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

SC115/2019
[2020] NZSC Trans 12

QUENTIN DYLAN WOODS

Appellant

v

NEW ZEALAND POLICE

Respondent

Hearing: 21 May 2020

Coram: Winkelmann CJ
William Young J
Glazebrook J
O'Regan J
Arnold J

Appearances: M Starling and N R Wham for the Appellant
V McCall and S E Trounson for the Respondent

CRIMINAL APPEAL

MR STARLING:

Tēnā koutou, e ngā Kaiwhakawā, ko Starling, ko Wham, o māua **(Māori 10:02:58)** e tū ana ahau mō te Kaipira i tenei wā.

WINKELMANN CJ:

Tēnā korua.

MS McCALL:

Tēnā koutou, e ngā Kaiwhakawā. Ko McCall ahau, kei kōnei māua ko Trounson, mō te Karauna.

WINKELMANN CJ:

Tēnā korua.

MR STARLING:

Good morning, our plan is to split the case for the appellant up into two. I'll be dealing with the issue about the sentence opposed on the appellant at various points in a general sense and in terms of the effects of that sentence. Ms Wham will address the Court on issues about intensive monitoring and residential restrictions and whether components of the sentence are residential restrictions and intensive monitoring. The approach that I am more than happy to have the Court address me directly on issues or I can give a brief overview of what I'm going to cover.

WINKELMANN CJ:

Go ahead and give your overview for a start.

MR STARLING:

Thank you. So I'm just going to cover briefly so the Court has got a sense of the general timeline of this case and that's covered at the very last page of our submissions at page 25.

WINKELMANN CJ:

And I think we've got some familiarity with that.

MR STARLING:

So in terms of my submissions the first bit that's important is we have the initial sentencing in the District Court at Palmerston North where the sentence imposed is eight months' imprisonment and release conditions and I would say that those release conditions were basic and reasonable, they were fairly run of the mill, not much more than standard conditions and we have at that stage a whereabouts condition that involves GPS monitoring but the whereabouts condition is just literally not to go to Palmerston North.

WINKELMANN CJ:

Is that a term of art, a whereabouts condition?

MR STARLING:

Yes, effectively it's a – whereabouts conditions are used in a variety of – they are used for release conditions, they are used in the – the Parole Board will use them. They are to – GPS can be used to monitor a variety of things. It can be used to monitor curfews, for home detention but can also be used to monitor whereabouts conditions and a whereabouts condition is always set out as the person can't go to a certain area. It can be as broad as not to go to reserves, parks, schools, places where persons under 16 might tend to congregate including malls. They can be very broad or sometimes very, very narrow, not to go to a particular address. So sometimes a whereabouts condition maybe just literally not to go to 1 The Terrace and the GPS is just there to allow that whereabouts condition to be monitored and checked on.

So in this case we have the GPS for the whereabouts then we have five days before release from prison. So five days short of the four months that the appellate would have actually have served of the eight month person term because it is a short sentence of imprisonment, it's two years around – only has to serve half of it, no parole hearing, automatic release. Five days prior there's an application made by the Department of Corrections to vary and so

now there's this – a very detailed plan is prepared to effectively move them to Christchurch where they will be managed by an agency that's called Christchurch Residential Care Limited and then we have all the conditions that are set out. So initially the plan was that they would be released in the North Island. They'd have some sort of support from Mental Health Services. When that became unavailable they were then moved to Christchurch and we have the saga as it has gone through the Courts.

So I would submit that that's the first significant change in relation to his actual sentence because that takes his sentence from being effectively four months in prison followed by conditions which are fairly standard release conditions. His conditions were just the general they would just have to report to probation, be involved in some sort of treatment programme if it was available and then the whereabouts condition. So these were conditions that weren't going to have much effect on his life in the community but just prior to release I would submit that his sentence is in fact increased by a very large amount and I would say effectively more than doubled because the effect of the new conditions meant they were imposed up until six months past sentence end date which is four months plus six months so the eight month prison term, they serve four months of it in prison, four months in the community plus six months so he's now four months in prison and 10 months on conditions which we would say are in fact more restrictive than home detention.

So having been sentenced, knowing what the sentence was going to be five days prior to his release from prison he gets what we're saying is more than a doubling of that sentence.

WINKELMANN CJ:

Can you just take me through the part in the community again, sorry, I think I may have missed your part when you explained when he was in the community, in the house in the community?

MR STARLING:

Well the agency that had been arranged for him to live with is an agency that's called Christchurch Residential Care Limited. They are an agency that operate out of I think only Christchurch. They operate a number of houses at a variety of properties in the Christchurch area and they often have people that are on – well usually the people that stay with CRC are people that are on extended supervision orders. And these can be, sometimes there can be more than one person living in a particular house but when I described them as being houses I mean they literally are houses. They are houses that CRC buy in residential areas. They then have one or two people living in them that are under some sort of Court order, either extended supervision orders or sometimes in this case other types of orders.

But at this point CRC also were managing a particular house which was on prison property that was known as The Lodge and that was a house that was built for a particular person quite a few years ago who was on an ESO, so effectively it was a house that was built for Lloyd McIntosh and it's very similar, well it's exactly the same setup as Stewart Murray Wilson had for his house. That house and other houses are now owned by Corrections directly on that prison property.

WINKELMANN CJ:

So is that the first house he lived in?

MR STARLING:

That's the first house he lived in, what effectively was The Lodge, and then he was moved from that property to a house in a residential area in Christchurch that was effectively purchased by CRC and the setup was he lived in a house by himself and CRC had the house that is effectively two doors down that they had staff would stay at and they would effectively manage him, the staff would work out of one of the houses and then they would go and spend time during the day with him at the other house which is two doors down.

I think it's pretty clear from the original sentencing notes that the Court was aware of what was being done with Mr Woods at this point with the appellant and they was at issue in terms of conditions that were being sought and Her Honour during the sentencing made reference to the fact that one of the conditions appeared to be residential restrictions which wasn't allowed but effectively the appellant was released on release conditions on what we say was intensive monitoring and residential restrictions given that he was living under conditions that meant from 8.00 pm to 8.00 am he was curfewed to the house itself.

WINKELMANN CJ:

And this is the house on prison grounds?

MR STARLING:

Initially it was but then a house in a residential neighbourhood, but initially it was a house on the prison grounds but it's about, well it was about perhaps between 50 and 100 metres away from the external fence.

WINKELMANN CJ:

Okay, right.

MR STARLING:

So it's –

WINKELMANN CJ:

It's outside the external fence.

WILLIAM YOUNG J:

It was outside the wire.

MR STARLING:

Yes Sir, and it was near what – it's near part of the farm that prisoners go to when they're doing farm work but they weren't having contact with prisoners at all.

WINKELMANN CJ:

So they were transferred from Palmerston North very shortly before their release to Christchurch?

MR STARLING:

Yes.

WINKELMANN CJ:

Presumably in anticipation of this?

MR STARLING:

Yes, and then they appeared in the Christchurch District Court for the variation within, I think within a day of them arriving in Christchurch and that was primarily because the plans for his release that were going to involve Mental Health Services and support had fallen over, there was no ability for them to access Mental Health Services so this was an alternative plan and the plan effectively involved them being 8.00 pm to 8.00 am being inside the house on residential restrictions, we say, monitoring by the GPS bracelet that it only then imposed by the District Court when they were sentenced for this whereabouts condition not to go to Palmerston North.

So he's now living in Christchurch, he has a GPS bracelet that is there to monitor a whereabouts condition not to go to Palmerston North but it's now being used to monitor his compliance with an 8.00 pm to 8.00 am, what we say is residential restrictions and then from 8.00 am to 8.00 pm seven days a week he is always in direct line of sight one-to-one monitoring with a member of the CRC staff. He never went anywhere by himself where he wasn't being accompanied by one or more people and these people were effectively, they weren't psychologists or treatment providers they were security people, they were there merely to mentor and monitor him and the programme he was on effectively was defined as 12 hours a day and in terms of what the programme consisted of it was whatever you do round the place for 12 hours a day, occasionally he might be taken somewhere but it was always accompanied by at least one person and that is what we're saying is intensive monitoring.

ARNOLD J:

This account you've given us is – I haven't seen any evidence about this. Is it sort of uncontested?

MR STARLING:

Well I think it's uncontested. The Crown position seems to be that if this was what was happening it wasn't what the Court said so then this case should be judicial review rather than about the legality of the conditions but certainly from the sentencing notes, sorry, from the summary of facts of the assault charges that the appellant was charged with while he was at the CRC residence it sets out very clearly what conditions he was being held under. So that makes it clear they were – it says what the breach was, it says what the assaults were and he was being effectively monitored during the 12 hours of daylight and restricted in his movements for the other 12.

But I would also submit that looking at the conditions at the Court set the clear intent at times of sentencing was that he was being – the he would be held under conditions that were equivalent to residential restrictions and intensive monitoring for 24 hours a day seven days a week.

