IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI O AOTEAROA

SC 33/2023

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| BETWEEN | DAVID CHARLES RAE<br>Applicant |
| AND | COMMISSIONER OF POLICE<br>Respondent |

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SUBMISSIONS OF COUNSEL ASSISTING ON APPLICATION FOR LEAVE TO BRING CIVIL APPEAL

Dated 6 October 2023

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Counsel certifies that the submission does not contain any suppressed information and is suitable for publication.

## SUBMISSIONS OF COUNSEL ASSISTING ON APPLICATION FOR LEAVE TO BRING CIVIL APPEAL

## MAY IT PLEASE THE COURT

### Introduction

1. Counsel has been appointed to assist the Court on the issues set out in the minute of Ellen France J dated 10 July 2023:

    (a) whether the Court has jurisdiction to hear an appeal from the Court of Appeal's decision to decline a recall judgment in a civil proceeding (the **Recall Judgment**);[1]

    (b) the possibility that, in the alternative, the Court should treat the application as an application (with leave to appeal out of time) for leave to appeal from the Court of Appeal's initial judgment (the **Initial Judgment**);[2]

    (c) whether the leave criteria are met; and

    (d) the substantive merits of the appeal (on the assumption leave to appeal is ultimately granted).

### Issue (a): Does the Supreme Court have jurisdiction to hear an appeal from the Court of Appeal's decision to decline a recall judgment in a civil proceeding?

2. Counsel has reviewed the parties' submissions on the jurisdiction issue and broadly agree with the analysis and options set out by the respondent.[3] Counsel assisting makes the following points in addition.

*Section 74(4): Meaning of "concluded"*

3. The meaning of the word "*concluded*" under s 74(4) of the Senior Courts Act 2016 is significant as it may mean that the Supreme Court can never grant leave to appeal against a decision refusing recall (if "*concluded*" is interpreted to mean delivery of judgment, not sealing).[4]

4. The term "*concluded*" is not used elsewhere in the Act, nor is there much to be gleaned from Hansard or the Select Committee Report.[5]

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1 *Rae v Commissioner of Police* [2023] NZCA 38 [**Recall Judgment**].
2 *Rae v Commissioner of Police* [2023] NZCA 4 [**Initial Judgment**].
3 Supplementary submissions for the respondent on application for leave to bring civil appeal (29 September 2023) [**Respondent Subs (No 2)**] at [3] and [20]–[50].
4 For more details, see Respondent Subs (No 2) at [46]–[50].
5 Supreme Court Bill 2003 (16-2) (select committee report).

5. Counsel agrees with the respondent that the purpose of s 74(4) is to ensure that appeals from interlocutory orders will only be given leave when it is necessary in the interests of justice for them to be determined before the proceedings result in a final judgment that may itself be subject to appeal.[6]

6. To this end, this Court has held that "*[i]f the matter at issue remains available for argument in a future application for leave to appeal (and a future appeal if leave is granted), it will be difficult to persuade the Court that the s 74(4) test is met*".[7] In that case, the Court was concerned about the potential "*disruption to the processes of the Court of Appeal (and the inconvenience to other parties to the remitted appeals) if this Court made the order the applicant seeks*",[8] that is to grant leave to appeal under s 74(4).

7. The focus on whether the proposed appeal against the interlocutory decision can be dealt with in an appeal against the substantive decision may mean that the "*conclusion*" of proceedings referred to in s 74(4) ought to be the time from which the time to appeal runs, namely delivery of the judgment.[9] It may also be relevant that a "*judgment of the Court of Appeal takes effect when it is given*",[10] and a "*party may apply for leave to appeal to the Supreme Court even though the judgment sought to be appealed against has not been sealed, as long as the party takes steps to ensure that the judgment is sealed promptly after the application for leave is filed*".[11]

8. There are also some comments from this Court that tend to indicate that the natural meaning of "*concluded*" refers to the delivery of final judgment rather than sealing:

   (a) "*it is not necessary to hear and determine the proposed appeal before the Court of Appeal* ***determines*** *[rather than 'concludes'] the substantive appeal*";[12] and

   (b) "*[t]he threshold may more readily be passed where correction by appeal following conclusion of* ***the hearing*** *[rather than 'the proceeding'] is not available.*"[13]

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6 See Respondent Subs (No 2) at [47.2].
7 *Dotcom v United States of America* [2021] NZSC 36 at [14].
8 *Dotcom v United States of America* [2021] NZSC 36 at [14].
9 Supreme Court Rules 2004, r 11(1)(b).
10 Court of Appeal (Civil) Rules 2005, r 52(1).
11 Court of Appeal (Civil) Rules 2005, r 52(3).
12 *Wu v Stalix Property Ltd* [2023] NZSC 2 at [7] (emphasis added).
13 *Hamed v R (Leave)* [2011] NZSC 27, [2011] 3 NZLR 725 at [12]–[13] (emphasis added). That case concerned the application of s 13(4) of the Supreme Court Act 2003, the predecessor in identical terms to s 74(4) of the Senior Courts Act 2016.

