IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA **SC 33/2023**

BETWEEN	**DAVID CHARLES RAE**
	Applicant
AND	**THE COMMISSIONER OF THE NEW ZEALAND POLICE**
	Respondent

SUPPLEMENTARY SUBMISSIONS FOR THE RESPONDENT ON APPLICATION FOR LEAVE TO BRING CIVIL APPEAL

29 September 2023

Presented for Filing by: Luke Cunningham Clere
Barristers & Solicitors
PO BOX 10357
WELLINGTON 6143

Tel: 04 472 1050
Fax: 04 471 2065

(S B MCCUSKER)

COUNSEL FOR THE RESPONDENT CERTIFY THAT, TO THE BEST OF THEIR KNOWLEDGE, THIS SUBMISSION CONTAINS NO SUPPRESSED INFORMATION AND IS SUITABLE FOR PUBLICATION

Issue

1. By minute dated 10 July 2023, Ellen France J requested submissions on the following matters:

> (a) whether the Court has jurisdiction to hear an appeal from the Court of Appeal's decision to decline to recall a judgment in a civil proceeding;
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> (b) the possibility that, in the alternative, the Court should treat Mr Rae's application as an application (with leave to appeal out of time) for leave to appeal from the Court of Appeal's initial judgment.
>
> (c) whether the leave criteria are met; and
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> (d) the substantive merits of the appeal (on the assumption leave to appeal is ultimately granted).

2. Each issue is addressed in the order requested.

Summary of submissions

Issue (a): the Court's jurisdiction to hear an appeal from the Court of Appeal's recall judgment

3. For the following reasons, the Court may not give leave to appeal against the Court of Appeal's refusal to recall in this case:

3.1 An application for recall of a judgment in the Court of Appeal is an interlocutory application, within the meaning of r 8A the Court of Appeal (Civil) Rules 2005 (**Court of Appeal Rules**).

3.2 Section 68 of the Senior Courts Act 2016 (**the Act**) provides that the Court has jurisdiction to hear appeals from determinations of interlocutory applications by the Court of Appeal, including applications for recall.

3.3 However, s 74(4) of the Act provides the Court:

> must not give leave to appeal to it against an order made by the Court of Appeal on an interlocutory application unless satisfied that it is necessary in the interests of justice for the Supreme Court to hear and determine the proposed appeal before the proceeding concerned is concluded.

3.4 The Court may wish to consider whether recall decisions are a type of interlocutory order to which s 74(4) does not apply. If it does not apply, then the Court may proceed to consider whether leave should be given (issue (c)). However, if the Court agrees with the respondent that s 74(4) does apply, it will be necessary to consider whether the "proceedings have concluded", since the

effect of s 74(4) is that leave may only be given to appeal against interlocutory orders when the proceedings have not concluded.

3.5 In this case, both the Court of Appeal's initial judgment and its recall judgment have been delivered, but neither have been sealed. The respondent submits that proceedings conclude, for the purpose of s 74(4), with the delivery of judgment rather than with sealing. If the Court agrees, then proceedings have concluded and, insofar as s 74(4) applies, leave may not be given. However, if the Court finds that proceedings conclude only with sealing, then proceedings have not concluded for the purposes of s 74(4) and the Court must go on to consider leave (issue (c)).

3.6 It is submitted that the proceedings in this case concluded with the delivery of the Court of Appeal's initial judgment. Alternatively, the proceedings concluded with the delivery of Court of Appeal's recall judgment. If the Court concludes that the proceedings concluded with delivery of either judgment, then leave may not be given.

3.7 However, neither the initial judgment nor the recall judgment have been sealed. In the event the Court concludes the proceedings will only have concluded with the sealing of one of these judgments, then the proceedings have not been concluded and it is necessary to consider whether leave should be given in accordance with the requirements in s 74(1) to (3) (issue (c)).

Issue (b): the application may be treated as an application for leave to appeal

4. If the Court finds that leave may not be given to hear an appeal against the Court of Appeal's refusal to recall, then in the circumstances of this case, the respondent does not oppose the application being treated as an in-time application for leave to appeal the Court of Appeal's initial judgment.

Issue (c) and (d): the leave criteria are not met, but even if they are, the appeal should be dismissed

5. The criteria for leave to appeal are not met in this case. The scope of any appeal is confined to two alleged factual errors:

5.1 The first relates to whether the Court of Appeal was right not to discharge a restraining order over a particular bank account. This is, in effect, a challenge to the substantive basis for the making of the restraining order under ss 24 and 25 of the Criminal Proceeds (Recovery) Act 2009 (**CPRA**). The substantive grounds for the order were not opposed in the High Court and went

unchallenged in the Court of Appeal. There is no scope for the applicant to now challenge the basis for this order in the context of a second appeal.

5.2 The second concerns whether the Court of Appeal's judgment accurately reflects the respondent's stance towards the issue of material non-disclosure once it was identified. The respondent submits there is no error in this respect.