WINKELMANN CJ:

And do you take that from Judge Farish's notes?

MR STARLING:

Yes, Your Honour and but in particular though and although she clearly addressed that residential restrictions was not available it was still imposed, those words weren't used but effectively it made no difference to the way that the sentence was in fact managed.

O'REGAN J:

But isn't that the Crown's point, what we're talking about is what was the sentence not how was it managed?

MR STARLING:

And that's why I've referred to the sentencing notes of the offence that he commits while he's there.

O'REGAN J:

But this is a sentence appeal so we're focusing on what did the Judge actually sentence them to and you're saying that those conditions as imposed by the Judge are in effect intensive monitoring and that that's beyond the Judge's power is that the –

MR STARLING:

That's correct.

O'REGAN J:

Or are you saying it's manifestly excessive?

MR STARLING:

I'm saying that the sentence as imposed on two separate occasions was intensive monitoring and residential restrictions that are both not available to the Court under the Sentencing Act 2002. The majority in the Court of Appeal determined that, I think accepted that the sentence was residential restrictions but that residential restrictions are lawful under the Sentencing Act and the issue about intensive monitoring hasn't been addressed in any of the decisions.

WINKELMANN CJ:

So if paragraph 8 of the minute, what's described as a minute of Judge Farish is at 48 of volume 2, she makes it clear that what she's talking about is a facility run by CRC.

WILLIAM YOUNG J:

At what page?

WINKELMANN CJ:

Page 48 of volume 2.

MR STARLING:

Yes Your Honour. The plan was set out very clearly and it was considered that because the appellant was seemed to pose a risk that these what I would say are extraordinary conditions were required prior to his release, but in relation to the matters that I'm covering which are the sentence itself. So Ms Wham is going to talk about the legality or not of intensive monitoring and residential restrictions but what I'm covering is let's say that the sentence was residential restrictions and intensive monitoring and that those things are lawful what effect do they have on the sentence itself.

O'REGAN J:

Why are we saying that when your argument is they're not lawful?

MR STARLING:

Well certainly the Court of Appeal majority has said they are, that residential restrictions is lawful so I'm –

O'REGAN J:

But I thought your case was they're not?

MR STARLING:

Yes, that's correct.

O'REGAN J:

Well why are you arguing against yourself?

MR STARLING:

Well because the alternative position then –

WINKELMANN CJ:

Are you making a rhetorical point?

MR STARLING:

No.

O'REGAN J:

I mean the reason we gave leave was to determine this question of whether it was in fact residential and intensive monitoring and whether that's lawful. I don't think this was just a general sentence appeal of was it six months instead of eight months.

MR STARLING:

No because the reason that this needs to be covered is because we would say that the reason that these sentences are not available is because of the effect they have on overall sentence length.

O'REGAN J:

Well it doesn't really matter why they're not available, if they're not available the Judge can't impose them and that's the end of the game.

WINKELMANN CJ:

Is the point your making, Mr Starling, that you're just explaining the impact of this, so if you assumed it was lawful what is the impact of it and you're saying it's so significant, is your submission it's so significant it can't be lawful and has to be explicitly authorised, is that your submission?

MR STARLING:

Yes, but also that it means that on the Crown approach if you effectively take out release conditions as being a part of the sentence, as being effectively something that doesn't necessarily matter in terms of how you look at this sentence length then you end up with cases like this and I just want to give the Court an example of what effectively is now given the Court of Appeal decision what would be the most extreme example of sentencings that could now occur. So the most extreme example of this would now be –

O'REGAN J:

But you're giving an extreme example of what will be if you lose the appeal. I mean why don't you try and win the appeal?

GLAZEBROOK J:

No, but I think isn't the point that this shows that it's either illegal under the Bill of Rights because you're actually having a punishment that's been set in the Sentencing act of nine months an appropriate sentence, sorry, eight months, but in fact you're detaining for a lot longer than that and therefore it can't possibly be legal, I think that was the point the Chief Justice was putting to you. Is that what you say both the Bill of Rights and the scheme say you can't actually be detained for longer than the actual detention period unless there is explicit authorisation?

MR STARLING:

Yes, that's correct, and because these release conditions are more onerous than home detention it means that the Court is effectively giving someone a prison term followed by another complete sentence. So the Courts are now able to give someone a two year prison term followed by what effectively would be 18 months of this regime so the person would spend a year in prison then be released and then spend the next 18 months being held somewhere where they were confined 12 hours a day for the night-time hours and then monitored for the other 12, so that would be for 18 months whereas a maximum home detention sentence is only 12 so in terms of the calculations for sentencing this would be equivalent to a 12 month home detention sentence that is usually worked backwards from a two year prison term that equates to 12 months' home detention.

Eighteen months on these conditions, well what would that be in terms of a starting point and then given the person would also spend 12 months in jail as well potentially on a calculation you'd be saying well that would be a start point of five years.

WINKELMANN CJ:

So you're saying it drives a coach-and-four? Through the statutory scheme?

MR STARLING:

Yes. I am happy to answer any questions about this part of the appeal but effectively if the Court seems to be pretty clear on what I'm arguing in terms of the sentence indications, I am happy to get Ms Wham to talk about the legality issues.

WINKELMANN CJ:

Yes, thank you. Thank you, Mr Starling, we will have Ms Wham now thanks.

MS WHAM:

The appellant says that section 93 of the Sentencing Act does preclude imposition of both residential restrictions and intensive monitoring as conditions of release on short terms of imprisonment but for slightly different ways, however, it is submitted that they are both explicitly precluded from that regime.

In respect of residential restrictions section 93(2B) includes that limitation conditions of a kind are special conditions as in section 15(3) of the Parole Act 2002 but it explicitly excludes residential restrictions and it says conditions other than a residential restriction condition. It's the appellant's submission that this plainly excludes imposition of residential restrictions as a special condition under section 93 of the Sentencing Act and the appellant also submits that this includes any condition that resembles residential restrictions because of section 93(2B) says special conditions includes without limitation conditions of a kind described in section 15(3). So it is submitted that the exact conditions of residential restrictions as described in the Parole Act are not necessary for a condition to amount to residential restrictions.

WINKELMANN CJ:

Can you just take us through that submission a little bit more slowly because that seems an important submission to me? You're saying that you used the words "of a kind" is it in section 93?

MS WHAM:

Section 93(2B) of the Sentencing Act, Ma'am.

ARNOLD J:

I mean the drafting of this isn't the greatest in a way because special conditions in 93(2B) at the end says, "other than a residential restriction condition referred to in section 15(3)(ab)". 15(3)(ab) says, "The kinds of conditions include without limitation," and then "residential restrictions" and when you look at what that means a lot of the individual conditions referred to as residential restrictions in section 32(2) are actually the same as other conditions in that list in section 15. So presumably you're not saying that, for example, a condition relating to where somebody resides which can be imposed under 15(3)(a) and there's also a residential restriction, I mean can the Court do that or not?

MS WHAM:

I would accept the Court can do that and it is the appellant's submission that there does need to be a line drawn between where residential restrictions starts and begins and there will be certainly components of the residential restrictions condition which are otherwise permissible under the Sentencing Act and it's just a question of where that line needs to be drawn because the appellant would submit that at the moment you could impose a bundle of conditions which functionally would amount to residential restrictions in name because of ones like difference or another and the appellant would submit that that would still amount to residential restrictions in a way that would be precluded by section 93 of the Sentencing Act because it is of a kind.

ARNOLD J:

So what's the test if because section 15 talks about at least four conditions that you can impose monitoring, courses, residence, whereabouts things and so on. At what point do you say a combination becomes a residential restriction?

MS WHAM:

We would say as soon as an offender is required to live at a specified place to be supervised either explicitly or functionally by a probation officer and it would be submitted that attendance at a programme to the satisfaction of a probation officer would amount to supervision by a probation officer as in this case. Where there is specified requirements to be at the address as in a curfew or other requirements if the programme is in the same place as the address, the offender would be required to be there at specified times which is one of the features of residential restriction, submitting to GPS monitoring where it's explicit or not that that is for a whereabouts condition or other.

WINKELMANN CJ:

So could you short circuit what you're saying to say that they are required to be at an address for a fixed period of time and that is subject to enforcement mechanisms?

MS WHAM:

Yes Ma'am. So because there would always be the requirement to be on GPS that that would be quite clear because the person if they were breaching they would be breaching in a way that would be fairly easily detected and enforced.

WINKELMANN CJ:

Well it might be the police doing a door knock and it would be living there, wouldn't, it because they would have to be required to go to a programme so you couldn't say because they are required to be at that programme and if they breach it that is a breach of their conditions, that couldn't be a residential restriction so it's living at an address and being there for a fixed period of time.

MS WHAM:

Yes Ma'am. The section 33(2) of the Parole Act which describes residential restrictions and it does say "described" rather than "defines" does have the condition that the person must carry their release licence and it's submitted for the appellant that this should not be a determinative feature of residential restrictions. It seems a fairly superficial or trivial a condition.