[Emphasis added.]

*No prejudice or miscarriage of justice arises from the proposed (narrow) interpretation of s 74(4)*

9. The consequence of interpreting the conclusion of proceedings to mean the delivery of final judgment is that the Supreme Court can never grant leave to appeal against a decision refusing recall due to s 74(4). This is because recall applications are made after delivery of judgment and therefore can never be "*heard or determined before proceedings are concluded*" (as required for leave under s 74(4)).

10. Counsel notes that the grounds on which a judgment may be recalled are "*strictly limited*",[14] affirming "*rarity of legal justification for recalling judgments*".[15] This is because the general convenience and need for certainty in allowing a judgment once delivered to stand for better or worse, subject to appeal.[16] Therefore, the Court of Appeal in *Horowhenua County v Nash (No* 2) set out three categories of cases in which recall may be justified:[17]

    (a) cases where since the hearing there has been an amendment to a relevant statute or regulation or a new judicial decision of relevance and high authority;

    (b) cases where counsel have failed to direct the Court's attention to a legislative provision or authoritative decision of plain relevance; and

    (c) cases where for some other very special reason justice requires that the judgment be recalled.

11. Those criteria are to be "*strictly applied*".[18] The recall process is not a substitute for an appeal,[19] there being narrower grounds for recall.

12. However, that is not to say that, if a recall application is declined, the issues raised in the recall application may not be raised in seeking leave to appeal against the substantive decision (that is the decision the applicant sought to recall). The Supreme Court may grant leave to appeal so long as s 74(1)–(2) are satisfied.

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14 *Erwood v Maxted* [2010] NZCA 93 at [3].
15 *Ngahuia Reihana Whanau Trust v Flight* CA23/03 26 July 2004 at [3].
16 *Horowhenua County v Nash (No 2)* [1968] NZLR 632 (SC) at 633.
17 *Horowhenua County v Nash (No 2)* [1968] NZLR 632 (SC) at 633, as cited in *Erwood v Maxted* [2010] NZCA 93 at [23].
18 *Erwood v Maxted* [2010] NZCA 93 at [23].
19 *Faloon v Commissioner of Inland Revenue* (2006) 22 NZTC 19,832 (HC) at [13], as cited in *Erwood v Maxted* [2010] NZCA 93 at [5].

13. It would seem, therefore, that recall grounds may be considered a narrow subset of what may form part of an appeal against the substantive judgment, but not vice versa.

14. Given that recall applications involve the application of "*well-settled principles*" (as set out in *Horowhenua*), in most cases it is unlikely that an appeal on grounds relied on in a recall application are likely to involve a matter of general or public importance or general commercial significance (see further the discussion at [21] below).[20]

15. That leaves only s 74(2)(b), namely that "*a substantial miscarriage of justice may have occurred, or may occur unless the appeal is heard*". In theory any one of the three grounds for recall set out in *Horowhenua* could lead to a substantial miscarriage of justice occurring unless the appeal is heard and the error corrected. Even accepting that the "*substantial miscarriage of justice*" ground has limited application in civil cases, being limited to cases in which the miscarriage is so "*repugnant*",[21] that is arguably consistent with the narrow grounds for which a judgment may be recalled in the first place.

16. There is therefore unlikely to be any prejudice to the applicant (or future applicants) in interpreting s 74(4) in a way which prohibits the granting of leave in relation to decisions refusing recall, and thereby always requiring an applicant to seek leave to appeal against the substantive decision rather than the decision refusing recall.

**Issue (b): Alternatively, should the Supreme Court treat the application as an application (with leave to appeal out of time) for leave to appeal from the Court of Appeal's initial judgment?**

17. Rule 11(4) of the Supreme Court Rules 2004 provides that "*[a] party may apply for an extension before or after the period expires*".