Background

The alleged significant criminal activity

6. Central to this proceeding are two Medicare fraud schemes in the United States: the DME Scheme and the Cancer Screening Scheme.[1]

7. In connection with the DME Scheme, the applicant pleaded guilty under oath in the United States District Court for the District of New Jersey for conspiring to launder USD $1,650,000 in criminal proceeds from a United States bank account to a Hong Kong-based bank account in the name of Cargill Consulting Limited (**Cargill Account**).

8. The respondent alleges that between 24 September 2018 and 25 March 2019, USD $196,882.41 of this amount was transferred from the Cargill Account into a New Zealand-based USD Account in the name of R Limited[2] (**R Ltd USD Account**).[3]

9. The applicant charged the DME Scheme's principal offender, Aaron Williamsky, a fee for transferring the proceeds from that Scheme.[4] The funds in the R Ltd USD Account are alleged to represent the applicant's share of those proceeds.[5] Proceeds from an undercover FBI operation were also transferred into the R Ltd USD Account.[6]

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1 *Commissioner of Police v Rae* [2020] NZHC 3132 (**HC Judgment**) at [34]. The schemes involved prescribing medically unnecessary Durable Medical Equipment and cancer screening tests to patients, respectively.

2 The nominal beneficial owner of R Ltd is the applicant's ex-wife, Sarah Rae. The Commissioner alleges the applicant exercises effective control over R Ltd. This is denied by the applicant. In a judgment dated 15 October 2021 concerning a claim for living expenses under s 28 of the CPRA, Churchman J found that Mr Rae exercised effective control over R Ltd and its assets: *Commissioner of New Zealand Police v Rae* [2021] NZHC 2766. An affidavit was subsequently filed by Sarah Rae in the context of the Commissioner's application for civil forfeiture orders on 6 December 2022.

3 In connection with the DME Scheme, the respondent also alleges that USD $1,303,332.38 was transferred from the Cargill Account into a bank account in the name of S Limited. See Affidavit of Marc VanZetta in support of restraining orders dated 5 February 2020 (**VanZetta**) at [5.14] [201.0020].

4 At [5.13] [201.0019]; [5.15] [201.0020]. The funds in the S Ltd account are alleged to be held for the benefit of Mr Williamsky: see [5.11] [201.0018].

5 At [5.20] [201.0020].

6 At [5.20] [201.0020].

Interactions between New Zealand and United States authorities

10. On 9 April 2019, the applicant was arrested and indicted in New Jersey in connection with the DME Scheme.[7] In June and July 2019, representatives of the respondent met with United States authorities requesting they provide evidence in support of domestic proceedings under the CPRA following receipt of a reports of suspicious transactions.[8]

11. Special Agent Marc VanZetta of the Federal Bureau of Investigation (**SA VanZetta**) provided a draft affidavit to the the respondent. It referred to the United States seeking repatriation of up to USD $196,882.09 in the R Ltd USD Account.[9]

12. In parallel, the applicant held plea discussions with the United States authorities. The United States agreed it would not seek forfeiture of the R Ltd USD Account.[10] A Plea Agreement and Forfeiture Order (the **Plea Agreement**) was signed on 19 December 2019. It was in connection with the DME Scheme only, and did not include the R Ltd Account.[11] The respondent's representatives did not make enquiries as to these facts of the applicant's sentencing when finalising the application for restraining orders.[12] The applicant was sentenced to time served on 7 February 2020.[13]

The restraining order and its variation

13. On 13 February 2020, Cooke J made without notice restraining orders (the **Order**) over the R Ltd USD Account, as well as a R Ltd NZD account with a balance of NZD $50,520.70 (the **R Ltd NZD Account**) and a R Ltd GBP account with a balance of NZD $1,855.66 (the **R Ltd USD Account**).[14]

14. Between March and May 2020, the respondent and the applicant corresponded on issues arising from the making of the Order.[15] On 9 May 2020, the respondent filed an affidavit advising that the United States no longer sought repatriation of the R Ltd USD Account.[16]

15. On 23 June 2020, the High Court released the R Ltd NZD Account from restraint. This was on the basis that the Court had been prima facie misled

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7 HC Judgment at [16] [101.0162].

8 Affidavit of Brent Andrew Murray dated 27 July 2020 (**Murray**) at [2.1] – [2.31] [201.0419] – [201.0423].

9 At [2.48] [201.0424].

10 Affidavit of AUSA Barbara Ward dated 25 July 2020 (**Ward**) at [10] – [13] [201.0382] – [201.0383].

11 At [20].

12 Reply affidavit of Alex Macdonald dated 27 July 2020 (**Macdonald**) at [2.4] – [2.19] [201.0120].

13 HC Judgment at [8] [101.0160].

14 A R Ltd GBP Account with a balance of NZD $1,855.66 and two S Ltd accounts were also restrained.

15 Case on Appeal at [301.0204] – [301.0312].

16 Supplementary affidavit of Marc VanZetta dated 6 May 2020 [201.0024].

by non-disclosure of the Plea Agreement, and that "releasing part of the restrained funds to allow [the applicant] to instruct New Zealand solicitors to represent him before this Court seems to me to be justified."[17] The balance of the accounts, including the R Ltd USD and GBP accounts, remained subject to the Order. The High Court accepted the respondent "should be given the opportunity to advance arguments" that the funds should remain restrained.[18]