ARNOLD J:

Well it's a control thing basically, isn't it?

MS WHAM:

Yes, the only other similar provision I could find was in the Bail Act, it's a condition of electronically monitored bail that you carry a notice of bail with you and produce it for inspection when required.

ARNOLD J:

Can you help me with two other things just while I'm interrupting you, 33(1) talks the special conditions if the residence that it's proposed the person will reside in is in an area in which a residential restriction scheme is operated by the Chief Executive and I couldn't find any definition of what that is.

MS WHAM:

My understanding of when that provision was enacted, the GPS monitoring facilities were perhaps not available in the breadth of New Zealand and I understand that's still the case in some areas so I believe it's just a technical requirement in respect of GPS or electronically monitoring.

ARNOLD J:

And the other thing is what's the effect of section 15(3A) where the Board imposes special conditions relating to residential restrictions. You've got to define the area of the residents, the persons allowed to – you've got to go through a process which is a mandatory requirement and I just wondered if you know the background to that.

MS WHAM:

My understanding it's similar, it's just a technical issue. The offender would need to have been clearly instructed as to the boundaries of their residence in order for them not to breach it and that's something that again is a technical issue to make sure that there's no reason that they can't – that it would be enforced if they stepped over the perimeter.

WINKELMANN CJ:

And is this related to Mr Starling's point that this was kind of a bit of a chopped together scheme that was set up because they actually used the GPS which was imposed for whereabouts to monitor the residential condition not the section 15A methodology.

MS WHAM:

Yes.

WILLIAM YOUNG J:

Can I just ask and it's something I don't fully understand, the way the residential restriction provisions are structured does rather presuppose that the person subject to them will be living in a multi-resident house.

MS WHAM:

I wouldn't make that submission. It would seem in Christchurch that at this stage that's generally true because of the limited amount of providers of this type of accommodation for this type of offender but I would submit that there's nothing that precludes it from being imposed on someone in a private residence, it just happens that the people that end up having this condition imposed on them are generally in supported accommodation rather than their own.

WILLIAM YOUNG J:

I'm just looking at section 15 of the Parole Act and section 15(3A) says if the Board imposes special conditions relating to residential restrictions the offenders probation officer must define the area of the resident specified

within which the offender must remain and show that area to the offender. So that seems to have been predicated on an assumption that there would be multiple people living in the same accommodation. Now was that the case when this regime was introduced, were they the sort of facilities which were available?

MS WHAM:

I would still submit, Sir, that it's merely just to make sure that the condition is clear to the offender and it can be reduced to the boundary of a single dwelling.

WINKELMANN CJ:

Because it can be a family home that the person –

WILLIAM YOUNG J:

Well that's the question I'm really asking actually, is it consistent with an assumption that the offender might be living in standalone house in the suburbs?

MS WHAM:

Yes.

WINKELMANN CJ:

If you look at 34(4) it does.

WILLIAM YOUNG J:

34(4)?

WINKELMANN CJ:

Yes.

WILLIAM YOUNG J:

Of the Parole Act?

WINKELMANN CJ:

Yes, which is cross-referred to there.

WILLIAM YOUNG J:

Doesn't it just say that the offender may leave the residence?

WINKELMANN CJ:

No 34(4) in the case of family residence every person of or over the age of 16 who ordinarily lives there. 34(4), Parole Act.

WILLIAM YOUNG J:

34(4), sorry, I was looking at 33(4).

WINKELMANN CJ:

Can I ask a question, have you finished that? Where's the authority to impose a GPS condition to monitor a whereabouts clause?

MS WHAM:

That's in the Parole Act, my apologies.

ARNOLD J:

It's 15(3)(f), isn't it? It says you can have electronic monitoring either for the whereabouts thing or for a residential restriction under (ab). It's 16 subsection (3) subsection (f), subclause (f) and that takes you back to (e) which I guess is the whereabouts thing or (ab) which is the residential restriction.

MS WHAM:

Thank you Ma'am, and a whereabouts condition isn't explicitly defined in the Parole Act but as His Honour has referred to section 15(3)(e) that's where it's described and that matches the definition in the Sentencing Act in respect of a whereabouts condition imposed under a sentence of intensive supervision.

WILLIAM YOUNG J:

Is there anything in the Parliamentary history to indicate why residential restrictions were taken out of the power of the Court in the Sentencing Act?

MS WHAM:

I haven't been able to find any explicit reference to that in the debates, Sir. So the appellant has submitted that residential restrictions are plainly excluded from imposition under section 93 and that includes a condition that resembles residential restrictions and the appellant submits that residential restrictions were nonetheless imposed by both Judge Farish and Judge Saunders, and in respect of Judge Farish's variation of conditions the appellant says that those amounted to residential restrictions because the appellant was required to stay at an address approved by the probation officer and because see Probation had already indicated what that address was going to be but nonetheless it was an address that must be approved by a probation officer. That amounts to the first requirement of residential restrictions that an offender stay at a specified address.

WILLIAM YOUNG J:

What happens if there isn't an approved residence available?

MS WHAM:

Well, the...

WILLIAM YOUNG J:

Or the approved residence that was available becomes unavailable because occupants withdraw their consent?

MS WHAM:

It would depend on how Corrections would manage that, I guess. In this case that sort of did happen to the appellant given that they were supposed to go into a psychiatric facility and Corrections had to scramble to find an address. He ended up being at an address on prison property in Christchurch. So it would seem that that is the address of last resort anyway.

WINKELMANN CJ:

Normally they go into hostels though, don't they, that sort of thing, run by the Salvation Army, half way houses? I mean they're not subject to this kind of regime.

MS WHAM:

Yes, this was a case where the appellant wasn't given the option of putting forward an address for approval and then having that accepted or not. This was a case where they were directed where to go by Corrections and wasn't given any opportunity to have any input.

ARNOLD J:

He didn't have a place to go to.

MS WHAM:

No, he didn't.

WINKELMANN CJ:

And he was actually taken out of his home city and taken to another city and put into a residence.

MS WHAM:

Yes, he was transferred at short notice because of a failing of the mental health system in my submission.

O'REGAN J:

So in terms of section 33(2) you're saying the specified residence meets (a) and then (b) you're saying because he had to be there from eight in the morning till eight in the evening doing a programme, that's effectively supervision, is that the –

MS WHAM:

That's effectively supervision particularly because he was to abide to the satisfaction of a probation officer and I'd submit that that implies that the probation officer would be supervising.

WINKELMANN CJ:

So what happens if you breach your conditions?

MS WHAM:

It depends, though it is open to the Department to file breach charges against the offender.

O'REGAN J:

Sorry, just going back to the supervision point, you're saying the eight in the morning till eight the evening, it says you have to do a course as directed by the probation officer.

MS WHAM:

Yes.

O'REGAN J:

Are you saying that means that there will always be a probation officer with them during that period?

MS WHAM:

No. My submission is that any oversight by a probation officer during the condition amounts to supervision as opposed to mere reporting but having no other requirements, so where an offender might have a condition that they report to their probation officer but it's just really a chat or a catch-up rather than them having to complete any requirements or engage in any activities which the probation officer will be reviewing and having input into and being able to themselves determine whether it's sufficient or not.

O'REGAN J:

But if a probation officer says you have to do a course somewhere else in the city with some other organisation they're not supervising them at that point, are they?

MS WHAM:

Well, I would submit that they are because if supervision of a probation officer meant actual physical supervision on a regular basis, in my submission there are no programmes that would ever amount to that condition because probation officers themselves aren't the ones running programmes or are overseeing offenders on a day-to-day basis. They are managing the offender whilst they engage in activities that are elsewhere.

WINKELMANN CJ:

Can I just take you back to the issue about the residential conditions? So we were running through how you said the definition of "residential restriction" was effectively substantially met. I'm just trying to find where the definition is again.

ARNOLD J:

It's section 33.

MS WHAM:

33(2), Ma'am.

WINKELMANN CJ:

So everything is pretty clearly met apart from the licence point?

MS WHAM:

Yes, Ma'am. So in respect of the sentence variation imposed by Judge Farish the requirements are met by having to reside at the address, having to undertake the programme which amounts to supervision, the curfew which is to be at the address or the residence at a specified time and the GPS monitoring which ostensibly was imposed to prevent the appellant from going

to the Horowhenua/Palmerston North area but was actually used to monitor compliance with his curfew condition and the appellant submits that those functionally amount to residential restrictions. The only thing setting it apart is that he was required to carry a licence which is submitted and it should not be determinative.

GLAZEBROOK J:

Can I just check with you because you can impose a specified address, do you agree with that?

MS WHAM:

Yes. Yes, Ma'am.

GLAZEBROOK J:

So you can say you live at a specified address and you can impose a programme. So say, for instance, the sentence was you live at number 3 Smith Street and you can't move from there without permission of the probation officer and you attend a programme at the X Institute as indicated by your, or another as indicated, your probation officer for two hours every day Monday to Friday, you presumably don't say that is effectively a residential restriction or do you?