18. In applying that rule, this Court has previously held that "*[a] litigant in civil proceedings who has been successful in the Court of Appeal will naturally conclude that finality has been reached in the litigation if the time for applying to this Court for leave to appeal is expired. This Court will accordingly not grant an extension of time under Rule 11(4) lightly. The appellant must show that in all the circumstances the interests of justice favour granting leave.*"[22]

19. In the circumstances, in counsel's view, if the Court finds that it has no jurisdiction to consider the Recall Judgment, the Court should treat the

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20 *Smith v Plowman* [2022] NZSC 109 at [5].
21 *Junior Farms Ltd v Hampton Securities Ltd* [2006] NZSC 60, (2006) 18 PRNZ 369 at [5].
22 *Thom v Davys Burton* [2007] NZSC 107 at [2].

application as one for leave to appeal from the Initial Judgment. Crucially, the respondent does not oppose the Court doing so[23] and there is no prejudice to the respondent in allowing the application.

## Issue (c): Are the leave criteria met?

20. The leave criteria are set out at s 74 of the Senior Courts Act 2016:

> **74 Criteria for leave to appeal**
>
> (1) The Supreme Court must not give leave to appeal to it unless it is satisfied that it is necessary in the interests of justice for the curt to hear and determine the appeal.
>
> (2) It is necessary in the interests of justice for the Supreme Court to hear and determine a proposed appeal if—
>
> (a) the appeal involves a matter of general or public importance; or
>
> (b) a substantial miscarriage of justice may have occurred, or may occur unless the appeal is heard; or
>
> (c) the appeal involves a matter of general commercial significance.

*General or public importance*

21. The proposed appeal against the Initial Judgment is on its face confined to factual assessments by the Court of Appeal. As noted by the respondent, the proposed appeal involves the application of seemingly settled principles regarding the discharge of *ex parte* orders to the specific facts before it, and the applicant does not challenge those principles.[24] This Court has tended not to grant leave in cases where the law is sufficiently clear, cases involving re-examination of factual matters in a uncontroversial context, and cases where there have been concurrent findings of fact in lower courts.[25]

22. However, it is possible to view the proposed appeal as involving an assessment of how the Commissioner of Police (the **Commissioner**) ought to approach without notice applications for restraining orders more generally, which it does on a routine basis, and the information it chooses to disclose to the court. There is an added level of complexity here as the application relates to (or at least, originates from) underlying criminal conduct in the United States and the court was reliant on the Commissioner to disclose all material information

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23 For reasons, see Respondent Subs (No 2) at [51].
24 See Respondent Subs (No 2) at [54.1].
25 See *McGechan on Procedure* (online ed) at [SC74.03].

obtained from overseas authorities. It is therefore arguable that the proposed appeal has general precedent value.

*Substantial miscarriage of justice*

23. This Court has previously held that the "*miscarriage ground is of limited application in civil cases*".[26] The ground is limited in the civil context to cases in which there is a sufficiently apparent error that is of such a substantial character that it would be "*repugnant to justice*" to allow the error to be left uncorrected.[27]

24. In the present case, as will be discussed below in relation to the substantive merits of the proposed appeal,[28] it is arguable that the error alleged by the applicant may be substantially "*repugnant to justice*" so as to amount to a substantial miscarriage of justice. But this is only if the alleged error goes beyond an insignificant factual misdescription and the mistake, had it been corrected, may have resulted in a different substantive outcome.

## Issue (d): What are the substantive merits of the appeal?

25. The proposed appeal concerns errors contained in three paragraphs in the Initial Judgment (emphases added):

> [3] On 11 February 2020 the Commissioner applied, without notice, for a restraining order over more than $6.5 million **in two bank accounts**, which concerned R Ltd and S Ltd. The Commissioner alleged the funds were tainted property and Mr Rae had unlawfully benefitted from significant criminal activity. More particularly, the Commissioner alleged Mr Rae committed the crime of money laundering by transferring to New Zealand the proceeds of fraudulent schemes committed in the United States of America in relation to that country's Medicare scheme.[29]
>
> …
>
> [7] On 23 June 2020, **Cooke J discharged the restraining order in relation to R Ltd**. The Judge also scheduled a hearing to determine the Commissioner's on notice application, which Mr Rae opposed on the basis of non-disclosure.[30]