High Court proceeding and the Court of Appeal judgment

16. The applicant sought discharge of the Order in its entirety on the grounds of material non-disclosure and submitted that the application was an abuse of process on account of the Plea Agreement entered into in the United States.[19] He did not oppose the respondent's application on substantive grounds.[20] The respondent did not dispute there had been material non-disclosure.[21]

17. The High Court dismissed the applicant's opposition. There was a "strong basis" for the making of the Order,[22] and no abuse of process arose as the Plea Agreement did not prohibit domestic action under the CPRA.[23] The Court declined to rescind the Order for material non-disclosure because the "missing information [did] not alter the decision that would have been made in relation to restraint."[24] The respondent's failure was "the consequences of lapse of standards and errors of judgment of those involved, but not bad faith."[25] Those failures were not "egregious."[26]

18. The applicant appealed. The appeal was dismissed on 3 February 2023 (**initial judgment**).[27] As in the High Court, the applicant did not challenge the substantive basis for the Order.[28] The Court of Appeal held that the High Court was correct to not rescind it.[29] It also agreed with the High Court that there was no abuse of process arising from the respondent's application.[30]

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17 Minute of Cooke J dated 23 June 2020 at [13] [101.0028].

18 At [16] [101.0032].

19 HC Judgment at [3].

20 At [21].

21 At [50].

22 At [39].

23 At [72].

24 At [56].

25 At [59].

26 At [57].

27 *Rae v Commissioner of Police* [2023] NZCA 4 [**Initial Judgment**].

28 Initial Judgment at [9]

29 Initial Judgment at [50].

30 Initial Judgment at [55], [57].

19. The applicant subsequently applied for recall of the initial judgment. On 6 March 2023 the Court of Appeal declined that recall application.[31] The Court held that the number of bank accounts held by R Ltd was "not important to our reasoning" and "even if it were, there is no basis to recall the judgment according to the principles articulated in *Horowhenua County v Nash (No 2)*."[32]

Issue (a): jurisdiction to hear an appeal from the Court of Appeal's recall judgment

The Court's approach to jurisdiction in criminal cases and to leave judgments in civil cases

20. In *de Mey v R* the Court held that it did not have jurisdiction, in criminal proceedings, to hear an appeal of the Court of Appeal's decision to refuse to recall a decision dismissing an appeal:[33]

> [4] A decision "on appeal under section 383" means the decision in which the Court of Appeal determines the appeal under s 383, in this case by dismissing the conviction appeal. By contrast, a decision of the Court of Appeal refusing to reopen its appeal decision is not a decision of that character. It is no more than a decision that the Court of Appeal will not re-consider its decision on appeal. It can be described as a preliminary decision which, if it had been made in favour of the applicant, would have led to another decision on appeal, namely either a decision confirming the original decision to dismiss the appeal or a decision to allow the appeal.

21. In *Uhrle v R* the Court held that this reasoning survived the "change in terminology from 'decision' in s 383A of the Crimes Act to 'determination' in the relevant provision in the Criminal Procedure Act" following the repeal and replacement of the Supreme Court Act 2003 (**Supreme Court Act**) with the Act (and the Crimes Act 1961 with the Criminal Procedure Act 2011).[34]

22. In the exercise of its civil jurisdiction, the Court in *Ngahuia Reihana Whanau Trust v Flight*[35] and subsequently in *Payne v Payne* held that s 68(b) of the Act, which provides that the Court has no jurisdiction to consider an appeal of the Court of Appeal's decision to refuse to give leave or special leave to appeal to the Court of Appeal, applies to "the

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31 *Rae v Commissioner of Police* [2023] NZCA 38 [**Recall Judgment**].

32 At [2] citing *Horowhenua County v Nash (No 2)* [1968] NZLR 632 (SC).

33 *de Mey v R* [2005] NZSC 27.

34 *Uhrle v R* [2020] NZSC 62, [2020] 1 NZLR 286 at [19].

35 *Ngahuia Reihana Whanau Trust v Flight* (2004) 17 PRNZ 357 (SC).

refusal of the Court of Appeal to recall any of its judgments in which the applicant was refused leave to appeal to the Court of Appeal".[36]

23. In *P v Commissioner of Inland Revenue* the Court held that s 68(b) only applies in relation to appeals against refusal to recall leave decisions, and not in relation to appeals against decisions of the Court of Appeal declining to recall substantive judgments.[37] In that case and in *Anderson v NZI International Acceptances Ltd*, the Court expressly left open the question of whether it has jurisdiction to hear an appeal from the Court of Appeal's decision declining to recall its substantive judgment.[38]

Applications for recall are interlocutory applications

24. In considering whether the Court has that jurisdiction, the starting point is to consider the nature of recall applications and their place within the scheme of the Act.