MS WHAM:

No, Ma'am.

GLAZEBROOK J:

So what makes – and the question then is what makes this different? Is it the 24 hour seven day a week?

MS WHAM:

The main difference is in this case, yes, the programme itself wasn't a defined programme that the appellant had to go away and attend and come back. It was just a time. The programme was defined by the time period that it was supposed to take without any reference to the actual activities that would be

engaging the appellant during that time. Also that the programme was run by the accommodation provider as well. It wasn't an external programme that he went out to attend classes for. It was just the programme basically was stay at home and do what we tell you.

WINKELMANN CJ:

But you're talking about the programme which is not the residential restriction. The residential restriction is a requirement to be, to live at a place between 8.00 pm and 8.00 am.

MS WHAM:

Yes, and it's the appellant's submission that putting the programme aside the remaining conditions would still amount to residential restrictions given that he was required to reside, had a curfew and GPS monitoring.

WINKELMANN CJ:

Because you don't need 24 hours to be a residential condition under restriction in 33(2).

MS WHAM:

No, Ma'am. So the programme condition, it's submitted, doesn't make it –

O'REGAN J:

Isn't that the basis of your submission that there was supervision though?

MS WHAM:

That is the basis of that, Sir, but I would still submit if he had been required to go and do a programme elsewhere that would still amount to supervision. It's just in this case it was supervision –

WILLIAM YOUNG J:

Say we deleted the programme provisions, would the sentence be fine then?

MS WHAM:

Pardon me, Sir, I didn't catch that.

WILLIAM YOUNG J:

Say we just said that this order went outside what's contemplated by the Act in relation to the 8.00 am to 8.00 pm element of it, so we'll just put a red line through that, would that convert it into a valid condition?

MS WHAM:

No, I would still submit that would still amount to residential restrictions.

WILLIAM YOUNG J:

So to live in a particular house and to be there for a particular period of time you say is a residential restriction?

MS WHAM:

With GPS monitoring as was in this case.

WINKELMANN CJ:

And that's (2)(c), section 33(2)(c), to be at the residence at times specified by the Board or at all times.

MS WHAM:

Yes, Ma'am.

WINKELMANN CJ:

So I think you're tending to mix up in your submissions the residential restriction and the intensive monitoring. As it happens you're also making submission that the combination amounted to a 24 hour detention, not just a 12-hour detention.

MS WHAM:

Yes, and I accept there is some overlap in my submissions in that respect.

WILLIAM YOUNG J:

Let's just take my thought experiment a further step. Say we said that it went too far to require electronic monitoring but the condition is otherwise okay, so live at an approved residence, be there for 12 hours a day, everything else is

out, that wouldn't be a residential restriction, would it, a residential condition or residential restriction, because it wouldn't contain electronic monitoring?

MS WHAM:

If the – for that period of time I would submit that it's still functionally residential restrictions because the requirement would be to still be at the place at the specified time. The only –

WILLIAM YOUNG J:

But can't that be imposed – isn't that just something that might be implicit in a residential, or, sorry, be a legitimate add-on to a condition as to where someone lives? I mean are you – effectively you're saying one element of the section, if you got say two elements of the five, that's enough.

MS WHAM:

Yes, I would concede that, Sir, that a curfew at an approved address would not amount to residential restrictions if the approved address was merely an approved address rather than a specified address.

WINKELMANN CJ:

I'm saying this to you, not to help you but because I'm going to ask the Crown this, that it would still nevertheless be a detention for a period of time if you were required and it's enforceable.

MS WHAM:

Yes.

WINKELMANN CJ:

How could it be authorised unless it's expressly authorised given the provisions of the New Zealand Bill of Rights Act?

MS WHAM:

Yes, and that was the submission that it needs to be explicitly authorised and not only is not explicitly authorised in the appellant's submission it's exclusively precluded under section 93.

WILLIAM YOUNG J:

Just dealing with that, the conditions that can be imposed on the termination, release conditions, can run for a period of six months longer than the sentence which means that the sentence effectively is extended. That's true under the Parole Act, is it, or not? Isn't this true?

MS WHAM:

Yes, Sir. In respect of whether the sentence amounted to residential restrictions under the Judge Saunders' sentencing, it's submitted that that was effectively the same and Judge Saunders was aware from the pre-sentence report that Christchurch Residential Care was going to be continuing the provision of accommodation for the appellant. So the conditions imposed by Judge Saunders don't functionally differ from the conditions imposed by Judge Farish.

WILLIAM YOUNG J:

Right, I missed the last bit. So they don't differ?

MS WHAM:

So they don't differ, no.

WINKELMANN CJ:

So when we look at this issue about whether you can just without monitoring impose a curfewed requirement that you stay put somewhere between X to X, so you could possibly require, for instance, that someone resides at a place between the hours of 5.00 pm and 8.00 am the next day, special which may be imposed, taking you back to the words you pointed out, includes without limitation conditions of a kind described. So you would say that they're not permissive of all conditions but rather only conditions of the kind described?

MS WHAM:

Yes. So it would have to be – that’s probably the difficulty. It’s just drawing the lines between where you can say a condition is described and similarly of a kind of the ones outlined in the Act itself, and it’s submitted in this case that the conditions as they were imposed are of a kind and that those conditions that are outlined in the Act are only descriptions rather than being explicit requirements. They’re not prescriptive. They’re descriptive.

WILLIAM YOUNG J:

I’ve read that in your submission. I didn’t quite understand what you meant by that.

MS WHAM:

So if I can draw your attention to section 93(2)(b) of the Sentencing Act.

WILLIAM YOUNG J:

Yes.

MS WHAM:

That describes special conditions, including without limitation conditions of a kind then described in section 15(3) of the Parole Act. So the Sentencing Act, in my submission, considers that the Parole Act doesn’t prescribe the conditions in section 15(3). They are descriptions of conditions. So there is some room for movement in respect of whether a condition would, could be described as being one of those conditions rather than those conditions prescribing exactly what the conditions are.

GLAZEBROOK J:

Can I just check with you just as a comparison, because you can say you’ve got to live at X address, say 3 Smith Street, it becomes a residential restriction in your submission if it’s accompanied by, and it might be accompanied by other things, but certainly accompanied by something that says, “And you cannot leave that between particular hours.”

MS WHAM:

Yes.

GLAZEBROOK J:

If you say, well, you have to reside there but you're perfectly entitled to stay out all night if you want to, go and stay with your mother and do anything that doesn't change that place of residence, which would presumably have a sort of you can't go and stay with someone else for a month?

MS WHAM:

Yes, Ma'am, so I would draw the comparison between that condition and then having a residence condition of perhaps bail where you must reside but you could go away for the night. Just because you've left for the night doesn't mean you don't reside there any longer and there is also, in my submission, a distinction between residing at a specified address and merely residing in an address of your choice which your probation officer has also approved.

GLAZEBROOK J:

Sorry, just so I get that, if you say I'd like to reside here, and your probation officer says, that seems okay, it's an address with your mother, there are no little children and you're not near a school, that's fine. There's a difference between that and saying and you will reside at this particular address that I impose on you. You don't have any choice of putting anything other forward. And you have to stay there at specified times or in this case you'd say 24 hours a day.

MS WHAM:

Yes Ma'am. So, yes. So where Corrections has specified the address, or where the condition itself specifies a particular address, I would submit that counts. But if it was the case where there was no address specified or contemplated, and it was up to the offender to propose an address and they were free to propose addresses and then move and propose new addresses, then it wouldn't necessarily amount to residential restrictions, even if they were required to live there, which ultimately they would probably be.

WILLIAM YOUNG J:

So your position is that the supervision of, the restriction that involves, let me just find it, be under the supervision of a probation officer, isn't an essential component of what a residential restriction is?

MS WHAM:

Well I would submit it's almost moot because anybody on a sentence with conditions is going to be under the supervision of a probation officer. They're going to have engagement with Probation, so I would submit that supervision does not amount to direct day-to-day supervision by a probation officer but requirements to report and abide by the directions of a probation officer, supervision by a probation officer.

WINKELMANN CJ:

I think we can go on to your next submission which is in relation to the supervision.

MS WHAM:

Thank you Ma'am. In respect of intensive monitoring it's submitted that that again is precluded but for a different reason. Intensive monitoring is a special condition described under section 15(3) in the Parole Act. In my submission section 15(3) doesn't allow intensive monitoring to be imposed under the Sentencing Act because it clearly describes intensive monitoring in the Parole Act as being a condition only available under an extended supervision order. It's not a condition that's otherwise available to the Parole Board for imposition on offenders getting parole without extended supervision orders.

WILLIAM YOUNG J:

But the conditions that can be imposed by the Court are referred to in ways that include parole conditions but aren't limited to them, isn't that right?