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26 *Junior Farms Ltd v Hampton Securities Ltd* [2006] NZSC 60, (2006) 18 PRNZ 369 at [4].
27 *Junior Farms Ltd v Hampton Securities Ltd* [2006] NZSC 60, (2006) 18 PRNZ 369 at [5].
28 See below at [25] and following, particularly [29], [39] and [42].
29 The applicant seeks a correction of the emphasised passage to "*in 3 bank accounts for R Ltd and 2 bank accounts for S Ltd*". See Submissions on behalf of the appellant (8 May 2023) [**Appellant Subs (No 1)**] at [32]
30 The applicant seeks a correction of the emphasised passage to "*Cooke J varied the restraining order to the limited extent that 1 account for R Ltd was released for the restricted use for the Appellant to use for legal fees; otherwise, both R Ltd and S Ltd remained subject to restraint*". See Appellant Subs (No 1) at [32].

...

[50] In any event, we consider Cooke J was correct not to rescind the restraining order given the considerations we have summarised, even if the Judge did adopt egregiousness as is suggested. In view of the considerations set out at [46]–[47], we note:

(a) The Commissioner acted in good faith. He did not know there had been a formal agreement between Mr Rae and the United States authorities, and therefore did not know those authorities had excluded the R Ltd bank account. Relatedly, the misleading information provided by the United States authorities was 'not the consequence of bad faith' for the reasons explained by the Judge. We add that **unlike the applicant in *Green Way*, the Commissioner accepted these shortcomings once they were identified**.[31]

(b) The missing (and misdescribed) information was important. However, that information would not have changed the outcome had it been known, save in relation to the bank account of R Ltd. **The exclusion of that account by United States authorities would presumably have led to that aspect of the restraining order application being declined**. But Cooke J rescinded the order in relation to R Ltd long before the contested hearing on 20 and 21 October 2020. So, this aspect had already been remedied by the time the Judge was asked to rescind the order in its entirety. And, as observed, the balance of the order would have been made had the missing information been before the Court.

*Criticisms in respect of paragraphs 3 and 7 of Initial Judgment*

26. In respect of [3] of the Initial Judgment, the applicant says there is an error as to the number of bank accounts. This error, on its own, is of no consequence to the final outcome. Indeed, in the Recall Judgment the Court of Appeal clarified that "*[t]he number of bank accounts held by R Ltd was not important to our reasoning.*"[32] Nevertheless, the applicant says that this error has significance in relation to [50(b)] of the Initial Judgment as it demonstrates the Court of Appeal proceeded on the mistaken basis that there was only one bank account for R Ltd.[33]

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31 The applicant seeks a correction of the emphasised passage to "*similar to the applicant in* Green Way*, the Commissioner did not accept these shortcomings once they were identified. It was the United States authorities that ensured the position re R Ltd was rectified*". See Appellant Subs (No 1) at [34].

32 Recall Judgment at [2].

33 See Submissions on behalf of the appellant (12 September 2023) [**Appellant Subs (No 2)**] at [21]–[23]; and Appellant Subs (No 1) at [8]–[9].

27. In respect of [7] of the Initial Judgment, the applicant submits that the Court of Appeal misdescribed what had happened in the High Court, that is the fact that Cooke J varied the restraining order to the extent that one (of three) R Ltd account(s) was released so that the applicant could pay his legal fees. That misdescription, the applicant says, reflects a substantive misunderstanding of the relevant facts by the Court of Appeal.

28. However, the use of the word "*discharge*" instead of "*vary*" is of no consequence to the final outcome. Indeed, Cooke J himself used the word "*discharge*" in describing the effect of his Honour's minute of 23 June 2020.[34] With respect to the fact that only one of the R Ltd accounts was discharged, that has significance only in light of the comments at [50(b)] of the Initial Judgment.

*Criticisms in respect of paragraph 50 of Initial Judgment*

29. In respect of [50(b)] of the Initial Judgment (being the applicant's main ground in this appeal), the applicant's argument, as understood by counsel assisting, is as follows:

    (a) The Court of Appeal held that the "*missing (and misdescribed) information was important*" and "*would … have changed the outcome had it been known [to the court] … in relation to the bank account of R Ltd*". Consequently, the Court of Appeal observed that "*[t]he exclusion of that account by the United States authorities would presumably have led to that aspect of the restraining order application being declined.*"[35]

    (b) However, the Court of Appeal misunderstood Cooke J as having "*rescinded the order in relation to R Ltd long before the contested hearing*". In fact what Cooke J did was to vary (or discharge in part) the restraining order in relation to one of the bank accounts for R Ltd in order to release funds for the applicant's legal fees.