25. The Act makes no express reference to recall decisions. However, r 8A of the Court of Appeal Rules provides:

> The Court may, on an interlocutory application or on its own initiative, recall or reopen a judgment given in writing or orally, at any time before a formal record of it is drawn up and sealed.

26. That applications for recall are interlocutory applications, accords with the definition of "interlocutory application" in s 4 of the Act, which provides general definitions of terms used in the Act. As the High Court in *Prescott v New Zealand Police* found, citing the definition of "interlocutory application" per s 4 of the Act:[39]

> "interlocutory" is meant "for some relief ancillary to that claimed in a pleading"; **[s 4 cited]** here, for recall of my substantive judgment.

27. It would also fall within the similarly worded definition of "interlocutory application" in s 65 which provides definitions of terms used in Part 4 of the Act (the Supreme Court). The term "interlocutory application" :

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36 *Payne v Payne* [2005] NZSC 52 at [1].

37 *P v Commissioner of Inland Revenue* [2021] NZSC 51 at [4] the Court held the reasoning in *Ngahuia*, above n 35, was not applicable as the Court of Initial Judgment that Court had refused to recall in this case "was not a leave decision".

38 *Anderson v NZI International Acceptances Ltd* [2022] NZSC 85 at [9]: "We leave open for present purposes whether jurisdiction exists to appeal a refusal to recall" citing "Senior Courts Act 2016, s 68(b). See *P (SC 56/2021) v Commissioner of Inland Revenue* [2021] NZSC 51; compare *Ngahuia Reihana Whanau Trust v Flight* (2004) 17 PRNZ 357 (SC); and *Payne v Payne* [2005] NZSC 52." The marked distinction between *P/Anderson* and *Ngahuia/Payne* was repeated by the Court in *Smith v Plowman* and *Young v Zhang* where the Court again expressly left open the question of whether jurisdiction exist to appeal a refusal to recall a decision dismissing an appeal: see *Smith v Plowman* [2022] NZSC 109 at [5] and *Young v Zhang* [2023] NZSC 44 at [8] and [9].

39 *Prescott v New Zealand Police* [2021] NZHC 941 at [2].

> (a) means an application in a proceeding or an intended proceeding for—
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> …
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> (ii) in the case of a civil proceeding, for relief ancillary to the relief claimed in the proceeding

28. As a "preliminary decision"[40] a recall decision falls within the common law definition of "interlocutory decision"[41] and is also in accordance with authority on the meaning of the term "interlocutory orders" in s 25(8) of the Judicate Act of 1873 (UK).[42]

29. Therefore, it is necessary to consider whether the Act provides jurisdiction for the Court to consider an appeal from the Court of Appeal on interlocutory application.

Section 68 provides jurisdiction to hear appeals against interlocutory orders

30. The jurisdiction of the Court is entirely statutory.[43] Its jurisdiction to hear civil appeals is governed by s 68:

> The Supreme Court may hear and determine an appeal by a party to a civil proceeding in the Court of Appeal against a decision made in the proceeding, unless—
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> (a) an enactment other than this Act makes provision to the effect that there is no right of appeal against the decision; or
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> (b) the decision is a refusal to give leave or special leave to appeal to the Court of Appeal.

31. For the following reasons, it is submitted that s 68 does provide jurisdiction to hear appeals against interlocutory orders:

    31.1 The term "a decision made in the proceeding" is broad and permissive.

    31.2 Subsections (a) and (b), create two express exceptions to the jurisdiction, suggesting that aside from these exceptions, jurisdiction lies in respect of all appeals against rulings.

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40 *de Mey*, above n 33, at [4].

41 Being decisions "which do not decide the rights of parties, but are made for the purpose … enabling the Court ultimately to decide upon the rights of the parties" per *Gilbert v Endean* (1875) 9 Ch D 259 at 268 – 269 (CA) per Cotton LG as cited in *Words and Phrases Legally Defined* (5th ed, LexisNexis, London, 2018) at 1584.

42 Being orders "other than the final judgment or decree in an action", not confined to an order made between writ and final judgment but also including an order to work out rights given by a final judgment per *Smith v Cowell* (1880) 29 WR 227 (CA) at 228 per Brett LJ. Lords Baggallay, Brett and Cotton each rejected the argument that "interlocutory must mean something between action begun and final judgment". See also Daniel Greenberg *Stroud's Legal Dictionary of words and phrases* (11th ed, Sweet and Maxwell, London, 2023) at 475.

43 *de Mey,* above n 33, at [3].

31.3 Section 74(4) provides conditions of leave for appeals against rulings on interlocutory applications, indicating that, subject to those conditions being fulfilled, the Court has jurisdiction.