MS WHAM:

Yes, so including without limitation, yes Sir. But I would submit that because intensive monitoring is explicitly excluded under the Parole Act as a condition

of parole, then it should be explicitly excluded under the Sentencing Act as a condition of –

WILLIAM YOUNG J:

Why?

MS WHAM:

Because in my submission it wouldn't be logical for it to be available as a condition to be imposed by a sentencing Court on an offender reaching a short term of imprisonment, but not available to the Parole Board.

WILLIAM YOUNG J:

Won't that be a matter not so much of jurisdiction but just good sentencing practice?

MS WHAM:

Well I would submit that it is explicitly excluded on that basis.

WILLIAM YOUNG J:

So what's the provision of explicitly excluded?

MS WHAM:

If I can take you to section 15(3) of the Parole Act.

WILLIAM YOUNG J:

No, do that, that would be helpful thank you.

MS WHAM:

Thank you Sir. So section 15(3)(g) allows intensive monitoring to be imposed as a special condition but may only be imposed if a Court orders it under section 107IAC of the Parole Act, which is the provision for conditions of extended supervision.

WINKELMANN CJ:

So you're arguing the statutory scheme is effectively that if you're going to be going about imposing monitoring conditions then you need to be operating under section 107IAC. Have we got that? Yes we have.

MS WHAM:

So in my submission section 15(3)(g) of the Parole Act entitles the Parole Board to impose intensive monitoring as a special condition, only on an offender where the Court has ordered it after an application for an extended supervision order has been determined, and I would submit that that's the only circumstance that intensive monitoring maybe imposed. It's unfortunate drafting, in my submission, that that's not made clear in the Sentencing Act but –

WILLIAM YOUNG J:

It's not in the text, it's not excluded by the text in the Sentencing Act. It's the scheme and purpose of the whole thing.

MS WHAM:

The Sentencing Act standalone, no, it's not mentioned in the Sentencing Act at all as a condition.

WILLIAM YOUNG J:

Where is the definition of – is there a definition. Here we are, "An intensive monitoring condition is a condition requiring an offender to submit to being accompanied and monitored, for up to 24 hours a day, by an individual..." So you say that that is the effect of the order that's been imposed by the Judges.

MS WHAM:

Yes.

WILLIAM YOUNG J:

Just again, isn't that also part and parcel of a residential restriction?

MS WHAM:

No because a residential restriction, a condition could amount to residential restriction without there being any presence by a departmental staff member or other approved person. A person, in my submission, can be subject to residential restrictions being entirely alone at their residence or for the rest of the time.

ARNOLD J:

No, the fact that they're under the supervision of a probation officer doesn't make it intensive monitoring.

MS WHAM:

No, I would accept that that doesn't make that intensive monitoring any more than if you were at community work in the presence of a probation officer you would be considered to be intensively monitored at that point.

WILLIAM YOUNG J:

So residential restriction requires the offender to be under the supervision of a probation officer and co-operate with and comply with any lawful direction and submit in accordance with the direction of a probation officer to the electronic monitoring. Wouldn't that be pretty close to intensive monitoring?

MS WHAM:

No, I would submit that you could be intensively monitored and have no other conditions, live where you like, have no GPS, have no requirements to attend a programme but have someone tagging around after you all day.

ARNOLD J:

No, you can't live where you like. If there are residential restrictions they are required to do these things.

MS WHAM:

Yes, Sir, I –

ARNOLD J:

So one of them is to stay at a specified residence, not where they like.

MS WHAM:

I refer only to the intensive monitoring condition. Thank you, Sir. So yes, in my submission you could have no other conditions but intensive monitoring. You could live where you like, do whatever you like during the day, be left to your own devices but for the fact that you have someone approved by the Department following you around everywhere you go, and clearly that wasn't explicitly imposed in this case but it is submitted that the combination of other conditions amounted to intensive monitoring and that's not available.

WILLIAM YOUNG J:

What I'm trying, do you say that an order made by way of residential restriction doesn't impose restrictions on the offender that are tantamount to those imposed by intensive monitoring albeit that they go further?

MS WHAM:

Yes, so my submission is that residential restrictions and intensive monitoring are quite distinct conditions.

WILLIAM YOUNG J:

I understand that. But just what you seem to be saying is that if there is a condition that provides, without using the language of section 107A, provides for intensive monitoring, then it's precluded except in the special circumstances.

MS WHAM:

Yes, Sir.

WILLIAM YOUNG J:

Now what I'm troubled with at the moment is that in fact a residential restriction would operate in part as if it were an intensive monitoring restriction condition.

MS WHAM:

Yes, and in this case it would because the provider providing the accommodation for the residential restriction condition...

WILLIAM YOUNG J:

Let's say this was a parole decision on a sentencing decision, the residential restriction could be imposed. That would provide, as an element of the way it operates, for what in substance would be the same as intensive monitoring.

MS WHAM:

If that was imposed as a – under the Parole Act itself, the programme can't be undertaken by the provider of the residence.

WILLIAM YOUNG J:

Yes, I'm not interested in saying in terms of that aspect. All I'm saying, what I'm thinking, what I think is that in reality there is intensive monitoring that's contemplated under a residential restriction.

MS WHAM:

There could be.

WILLIAM YOUNG J:

And in which case the preclusion of intensive monitoring along the lines of your argument doesn't make much sense in the scheme of the Parole Act.

MS WHAM:

Well, in my submission there would be – it wouldn't amount to intensive monitoring because a person is required to reside at, in supervised accommodation, unless there's a person in their room all night with them.

WINKELMANN CJ:

You've already answered, I think, the question that Justice Young is asking you which is that there's this additional component to intensive monitoring which is the requirement that the person be accompanied and – submit to

being accompanied and monitored throughout 24 hours a day by an individual who's been approved by a person authorised by the Chief Executive, and that's not an element of residential restriction.

MS WHAM:

Yes, Ma'am, that's the extra aspect of it.

WINKELMANN CJ:

And if it were then it would be an intensive monitoring order and you would be making the same submission as you're making here.

MS WHAM:

Thank you, Ma'am. And it's submitted that that amounted to intensive monitoring in the appellant's case because in respect of the imposition of conditions by Judge Farish the appellant was required to be at the address and abide by the rules of the programme and have the curfew and in the affidavit of the probation officer, Mr Maclean, which was provided to Judge Farish in support of the application to impose further conditions on the appellant, Mr Maclean deposed that residents of the programme and residence where the appellant was to go were not permitted to leave unsupervised, that's at paragraph 18 of Mr Maclean's affidavit which is in the first bundle at page 54.

WINKELMANN CJ:

So the Crown says against you well that's how it operated but how was the Judge – I mean that wasn't the term that was imposed. It seems a rather technical point but that's another issue.

MS WHAM:

If I can draw your attention to Her Honour Judge Farish's minute in the second bundle at page –

WINKELMANN CJ:

Forty-eight.

MS WHAM:

Forty-eight, thank you, Ma'am. Her Honour does say that she accepts that residence at Toruatanga the residence would address most of the issues anyway in respect of supervision.

WINKELMANN CJ:

And would you say in any case that's the effect of the orders that were imposed.

MS WHAM:

That's the effect of the orders that were imposed and it is further submitted that that was the intention of the conditions given that –

WINKELMANN CJ:

The 24 hour nature of them.

MS WHAM:

I beg your pardon?

WINKELMANN CJ:

It's not a coincidence their 24 hour nature.

MS WHAM:

No, no given that there is still no clarity on what the actual structure of the programme was day-to-day and why it would take 12 hours a day, seven days a week.

GLAZEBROOK J:

Can I just where you're referring to the Maclean affidavit, what paragraph again?

MS WHAM:

Paragraph 18.

WILLIAM YOUNG J:

I'm just going to go back to this question because I still haven't got it clear in my mind. Under the residential restriction the offender is required to be under the supervision of a probation officer and co-operate with and comply with lawful directions given by the probation officer. It may be that that probation officer will say you've got to be with me or by me all the time or with someone I approve all the time which effectively is what you say is happening here.

MS WHAM:

Well I would submit that if a probation officer did direct that an offender be in the presence of an approved person at all times that would amount to intensive monitoring but –

WILLIAM YOUNG J:

Well isn't that a complaint about out of sentence administration rather than jurisdiction?

MS WHAM:

Yes, that would be, Sir, and I would say that isn't what has happened here and in this case it is the Judge that has imposed that condition rather than a probation officer using their discretion to try and impose that.

WILLIAM YOUNG J:

Right, okay.

MS WHAM:

In Judge Farish's decision she does explicitly say at paragraph 11, "That the appellant is to undertake, engage and complete a reintegration programme administered by the programme provider." So that is the condition set by the Judge not a decision by a rogue probation officer to impose what would amount to intensive monitoring on the appellant.

WILLIAM YOUNG J:

But did that actually require the probation officer to accompany and monitor the offender?