    (c) Had the Court of Appeal properly understood that the bank accounts of R Ltd were not discharged in their entirety by Cooke J, it would have released those restrained accounts. This is because the application for restraining orders in relation to those accounts ought to have been declined in the first place had the missing information been before the High Court.

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34 *Rae v Commissioner of Police* [2020] NZHC 3132 [**HC Judgment**] at [2].
35 Initial Judgment at [50(b)].

(d) The effect of the Court of Appeal's proper understanding of the facts would mean that sub-paras (b), (c) and (d) record factors in favour of the applicant (as opposed to just sub-paras (c) and (d)). And "*[t]hat would mean the balance of interests applied by the Court of Appeal would overall result in the rescinding of the restraint orders as a whole; i.e. for both R Ltd and S Ltd.*"[36]

*Criminality attributable to R Ltd not relevant to the appeal*

30. In support of his argument, the applicant also claims that the United States authorities "*had accepted that R Limited had no criminal conduct that could be attributed to it, and that is why it would not support any repatriation of funds from R Ltd to the US*".[37]

31. The respondent says in response that "*[t]he evidence of the United States authorities led the High Court to the conclusion there were reasonable grounds to believe that* [redacted] *[R Ltd] was involved in criminal conduct.*"[38]

32. The respondent further says that if the applicant is correct and he persuaded the United States authorities that the funds in the R Ltd accounts were legitimate, then that begs the question why he did not provide the same information to the New Zealand courts.[39] Instead, in the High Court, with the benefit of legal advice, the applicant decided not to contest the substantive grounds of the restraining order for "*strategic reasons*".[40] In the circumstances, the respondent submits there is no miscarriage of justice here and the applicant cannot walk back on his strategic decision in the context of a second appeal.

33. Counsel assisting agrees that the applicant has not adduced evidence which supports the proposition that the United States authorities accepted the lack of criminal conduct in respect of the R Ltd accounts. The fact that the United States authorities did not include the accounts of R Ltd in the final plea agreement does not necessarily mean that there was an acceptance that no criminality was attributable to R Ltd. It could, for example, be the result of a compromise reached between the United States authorities and Mr Rae irrespective of the parties' substantive views.

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36 Appellant Subs (No 2) at [39].
37 Appellant Subs (No 2) at [58].
38 Respondent Subs (No 2) at [60]–[61].
39 Respondent Subs (No 2) at [63].
40 HC Judgment at [21].

34. For context, it is not unusual for respondents in applications for restraining orders not to oppose the application by rebutting the merit of the Commissioner's case for significant criminal activity. The standard for a restraining order is whether there are "*reasonable grounds to believe*".[41] That is a low threshold for the Commissioner to satisfy. However, the Commissioner still needed to satisfy the Court that such reasonable grounds existed, and evidence of criminality was adduced by the Commissioner which Cooke J found to have met the relevant threshold. It does not follow that because Mr Rae did not attempt to positively establish the legality of the R Ltd accounts at the restraint stage, he is therefore barred from challenging the findings made by the Judge on that point.

35. In the end, the proposed appeal in relation to [50(b)] of the Initial Judgment does not turn on this point. The lack of criminality in respect of R Ltd was not argued in the courts below in the context of restraint, and it is not necessary for this Court to make a determination on that point for the purposes of this appeal. In any event, that issue may be pursued in relation to forfeiture and there is therefore no miscarriage of justice.

*Recall Decision of limited relevance to the appeal*

36. The respondent also says that the Court of Appeal "*did not conclude that the restraint over the* [redacted] *[R Ltd] Accounts should be discharged. Its intent was otherwise plain: to confirm the High Court was correct to not rescind the Order. The Court of Appeal rejected the applicant's claims to the contrary when it refused his recall application.*"[42]

37. However, in the view of counsel assisting, the Recall Judgment is not dispositive of the issues raised on appeal (or at least in relation to [50(b)] of the Initial Judgment). The legal principles applicable to an application for recall (being relatively narrow)[43] are different to those applicable on appeal to this Court (being by way of rehearing).[44]

38. In counsel's view, if the Court considers that the recall procedure was likely not an available or correct avenue to pursue the issue raised by Mr Rae, the limited response given by the Court of Appeal in the Recall Judgment should be taken as being confined to its own context.