31.4 In contrast, s 56 of the Act expressly provides that the Court of Appeal has no jurisdiction to consider appeals against orders made on an interlocutory application except in specific circumstances.[44] Also, in contrast, s 69 of the Act prescribes the Court's jurisdiction to hear an appeal by a party to a civil proceeding in the High Court in terms identical to those of s 68, *except* s 69 has an additional subsection which expressly excludes jurisdiction of the Court to hear a decision made by the High Court on an interlocutory application.[45]

The significance of section 74(4)

32. If section 68 provides jurisdiction, s 74 sets out how that jurisdiction is to be exercised. In addition to meeting the leave criteria in s 74(1) to (3), an appeal against an order made on an interlocutory ruling must meet the test set out in s 74(4):

> The Supreme Court must not give leave to appeal to it against an order made by the Court of Appeal on an interlocutory application unless satisfied that it is necessary in the interests of justice for the Supreme Court to hear and determine the proposed appeal **before the proceeding concerned is concluded**. [emphasis added]

33. Whilst s 74(4) does not expressly state that leave may not be given if proceedings are concluded, that is the unavoidable implication of the language of the subsection and in accordance with the scheme of the Act, if proceedings have concluded, appeal lies against the final determination.

34. Therefore, leave may only be given if the following conditions are met:

34.1 leave is considered before the proceedings are concluded; and

34.2 it is in the interests of justice that the proposed appeal be determined before the proceedings are concluded.

35. In *Hamed v R* the Court considered the meaning of the "the proceedings concerned" in the identically worded predecessor to s 74(4), s 13(4) of the Supreme Court Act:[46]

> The reference in s 13(4) to the necessity to hear and determine the proposed appeal from the Court of Appeal on an interlocutory

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44 Senior Courts Act 2016, ss 56(3) and 56(5).

45 Section 69(c).

46 *Hamed v R* [2011] NZSC 27, [2011] 3 NZLR 725 at [8].

> application "before the proceeding concerned is concluded" is consistent only with the interlocutory application being the application to the trial court leading to the order which is the subject of appeal to the Court of Appeal, rather than an interlocutory order made by the Court of Appeal in the appeal, **although the latter would also be covered.** [emphasis added]

36. Therefore, the proceedings which must not yet have concluded, are those in which the interlocutory application was made. In this case, the proceedings are those in the Court of Appeal.

Whether context requires that s 74(4) be interpreted so as not to apply to recall decisions

37. It is clear from the wording of s74(4) itself that Parliament's intended purpose in enacting it was to ensure proceedings could advance to final judgment without the delay involved in appealing an interlocutory order, unless necessary in the interests of justice for the proposed appeal to be heard first. Recall applications will, by definition, always be determined after the delivery of the substantive judgment that they seek recalled and will, in most cases, be made at the conclusion of the proceedings. Therefore, the application of s 74(4) to recall decisions would appear not to serve the purpose of the subsection. Further, it may give rise to the type of technical but non-substantive arguments on whether proceedings have "concluded" that are outlined below.[47]

38. The Court may therefore wish to consider whether, notwithstanding the literal meaning of s 74(4), that meaning may need to be modified to give effect to its purpose.[48]

39. Section 65 of the Act provides that the definition of "interlocutory application" contained in that section applies "unless the context otherwise requires". It may be suggested in relation to s 74(4) context requires the Court not to follow, unmodified, the definition of interlocutory application to be found in s 65 but to exclude recall applications from the ambit of "interlocutory applications" that fall within the scope of s 74(4).[49]

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47 See paragraphs [46] – [47] below, in particular [47.4].

48 *Commerce Commission v Fonterra Co-Operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22]: "Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross checked against purpose in order to observe the dual requirements of s 5 [of the Interpretation Act 1999]."

49 In *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2017] NZSC 135, [2018] 1 NZLR 21, Arnold J summarised the Court's view of the correct approach to "unless context otherwise requires" at [65] as "where there is a defined meaning of a statutory term that is subject to a context qualification, strong contextual reasons will be required to justify departure from the defined meaning. The starting point for the court's consideration of context will be the immediate context provided by the language of the provision under consideration. We accept that surrounding provisions may also provide relevant context, and that it is legitimate to test the competing

40. However, whilst the "unless the context requires" proviso in s 65 may entitle the Court to depart from the definition of "interlocutory application" contained in s 65 itself, recall applications are interlocutory applications not simply because they fall within the definition in s 65 but because:

    40.1 r 8A of the Court of Appeal Rules provides that a recall application is an interlocutory application;

    40.2 recall applications fall within the definition of "interlocutory application" in s 4 of the Act;[50] and

    40.3 as "preliminary decisions", recall decisions fall within the definition of interlocutory decisions as commonly understood.[51]

41. To disapply the common understanding of the term "interlocutory application" and so introduce an inconsistency into the Act would appear to do more violence to the language of s 74(4) than is justified by the fact that recall applications do not fit comfortably within the scheme of that provision.

42. Further, although Parliament is unlikely to have contemplated the application of s 74(4) when enacting the subsection of s 74(4) to recall decisions is not contrary to the purpose of the subsection or the wider purposes of the Act for recall applications to fall within the ambit of s74(4).