MS WHAM:

No, but it did have the effect of a staff member of the accommodation provider, CRC, to be present and it was that person who would be the approved person rather than a probation officer, and given that CRC was contracted by the Department I would submit it's plain that those staff members of CRC were approved individuals for the purposes of the definition of intensive monitoring.

WILLIAM YOUNG J:

I think I'm beginning to see it. I suppose if one were a pedant one would say that, well, it's not a residential restriction because it's not the supervision of the probation officer that's involved, it's the supervision of someone else.

MS WHAM:

Well, I would submit that there's the – the CRC staff are the people intensively monitoring the appellant, probation officer who is ensuring that the appellant abides by the rules of the house and is otherwise engaged with the conditions is the supervision of a probation officer.

And so it is submitted for the appellant that Judge Farish's conditions amounted to intensive monitoring by way of having to attend the programme in particular. The affidavit of Mr Maclean in support of those conditions did depose that the rules of the house where the appellant was required to live included a rule that residents were not to leave the property unsupervised and that condition, that information was before the Judge when the condition was imposed, so any person being sentenced to a condition that required them to live at that residence would necessarily be intensively monitored because it is a rule of the house that residents cannot leave on their own or without supervision, so that would include leaving the house but with a friend.

GLAZEBROOK J:

It does say when they're leaving the house. It doesn't actually say they will be always under supervision when they're in the house specifically. I mean one assumes, of course, that they would be and the practice was that they would be but...

MS WHAM:

I would submit that even if the person only has somebody with them when they leave that would still amount to intensive monitoring even if they're allowed to sit in their bedroom by themselves all day without somebody. It doesn't necessarily mean 24/seven person-to-person monitoring and my understanding is that even people who are subject to explicit intensive monitoring are allowed to sleep in a bedroom on their own.

GLAZEBROOK J:

One would certainly assume that might be the case.

MS WHAM:

Yes. So I would submit that if someone is entitled to some time by themselves during the day, that doesn't mean they are not being intensively monitored just because the times that they do have person-to-person monitoring is limited to them leaving the property, because if they had person-to-person monitoring while they were at home all day that would, in my submission, be more intrusive than a sentence of imprisonment really in some ways.

WILLIAM YOUNG J:

Is the expression "residential restriction scheme" defined anywhere?

MS WHAM:

No, it's not. My reading of the debates and advice at the time was that it merely refers to parts of New Zealand where the GPS monitoring works and there are some places in New Zealand where it – or where at the time that it wouldn't be possible to have a residential restriction scheme because the

GPS technology doesn't work because there's no signal or other technical issues.

WILLIAM YOUNG J:

Are the places in which your client has stayed, are they operated in relation to parolees under the Parole Act under residential restrictions? Are they the same or are they different? Is it different?

MS WHAM:

My understanding is that it's the same and I'm not sure even how relevant that definition is any more. I'm not sure if there are any places in New Zealand where the schemes don't run.

GLAZEBROOK J:

No, carry on.

MS WHAM:

Sorry. Certainly, as far as Christchurch goes, my understanding that was always available there. There has never been any difficulty in Christchurch proper of there not being technical feasibility...

WILLIAM YOUNG J:

So you think it's referable to cellphone coverage the availability of particular residences operated by the department?

MS WHAM:

Yes, Sir.

GLAZEBROOK J:

I was just going to ask, when we were talking about those perimeter issues and specific aspects, I know that there used to be issues in home detention in respect of that in the sense that I had someone say, well for the whole of his home detention they weren't allowed to get to his letterbox because it was outside of his perimeter and I was trying to look to see if they had those same

things in terms of home detention in terms of saying this is the area which in my understanding in that case it was the area that was defined by what was able to be monitored electronically in that he couldn't get to his letterbox because it was outside of the area that was available for electronic monitoring or if they had moved it to get them to his letterbox he wouldn't be able to be in the house. I don't know if you know if there are similar provisions because people aren't confined to a particular bedroom, they are confined to a property which can include out buildings and gardens.

MS WHAM:

Yes, my understanding it's a similar issue.

GLAZEBROOK J:

It's a similar issue?

MS WHAM:

Yes.

O'REGAN J:

What do you say this Court should now do?

MS WHAM:

The appellant submits that the Court should find that both residential restrictions and intensive monitoring are precluded special conditions for offenders on sentences of short term imprisonment and excluded by s 93 Sentencing Act and find that the appellant was subject to both conditions under both of their sentences functionally if not explicitly.

O'REGAN J:

So you want us to effectively make a declaration to that effect? There's no practical step you're asking us to take?

MS WHAM:

No, because the appellant has reached the end of his sentence, he is no longer under those restrictions anymore anyway but it's submitted that the matter has not moved because from the appellant's point of view if he gets sentenced again given his static nature I think of his difficulties he is likely to be on the receiving end of a similar regime if the District Court considers it available but also the imposition of these conditions is fairly common and it does have a broader effect on offenders who are subject to –

O'REGAN J:

So you're not asking us to quash the conditions?

MS WHAM:

Yes, it would be sought that the conditions be quashed as far as they –

O'REGAN J:

But if they're spent is there anything left to quash?

MS WHAM:

Well, yes, that would be moot in that respect. That is more declaratory, yes Sir.

So the short point for intensive monitoring it is submitted that it's available under an extended supervision order only and despite it not being explicitly imposed on the appellant both Judge Saunders and Judge Farish functionally imposed intensive monitoring by requiring the appellant to live at a residence and complete a programme there where the conditions of the house were that he could not leave unsupervised and there were staff there.

WINKELMANN CJ:

Thank you, Ms Wham, are those your submissions?

MS WHAM:

Thank you, Ma'am. Those are my submissions, thank you.

WINKELMANN CJ:

Any questions? No? Thank you, Ms Wham, we'll take the morning adjournment.

COURT ADJOURNS: 11.29 AM

COURT RESUMES: 11.47 AM

WINKELMANN CJ:

Ms McCall.

MS McCALL:

Good morning, Your Honours. What I had proposed to do subject to any suggestions from the Court was first to go through the purpose of release conditions and this is a point that the Crown says is important to make because release conditions are not designed to be punitive of a person. They are designed to assist with that person's rehabilitation and reintegration. Then to go through –

GLAZEBROOK J:

Can I just check, is that a submission that it's not part of the sentence?

MS McCALL:

It is imposed at the point at which the person is sentenced and the *Patterson* decision says that it is in that sense a sentence and that it's a response to the person's offending, but the purpose of release conditions imposed at the time that the person is sentenced is to assist once they are released from prison with their rehabilitation and reintegration. They're not punitive and –

WILLIAM YOUNG J:

Can it not be it's preventing further offending, not a purpose?

MS McCALL:

It is a purpose but that is not a punishment for the offending.

WILLIAM YOUNG J:

No, no, but you just talked reintegration and rehabilitation but incapacitation, to use a cruder term, is that not an element that's relevant because that seems to have been the primary purpose here?

MS McCALL:

Yes, so the three purposes for which release conditions can be imposed are, as Your Honour points out, to reduce the risk of re-offending, facilitate or promote the rehabilitation and reintegration of the offender and then, thirdly, to provide for the reasonable concerns of victims of the offending, and those purposes are –

WILLIAM YOUNG J:

Sorry, that's past victims or future victims?

MS McCALL:

I take it past victims. So those purposes are set out in section 93(3) of the Sentencing Act and section 15(3) of the Parole Act.

Second point we made there is that while release conditions are imposed by the Sentencing Court they are actually administered on a day-to-day basis by the Department of Corrections. So it's not that the Court specifies the content of the programme or the address necessarily at which a person may be permitted to reside. Those are handled subsequently by the Department.

GLAZEBROOK J:

Well, that's not quite right, is it, in the sense that the types of programmes are often put before the Judge as they were here. So it's not, well, you just do a programme that's whatever you like. Often they will actually be programmes that the Court has thought particularly appropriate, won't they? And the same with Parole Board.

MS McCALL:

Sometimes the programme that is intended to be provided to the offender will be put before the Court but the actual conditions that are imposed by the Court don't require any particular programme. The Judge may express a view as to what would be appropriate but the actual conditions that are ultimately imposed don't set out those sorts of details.

GLAZEBROOK J:

Well, I have seen ones that do specify particular programmes. Is that under something else? Because some Judges take great interest in what the programmes are and will actually make it a condition.

MS McCALL:

Great pains, yes.

GLAZEBROOK J:

I mean obviously with a "or any other similar programme".

MS McCALL:

Yes, and that I think is the point. Perhaps if it would assist Your Honours, at the back of our submissions there's a table that sets out the conditions that were actually imposed in the appellant's case. So in terms there of the programme condition imposed by Judge Farish on the variation application, "To undertake, engage in and complete a reintegration programme administered by a programme provider between the hours of 8.00 am and 8.00 pm each day of the week, as approved by a probation officer, and to abide by the rules of the programme to the satisfaction of the probation officer," and then similarly in the case of the conditions imposed by Judge Saunders for the second set of offending, the programme condition there says, "To undertake, engage in and complete a reintegration programme as detailed," in that case...

