decision to the Court of Appeal.

Mr Rae identified four errors in the Court of Appeal’s judgment dismissing his appeal. These errors related to the number of bank accounts associated with R Ltd and the extent of the discharge of the restraining order made by the High Court in relation to R Ltd. He therefore applied to the Court of Appeal for the recall of its substantive judgment and submitted that, given the correcting information, it should alter its substantive judgment and allow his appeal in part. The Court of Appeal refused to recall its substantive judgment. It considered that the errors identified were not important to its reasoning and in any event would not have had an impact on the outcome reached in its substantive judgment.

Supreme Court decision

The Supreme Court granted Mr Rae’s application for leave to appeal (out of time) against the Court of Appeal’s substantive decision. Nevertheless, the Court has unanimously dismissed the appeal.

In doing so, the Court addressed each of the four issues raised during the oral hearing

(1) *Jurisdiction to hear an appeal against a refusal of recall*

The Court has determined that, while the Court does have jurisdiction, the leave criteria in s 74 of the Senior Courts Act 2016 means it is unlikely that the Court would grant leave to appeal against a Court of Appeal judgment dealing with an interlocutory application for recall in a civil proceeding.

Instead, the proper course is for the applicant to apply to this Court for leave to appeal against the substantive judgment to which the recall application related. Many issues raised with the Court of Appeal in an unsuccessful recall application can be dealt with by this Court in an appeal against the substantive judgment.

(2) *Treating Mr Rae's application as applying for leave to appeal against the Court of Appeal's substantive judgment*

The Court accordingly decided to treat Mr Rae's application as an application for leave to appeal out of time against the Court of Appeal's substantive judgment.

(3) *Were the leave criteria met?*

The Court held that there were material errors in the Court of Appeal's judgment which were best dealt with substantively and that in those circumstances it was in the interests of justice to grant leave to appeal.

(4) *Should Mr Rae's appeal succeed?*

Dealing substantively with the issues raised by Mr Rae, this Court considered that while the factual errors in the Court of Appeal substantive judgment were material, the outcome reached by the Court of Appeal was nonetheless correct.

The Court of Appeal correctly found that the Commissioner did not act in bad faith in failing to disclose the relevant information immediately and that the defects in the information initially provided to the High Court in the material supporting the without notice application to that Court were not such as to justify the restraining order being completely discharged in relation to R Ltd. And the errors made that did underlie part of the Court of Appeal's reasoning would not have altered the outcome as information about the plea deal and the number of accounts associated with R Ltd did not necessarily impact on the validity of the restraining orders under New Zealand law. Further, the restraining order is an interim process pending the resolution of the application for a forfeiture order, where Mr Rae can raise arguments as to the proper basis for forfeiture of the funds in the R Ltd accounts. Accordingly, the appeal was dismissed.

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