43. The role of the Supreme Court is to give judgment on "important legal matters".[52] It follows from this and from the leave criteria in s 74(1) to (3), that not every error of the Court of Appeal is susceptible to appeal. Insofar as recall is sought on the basis that it is necessary to avoid a miscarriage of justice, the remedy for that alleged miscarriage lies in seeking leave to appeal the substantive judgment itself.

44. The specific purpose of s 74(4) is to restrict appeals on interlocutory matters to those which it is necessary to determine prior to substantive judgment being given in the lower court. If a recall application does not fall within that narrow class of interlocutory applications, that is because

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interpretations against the statute's purpose, against any other policy considerations reflected in the legislation and against the legislative history, where they are capable of providing assistance. While … the context must relate to the statute rather than something extraneous, we do not see the concept as otherwise constrained." See also *Police v Thompson* [1966] NZLR 813 (CA) and *Barr v Police* [2009] NZSC 109, [2010] 2 NZLR 1.

50 *Prescott*, above n 39, at [2].

51 *de Mey*, above n 33, at [4]. See also paragraph [28] above.

52 Senior Courts Act 2016, s 6(1).

there is a substantive judgment that may itself be appealed. It is therefore neither contrary to the purpose of s 74(4), nor a potential cause of injustice, that leave to appeal the recall judgment should not be given in cases where the proceedings have concluded.

If s 74(4) does not apply to recall decisions

45. If, notwithstanding the above submissions, if the Court determines that s 74(4) does not apply to recall decisions, then pursuant to s 68, the Court has jurisdiction to hear the proposed appeal and it is necessary to go on to consider whether leave should be granted in accordance with the criteria in s 74(1) to (3).

When proceedings are concluded for the purpose of s 74(4)

46. The Act provides no definition for "the conclusion of proceedings" and therefore it is necessary to consider whether in this case, the proceedings concluded with delivery of the Court of Appeal's initial judgment (in which case the proceedings in this case have concluded) or the sealing of that judgment (in which case the proceeding has not concluded, the judgment not having been sealed). A third possibility is that proceedings concluded with the delivery of the Court of Appeal's recall judgment. However, since that judgment has, like the initial judgment, been delivered but not sealed, the essential question remains whether it is the delivery or the sealing of judgment that concludes the proceedings.

47. For the following reasons, it is submitted that proceedings are concluded upon the delivery of judgment and not its sealing for the purposes of s74(4):

    47.1 When proceedings are concluded should be determined with reference to the statutory context and underlying purpose of the provision in question. As was noted in *Spencer Bower and Handley on Res Judicata*, "proceedings may be final for one purpose and not for another".[53]

    47.2 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. Therefore, proceedings are concluded for the purposes of s 74(4), when they have resulted in a final judgment that may itself be subject to appeal.

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53 *Spencer Bower and Handley Res Judicata* (5th ed, Lexis Nexis, 2019) at [5.02].

47.3 The time for appeal runs from the delivery of judgment and not sealing.[54]

47.4 To alternatively hold that proceedings are only concluded when judgment is sealed would have the effect of perversely incentivizing appellants not to take steps to seal the judgment promptly after applying for leave to appeal, as required by r 52(3), so that they are in a position to argue that in the absence of a sealed judgment, the proceeding have not concluded.

47.5 Finally, sealing does not confer unchallengeable finality on proceedings, given the Court of Appeal's jurisdiction to consider applications to recall perfected judgments in exceptional cases.[55]

The significance of whether the proceedings have concluded for the disposal of this application for leave

48. For the above reasons it is submitted that the proceedings in the Court of Appeal concluded, for the purpose of s 74(4), when the Court of Appeal delivered its initial judgment on 3 February 2023. In the alternative, the proceeding was concluded when the Court of Appeal delivered its recall judgment on 6 March 2023.

49. If the Court finds for the respondent on this point, then, insofar as this application is subject to s 74(4), leave to appeal may not be given.

50. However, if the Court finds that the proceedings have not concluded because neither of the Court of Appeal's judgments have been sealed, leave may be given if "it is in the interests of justice that the proposed appeal be determined before the proceedings are concluded" and the other criteria for leave in s 74(1) to (3) are met.

Issue (b): the application may be treated as application for leave to appeal

51. For the following reasons, the respondent does not oppose treating the application as an application for leave to appeal the initial judgment:

51.1 The current uncertainty as to whether the Court has jurisdiction to consider an appeal against a refusal to recall a judgment.

51.2 The fact that the applicant is self-representing litigant.

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54 Rule 11(1)(b) of the Supreme Court Rules 2004 provide that the time for appeal runs from the date of the judgment being delivered, rather than the date of sealing. Similarly, r 52(1) of the Court of Appeal Rules provides that a judgment of that Court takes effect from when it is given, and r 52(3) provides that an application for leave to appeal against a judgment may be made to the Supreme Court even though the judgment has not been sealed (although the party seeking leave should take steps to have it sealed, promptly, after application for leave has been filed).