O'REGAN J:

Well, he just referred back to his earlier sentencing notes, I think.

MS McCALL:

Yes, just referred back to the earlier sentencing.

O'REGAN J:

And it was the same wording.

MS McCALL:

And I suppose the point to be made there, Your Honours, is that this is a sentence appeal and what the Crown says the Court's role here is to do is to determine whether the conditions that were imposed on the appellant was a lawful combination of conditions, and as I'll come back to there's not actually any admissible evidence in the record in this case as to how those conditions were administered by the Department of Corrections.

GLAZEBROOK J:

So we don't, we ignore the affidavit which says these conditions are going to be administered in this way?

MS McCALL:

The affidavit of Mr Maclean?

GLAZEBROOK J:

Mr Maclean.

MS McCALL:

Perhaps I can take Your Honours to that affidavit because the one thing that we would say about that is that that affidavit was put before the Court on an application to vary the conditions that were imposed on the appellant and one of the conditions that was sought by the Department of Corrections at that time is a programme condition that is sometimes referred to as an "in the care of" condition. So section 16 of the Sentencing Act sets out the types of programmes that may be imposed – pardon me, section 16 of the Parole Act, sets out the types of programmes that may be imposed as a programme condition. The first is for any psychiatric or other counselling assessment.

The second is attendance at any medical, psychological, social, therapeutic, cultural, educational, et cetera, et cetera, rehabilitative, or reintegrative programme which is the condition, in our submission, that was imposed here.

Then Corrections also sought the conditions set out at subparagraph (c), placement in the care of any appropriate person, persons or agency approved by the Chief Executive such as iwi, hapū, et cetera.

In Mr Maclean's affidavit there is reference to, at paragraph 21, current special conditions of his release are not sufficient to mitigate Mr Woods' risk to themselves and others and additional conditions are requested to enable Corrections to support them and place them in appropriate accommodation with wraparound support including full-time care and oversight. And what we say about that aspect of the affidavit, the imposition of that sort of full-time supervision is that it may well be that that was referring to the condition that was proposed that the appellant be placed in the care of Christchurch Residential Care Services.

WINKELMANN CJ:

It just doesn't seem like a very attractive position for the Crown to be taking that this is – I mean is issue taken that in fact that the appellant was kept in these circumstances or because it's a significant legal point has been argued through various levels of the Court about the effect of these orders and it's put before us that Judge Farish obviously knew about the conditions, the terms that this house operated on, its rules. Mr Starling makes the point that the charge in relation to the incident that occurred at the residence that was being administered makes clear the terms and conditions under which the appellant was being held. I mean is it seriously contended that we don't have sufficient information before us to say what those terms and conditions, what the conditions they were being held under were, the appellant was being held under, sorry, were?

MS McCALL:

With the exception of the breach charge in relation to the electronic monitoring which I might come back to, the Crown's position is that there's no evidence in the record before the Court on which this Court could make findings that, for example, the appellant was being accompanied and monitored at all times during the provision of the programme.

GLAZEBROOK J:

So we ignore paragraph 18 of Mr Maclean's affidavit which says they are not allowed to leave the premises without being accompanied because that's nothing to do with full-time monitoring it's a rule of the programme that it was quite clear was going to be the programme that Mr Woods was going to be required to attend despite the – it wasn't any old programme, it was that particular one with that restriction?

MS McCALL:

Again I suppose my submission is that the weight that can be put on this affidavit in terms of whether that's part of the programme or whether that was going to be a rule.

GLAZEBROOK J:

Well it says so, it says so, it says it's a rule of the house that you can't leave without being accompanied and he has to abide by the rules of the house. Sorry, I'm paraphrasing, that's what I thought it said.

MS McCALL:

No, I understand the point.

WINKELMANN CJ:

Also it just seems that the Crown knows what the terms and conditions are, you know what has been argued against you. If you take exception to that it just seems unusual that it's not been clarified because we're considering legal arguments here.

MS McCALL:

Well I suppose the Crown's point has always been on a sentence appeal the Court needs to look to the conditions that were actually imposed to see whether they were lawful to the extent that they were administered in an unlawful way by the Department of Corrections doesn't undermine the lawfulness of the conditions in terms of interpreting what is permitted by Parole and Sentencing Acts.

WINKELMANN CJ:

So the Court of Appeal grappled with it though, didn't they?

MS McCALL:

The Court of Appeal did and ultimately the majority.

WINKELMANN CJ:

Did they say they didn't have enough evidence?

MS McCALL:

They said that they didn't have enough evidence.

WINKELMANN CJ:

Where's that?

MS McCALL:

Paragraph 43 of the Court of Appeal's decision refers to my response to my learned friend's comments about the way the programme was being implemented. It says, "Ms McCall informed us from the Bar that it was the intention of the Department to reduce the extent by which Mr Woods was accompanied...While we do not doubt counsel faithfully reported their instructions, there is no evidence before the Court that would enable us to make any findings about how the District Court's orders are being implemented. And in any event, if there is anything about the implementation that goes beyond the limitations that may be reasonably necessary to achieve

the objectives for which the special conditions were designed, Mr Woods would be entitled to pursue a challenge to those elements by judicial review.”

GLAZEBROOK J:

So if you send somebody to a programme that you know actually breaches the conditions upon what you’ve been told, that’s not for a sentence appeal. That’s for somebody to go to the trouble, who’s already very damaged, to the trouble of judicially reviewing the implementation despite the fact that at the time of the sentence it was known that the conditions at least at paragraph 18 of Mr Maclean’s were a condition of the programme, and I can understand why they might be a condition of the programme because when you’re doing what you are doing you don’t want people rushing off and leaving in the middle of that because that defeats the programme. So it’s not a criticism of the accommodation provider because it seems a perfectly sensible condition but it is a condition.

MS McCALL:

I’m not sure I would accept that it’s a condition of the programme because in the affidavit –

GLAZEBROOK J:

Well, it’s a condition of the residence.

MS McCALL:

Condition of the –

GLAZEBROOK J:

Well, do we want to just look at what he says?

O’REGAN J:

But the residential order wasn’t made. Isn’t that your point? That this point was made when Mr Maclean was contemplating a residential restriction that in fact was never made?

MS McCALL:

What was being contemplated by Mr Maclean in my submission at that point was an “in the care of” condition under section 15(c) which Judge Farish specifically rejected imposing, finding that she could not impose such a condition because it would amount effectively to a residential restriction.

GLAZEBROOK J:

That’s not what I’d – can we look at the affidavit?

MS McCALL:

Yes.

GLAZEBROOK J:

Can you perhaps just turn it up?

WINKELMANN CJ:

Because she said that the conditions he’d be held in met most of those concerns anyway I think was her point, was Judge Farish’s point.

GLAZEBROOK J:

Paragraph 18, “Residents are not permitted to leave the property by themselves. Supervised outings occur with staff to ensure the safety of residents in the local community,” and you have safety plans developed. But are you saying that because of the 24 hour supervision and somebody being with them at all times was not imposed that that was not imposed, because it actually says it’s a rule of the house. They’re expected to abide by house rules and they’re not permitted to leave. You’re saying that she imposed this. Because she took out the 24 hour monitoring, somehow she thought the rules were not going to be applied to them?

MS McCALL:

Well, to say that, first of all, there’s no evidence in the record that those rules were in fact applied to them ultimately.

WINKELMANN CJ:

But wasn't the GPS monitoring for that purpose of applying those rules and actually the summary of facts makes clear from the offending that they were applied to them?

MS McCALL:

The condition that was in fact imposed by the District Court was electronic monitoring in order to ensure compliance with the whereabouts condition. Now it may be that as a matter of fact in the execution of that –

WINKELMANN CJ:

He was in a different island.

MS McCALL:

Pardon me?

WINKELMANN CJ:

He was in a different island to the area that he was required not to go to.

MS McCALL:

But at that point in time I submit that it didn't take a very long time to get on a plane and fly to Palmerston North, which is obviously not the case these days, but...

GLAZEBROOK J:

It actually says, "To submit to GPS monitoring in compliance with any condition relating to your whereabouts," but if the condition relating to your whereabouts was that you were to reside there then surely it was looking at that as well, not nearly. I mean it didn't just ping if you happened to go to Palmerston North, did it?

MS McCALL:

Well the condition in respect of the appellant's whereas was not to go into some variation of Palmerston North, the Horowhenua District or Manawatu without prior written approval.

GLAZEBROOK J:

Because the last one says to comply with the Crown of electronic monitoring and provide access of the approved residence to the probation officer for the purpose of monitoring and maintaining, just maintaining the equipment I suppose.

MS McCALL:

Yes.

WINKELMANN CJ:

I'm just struggling with the Crown's point of view because this has been an appeal where the basis on which the appellant was managed under these conditions has been an issue and the Crown has all the facts. Why has the Crown not just given us the evidence instead of taking the point that the evidence is not before the Court and therefore judicial review has to be pursued? It just seems a rather technical approach.