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41 Criminal Proceeds (Recovery) Act 2009, ss 24–26.
42 Respondent Subs (No 2) at [62].
43 *Horowhenua County v Nash (No 2)* [1968] NZLR 632 (SC).
44 Senior Courts Act 2016, s 78.

*Analysis of paragraph 50*

39. The critical issue, in counsel's view, is whether the Court of Appeal — having said that "*[t]he exclusion of that account by the United States authorities would presumably have led to that aspect of the restraining order application being declined*" — would (or should) have discharged the restraining order in relation to the accounts of R Ltd if it understood that those accounts had not been discharged by Cooke J.

40. The applicant's reasoning that if [50(b)] is weighed in his favour, then because he has sub-paras (b), (c) and (d) for him and only sub-paras (a) and (e) against him, the balance of factors weighs in his favour and should "*result in the rescinding of the restraint orders as a whole*" is subject to the obvious challenge that a balancing exercise is not a arithmetic equation of 3 factors versus 2. Plainly, the Court of Appeal could have assigned different weight to different factors.

41. Furthermore, [50] of the Initial Judgment is not the only reason the Court of Appeal held that Cooke J was correct. The paragraph starts "*In any event …*". There are other reasons to uphold the decision of Cooke J (including those outlined at [48]–[49] and [54] of the Initial Judgment). It must be read in light of the entire judgment.

42. The Court of Appeal's comment as to the partial discharge of the account based on a distinction of what was excluded by the United States does, on a plain reading of the paragraph, suggest that it had apprehended that to the basis on which Cooke J discharged the restraining orders in respect of the account(s) excluded. In the context of this argument, it does not in fact matter if there is one or multiple R accounts. The importance is that there is a distinction as to the appropriateness of restraint or discharge based on the differential treatment by the United States authorities. At a stretch, the Court of Appeal's comment may also be read as a passive endorsement of that position. However, the applicant urges this Court to go further and discharge all accounts (those relating to both R Ltd and S Ltd).

43. The Court of Appeal may have considered that the exclusion of certain accounts by the United States authorities would have itself formed a reason for the first instance judge to have declined the granting of without notice orders, had that information been disclosed.

44. Counsel notes that neither Mr Rae nor the Commissioner argued in the Court of Appeal that the R Ltd accounts should be dealt separately

from the S Ltd accounts.[45] The relevance of the material which had not been disclosed was connected with the impact it may have had on the judge determining the without notice application in a global sense. The concern was the potential for an abuse of process and not for the lack of proof of criminality in respect of the R accounts only.

45. It would appear that the Court of Appeal's comment at [50(b)] that the missing (and misdescribed) information was important, but only in respect of R Ltd was not made on the basis of arguments made before that Court or in the High Court.

46. Importantly however, in light of the High Court's finding in respect of the abuse of process arguments, on notice orders for all R Ltd and S Ltd accounts would have been made had the missing information been before the Court.[46] The partial discharge of the R Ltd account was, in that sense, a procedural remedy strictly in response to the act of material non-disclosure itself.

47. The applicant has not appealed against the Court of Appeal's finding in respect of the abuse of process ground. Issues which relate to the potential unfair effect of the recovery mechanisms can be argued by the applicant in the context of forfeiture and relief for hardship.

## Conclusion

48. In summary, on each of the issues outlined in the minute of Ellen France J dated 10 July 2023, counsel submits:

    (a) this Court likely does not have jurisdiction to hear an appeal from the Court of Appeal's decision to decline a recall judgment in a civil proceeding by reason of the leave criterion under s 74(4) of the Senior Courts Act 2016 not being met;

    (b) the interests of justice favour this Court treating the application as an application (with leave to appeal out of time) for leave to appeal from the Initial Judgment;

    (c) there are arguments finely balanced for and against the leave criteria being met in this case, including that the appeal arguably involves a matter of general or public importance, and, depending of the Court's view on the substantive merits, may involve a substantial miscarriage of justice; and

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45 See Synopsis of submissions for the respondent ( 17 November 2022); and Submissions of counsel assisting (3 November 2022).

46 HC Judgment at [75] – [76]; Initial Judgment at [54].

(d) the substantive merit of the appeal largely turns on this Court's views on the effect of [50(b)] of the Initial Judgment.

Dated 6 October 2023

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Y Mortimer-Wang | J Kim

Counsel assisting the court