55 The Court can exercise its inherent powers to recall a judgment that has been sealed, and on that basis, can accept for filing an application to recall a decision which has been sealed: *Peterson v Mills*

51.3 The applicant's submission that he is only out of time for leave to appeal the initial judgment because he chose to pursue an application for leave against the recall decision.

51.4 The fact that the applicant is not significantly out of time.[56]

52. In not opposing the extension of time to consider an application to appeal the substantive judgment in this case, the respondent does not consider himself bound to accede to applications for leave to appeal against recall decisions being treated as in-time applications for leave to appeal the substantive judgment, in future cases. Applications for leave against recall decisions should not become a backdoor to appeal for appellants who have failed to follow correct procedure.

Issue (c): the criteria for leave to appeal are not met in this case

53. A decision to discharge or continue an ex parte order involves the exercise of a discretion.[57] Second appeals of the exercise of a discretion are seldom entertained,[58] particularly where both lower courts have reached concurrent conclusions on how that discretion should be exercised.

54. With respect to s 74(2) of the Act:

54.1 The appeal does not involve a matter of general or public importance. It is confined to the Court of Appeal's assessment of factual matters in the exercise of its discretion not to discharge the Order. The initial judgment otherwise involved the application of settled principles regarding the discharge of ex parte orders[59] (which are not challenged by the applicant) to the specific facts before it.

54.2 Nor does the appeal raise a matter of general commercial significance. It concerns the alleged laundering of criminal proceeds.[60]

55. Whether there has been a miscarriage of justice is a high threshold: a factual error must be of "such substantial character it would be repugnant to justice to allow it to go uncorrected in the particular case".[61]

[2021] NZCA citing *Lyon v R* [2019] NZCA 311, [2019] 3 NZLR 421 at [32].

56 The respondent calculates the leave application would be 24 working days out of time.

57 At [28], citing *Brink's Mat Ltd v Elcombe* [1988] 1 WLR 1350 (CA) at 1357.

58 *Clark v Attorney General* [2005] NZSC 4 at [6], *Gregory v Gollan* [2009] NZSC 29 at [2].

59 See *Brink's Mat Ltd v Elcombe*, above n 57; *Jennings v Crown Prosecution Service* [2005] EWCA Civ 746, [2005] 4 All ER 391; *Malabu Oil & Gas Ltd v Director of Public Prosecutions* [2016] Lloyd's Rep FC 108.

60 As noted at [61] below, the applicant did not adduce evidence of any legitimate commercial dealings as to the funds under restraint.

61 *Junior Farms Ltd v Hampton Securities Ltd* [2006] NZSC 60, (2006) 18 PRNZ 369 at [4] – [5].

56. The alleged errors are discussed below. They are either errors of a descriptive kind which do not reflect the uncontested findings of the High Court, or are otherwise factually accurate. They would not have any bearing on the Court of Appeal's decision not to discharge the Order, or the merits of the proposed appeal should leave be granted.

Issue (d): if leave is granted, the substantive appeal should be dismissed

Restraint of the R Ltd Accounts

57. The proposed appeal largely turns on paragraph [50](b) of the initial judgment:

> 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 of 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.

58. This paragraph contains a descriptive error in reporting what the High Court did with the R Ltd NZD Account on 23 June 2020. The Order was not discharged on its exclusion by the United States authorities, but rather was varied to allow the applicant to instruct legal counsel.[62]

59. The applicant contends these are more than descriptive errors. He claims 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." It submitted that the High Court was "misled (whether accidentally or on purpose) as to R Ltd; the Court of Appeal was correct in determining the misleading should have led to R Ltd being discharged for the reasons it expressed."[63]

60. The applicant provides no basis as to how this conclusion could be drawn:

    60.1 It was not raised as a ground of appeal in the Court of Appeal.

    60.2 There was no evidence before the High Court, beyond his assertions,[64] of acceptance by the United States that R Ltd "had no criminal conduct that could be attributed to it." The claim was

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62 Minute of Cooke J dated 26 June 2020 at [13] [101.0032]. The paragraph also contains a descriptive error as to the number of R Ltd Accounts under restraint, there being three rather than one.

63 Written submissions on behalf of the appellant dated 12 September 2023 at [57] – [58].

64 See for example Affidavit of David Charles Rae dated 22 June 2022 at [17](l) [201.0192].

denied by Assistant United States Attorney Barabra Ward (**AUSA Ward**) in her affidavit evidence,[65] and in cross-examination.[66] SA VanZetta's affidavit provided the evidential basis for the alleged illegitimacy of those funds.[67] At the High Court hearing, he confirmed its truth and accuracy.[68]

61. The evidence of the United States authorities led the High Court to the conclusion there were reasonable grounds to believe that R Ltd was involved in criminal conduct. Clearly, the Court did not accept they had "accidentally or on purpose" misled it in this respect. There is no evidential or legal basis on which this finding is capable of being disturbed on appeal:

61.1 The applicant explained in the High Court that he did not substantively oppose the respondent's application for "strategic reasons."[69] His written submissions record that his "opposition remains focussed on the grounds of material non-disclosure and abuse of process," and that "any cross-examination [of him] on the substantive allegations would appear to be of limited relevance."[70]

61.2 The High Court did not consider the applicant's explanations around the legitimacy of the restrained funds to be credible. The Court observed that there was "no real evidence" of the commercial activities the applicant allegedly undertook, despite it being a "reasonably straightforward matter to identify the activities that generated the kinds of sums in question had they taken place." There was also "little explanation for the use of entities incorporated in different jurisdictions other than for the purpose of concealing the dissipation of funds." A "strong basis" for the belief that the applicant's activities involved money laundering in New Zealand existed.[71]

61.3 These findings were not challenged on appeal, which were again focussed on the grounds of material non-disclosure and abuse of process.[72] The Court of Appeal's initial judgment recorded that the High Court's substantive findings were "not challenged, and

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65 Ward at [9][201.0382].

66 Notes Of Evidence at 54 [201.0404].

67 See VanZetta 1 at [5.15] – [5.19], [5.23] – [5.25].

68 Notes Of Evidence at 2 [201.0059].

69 HC Judgment at [21].

70 Respondent submissions dated 13 October 2020 at [2.5] [101.0128].

71 HC Judgment at [38] – [39].

72 Save for Mr Rae's challenge to the abuse of process point on the limited grounds that "complications" arose from enforcing two forfeiture orders: Initial Judgment at [54] – [55].

> we say no more about it."[73] It otherwise relied on its findings that "the missing information does not alter the decision that would have been made in relation to restraint."[74]

62. The Court of Appeal misdescribed what the High Court did in varying the Order on 23 June 2020 and its reasons for doing it. However it did not conclude that the restraint over the R Ltd Accounts should be discharged. Its intent was otherwise plain: to confirm the High Court was correct to not rescind the Order.[75] The Court of Appeal rejected the applicant's claims to the contrary when it refused his recall application.[76]

63. If the applicant persuaded the United States authorities the funds in the R Ltd Accounts were legitimate, it begs the obvious question why he did not provide the New Zealand courts with the same information. As the High Court observed, doing so would be straightforward.[77] The applicant says this was for strategic reasons.[78] However no miscarriage of justice arises here. The applicant, with the benefit of legal advice, made a decision not to contest the substantive grounds for the Order. It is not open for the applicant to walk back this decision in the context of a second appeal.

64. Lastly, the respondent's application for civil forfeiture orders was filed on 21 May 2021. It has been awaiting hearing since 27 September 2021.[79] Following adjournment of the original Court of Appeal fixture,[80] the High Court stayed the application and directed it be set down within three months of this appeal's determination.[81] If the applicant wishes to formally challenge the respondent's allegations as to the legitimacy of the R Ltd Accounts, as he now seeks to do in this Court, it is more appropriately dealt with in the context of that application.

Filing of supplementary affidavit

65. The applicant also contests paragraph [50](a) of the initial judgment:

> 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

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73 Initial Judgment at [9].

74 Initial Judgment at [15], citing the HC Judgment at [56].

75 Initial Judgment at [50].

76 Recall Judgment at [2].

77 HC Judgment at [39].

78 HC Judgment at [21].

79 Minute Cooke J dated 27 September 2021.

80 This arose as a consequence of the applicant's failure to comply with directions to file his synopsis for the appeal: Minute of French J dated 1 February 2022.

81 Minute of Churchman J dated 9 May 2022 at [17].

> 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.

66. The applicant refers the evidence of AUSA Ward and Detective Sergeant Alex Macdonald as to the filing of SA VanZetta's supplementary affidavit correcting the position of the United States authorities on the R Ltd account. Both witnesses depose that, as a result of ongoing discussions with the applicant, the respondent had deferred the filing of that affidavit.[82] After the United States again requested the respondent file the affidavit, he did so.[83] On this basis, the applicant alleges that the Court of Appeal's finding that the "Commissioner accepted these shortcomings once they were identified," is incorrect.

67. There is no error. The Court of Appeal is referring to the fact that, at the hearing of the on-notice application, the respondent accepted there was material non-disclosure on his part.[84] Unlike the applicant in the *Green Way* case referred to, he was "repentant".[85] This followed the failure of the respondent to appreciate the relevance of the material not disclosed, and the Court's identification of those shortcomings in its minute of 26 June 2020.

Conclusion

68. For these reasons, the respondent submits the application should be dismissed. In the event that leave to appeal is given, counsel will be available as required.

29 September 2023

D Jones / S B McCusker
Counsel for the respondent

82 Reply affidavit of Alex Holden Macdonald in support of an on notice application for restraining order (prior to civil forfeiture order) dated 27 July 2020 at [3.9]; Ward at [24] [201.0387].

83 At [3.10].

84 Initial Judgment at [10], citing HC Judgment at [50].

85 Initial Judgment at [47](a), citing *Green Way Ltd v Mutual Construction Ltd* [2021] NZHC 1704.

TO: The Registrar of the Supreme Court of New Zealand.

AND TO: The applicant