MS MCCALL:

Because the Crown has always taken the view, Your Honour, that the underlying point in this case is what conditions a sentencing court can impose on a person at the time that they sentence them to a short-term sentence of imprisonment. The lawfulness of those conditions ought not to be affected by any unlawfulness in the administration of them. So if the Department of Corrections, for example, did and I have no reason to dispute that they did use the electronic monitoring which the Court had ordered should be for a particular purpose for another purpose, that doesn't invalidate the lawfulness of the condition.

WINKELMANN CJ:

Yes, but what is said against the Crown and what is not a hard narrative to pull out of the facts is that the Department of Corrections sought these orders to create a 24 hour restraint and monitoring regime and that was the orders sought and granted and if you wanted to set up a different narrative and there is an available narrative of the facts I think, if you wanted to set up a different narrative I think you should have put affidavits in.

MS McCALL:

I suppose we could have taken that step. I think that the way that the Crown has always envisaged this case as being is a question of what sentencing Courts are able to do when they sentence people rather than how conditions might ultimately be administered.

WINKELMANN CJ:

But there's an artificiality about that because you're asking us to remove the fact that what was known really everybody was operating on the basis that the system would operate in this way. It seems when you read Judge Farish's you are asking us to precede in the artificial basis that all she did was we can only just read the typeface of what she ordered as opposed to the context in which she ordered it.

MS McCALL:

Well if Your Honour's point is that what Judge Farish ordered was a combination of release conditions that would take account of all 24 hours of the appellant's day then I can see that that's what Judge Farish did.

WINKELMANN CJ:

Knowing the rules of the house.

MS McCALL:

Well again I'm not sure that we can take Mr Maclean's affidavit as being necessarily what was imposed because in my submission that affidavit was

filed in the context where the appellant was going to be placed into the care of CDC.

WINKELMANN CJ:

All right.

GLAZEBROOK J:

But nevertheless those were the rules of the house so if you put them in that house then you're putting them in relation to those rules. I can't see how you can get around that? Just because there's not a care – I mean if those are the rules of the house and you put someone in that house you have to assume that those rules will be applied to the person you put in the house.

MS McCALL:

Except for the fact I would submit that what Judge Farish ordered was not that he go to that house specifically, was that he lived at an approved address.

GLAZEBROOK J:

Well she knew he was going to that house, that was the only house available. He already had something fall through and this was the only option that was in front of anybody so it's totally artificial to say that he could have actually been sent to Dunedin to live in a house with no restrictions at all because that was not the point.

MS McCALL:

No, but I suppose my submission in response to that would be that the fact that the appellant was going to live at that house wasn't one of the conditions that was imposed by the Court and again there's not sort of sufficient – I mean we all understand that the alternative from the sentencing remarks, the alternative that was not capable of being fulfilled in the appellant's case was that he would live in a secure mental health facility. So the fact that –

GLAZEBROOK J:

Yes, but presumably that would have to have been done in accordance with the provisions that allow people to be put in secure mental health facilities or by consent.

MS McCALL:

Yes.

WINKELMANN CJ:

Anyway we're probably tagging around this enough and you were starting out by telling us, and apologise for having given you –

MS McCALL:

No, absolutely, Your Honour.

WINKELMANN CJ:

You were telling us that the purpose of it is those three purposes that we've identified.

MS McCALL:

And to say in that context that there is a lot of evidence in the record before this Court as to what the Crown says was the need for what I might characterise as comprehensive release conditions in the appellant's case. There's evidence that their offending was escalating. There was offending while the appellant was already subject to release conditions in one case and so the Court is faced with an appellant with that history effectively had to sentence the person that came before them and the District Court can't be criticised for imposing conditions which were comprehensive in terms of the periods of time that they covered given the likelihood that very intensive wraparound services would be required in the appellant's case.

However, of course the types of conditions that are imposed are not completely untrammelled. As the Court of Appeal noted in *Patterson v R* [2017] NZCA 66 they must be both rationally, well there must be a rational

nexus between the conditions imposed and the purposes for which conditions can be imposed. They must be reasonably necessary to fulfil those purposes and proportionate in the circumstances, and the *Patterson* decision, if Your Honours would like to note it down, is tab 9 of our bundle of authorities and that set of requirements is set out at paragraph 18.

The rational nexus reasonably necessary and proportionate formulation is a reflection of the requirements where a justification is sought to be established to a right affirmed by the New Zealand Bill of Rights Act and at paragraph 21 of the *Patterson* decision the Court notes that all protected rights are subject to such limits as may be demonstrably justified in a fair and democratic society. As this Court noted in *R v Janssen* [2007] NZCA 450 the appellant's Bill of Rights Act rights must be considered when imposing special conditions but justification for any restriction on those rights may be found in the Sentencing Act. So in my submission the requirements of rational nexus and reasonable necessity and proportionality are a reflection effectively of the *Oakes* test.

Then at paragraph 22 of the *Patterson* decision, the Court goes on to say, "The justification in this case rests on the need to reintegrate and rehabilitate offenders in the period following their release from prison. It is achieved partly by preventing them from re-offending while they re-establish themselves in the community. Section 93 adopts a plainly reasonable premise that such offenders form a class whose members may be at risk of re-offending and in need of rehabilitation. Hence the legislation expressly contemplates, for example, conditions about place of residence, finances and non-association all of which impose significant impositions on liberty.

And then just to round off that point, section 7 of the Parole Act provides that release conditions must not be more onerous or last longer than is consistent with the safety of the community bearing in mind under section 7(1) that when making decisions about the release of offenders from custody the paramount consideration in every case is the safety of the community.

O'REGAN J:

Does that apply also to conditions imposed under the Sentencing Act?

MS McCALL:

Yes, I'd say so.

GLAZEBROOK J:

Is that through the Sentencing Act itself in terms of 7 and 8 or do you say that the Parole Act in relation to conditions carries over? I think you can probably make the argument both ways.

MS McCALL:

Exactly and I think that the destination you'd arrive at would be the same whichever route you took. I suppose a way that I would suggest the Court could arrive at that outcome is to say that s 93 of the Sentencing Act rather imports what conditions may be imposed under section 15 of the Parole Act 2002 which is itself subject to the sort of guiding principles and I think section 6 of the Parole Act 2002 gives some indication that it's also designed to apply to release conditions because section 6(2) notes in the last sentence there, "offenders may be subject to release conditions after their statutory release date."

WINKELMANN CJ:

Sorry, what section was that?

MS McCALL:

Pardon me, section 6(2) of the Parole Act 2002. Unless Your Honours have any further questions about any of that perhaps if I move on to the argument about intensive monitoring.

GLAZEBROOK J:

There's perhaps another way of coming at this but you say that there could be unlawful exercise of these conditions and what would you say would have been an unlawful exercise of the conditions, i.e., would you accept that if the

person could not leave at any time without being supervised would be that unlawful?

MS McCALL:

It would depend on the content of the programme to which they were subjected because the other thing that's not before the Court in this appeal really is an explanation of how the Department of Corrections puts together programmes and there are some instances in which because, for example, a person is at high risk of absconding they may need people to be around them in order to ensure they participate in a programme or in the programme that has been provided for them. That is not, in my submission, the same thing as intensive monitoring, that's ensuring that they comply with the programme condition to the extent that the programme required – well to the extent that the programme that was imposed was delivered in the house and required a person to be present for that purpose, my submission would be that it's not unlawful. If what the Department of Corrections did was effectively have somebody follow the appellant around at all times when they were not assisting with participation in the programme then, yes, arguably that would be an unlawful administration or an unlawful imposition of that condition.

GLAZEBROOK J:

So does the Crown accept that it would be unlawful if the Department of Corrections monitored this in a way that it was effectively a residential condition or effectively a residential restriction, sorry, or effectively intensive monitoring?

MS McCALL:

Well in terms of the monitoring that might convert it into a residential restriction I think that there is evidence before the Court in the form of the summary of facts where a breach of the residence condition was alleged, i.e. Corrections was apparently monitoring the electronic monitoring for a purpose that was not necessarily to ensure compliance with the whereabouts condition. That is what it seems from the summary of facts.

GLAZEBROOK J:

Well, let's go back a step. If in fact he had to stay there 24 hours out of 24 unless he was accompanied, what would you say about that? Is that a residential restriction?

MS McCALL:

If the conditions that the Court imposed required the person –

GLAZEBROOK J:

No, no. You say the Court didn't impose that condition.

MS McCALL:

Mmm.

GLAZEBROOK J:

But that's my understanding. As you say, the Court didn't impose that condition and we can't say that it was imposed because all that was imposed was a standard residence condition but if in fact they were administering it to say that you don't leave these premises at all any time during the period without being accompanied, what do you say about that?

MS McCALL:

I would say that that would be unlawful administration by the Department of Corrections of that condition.

GLAZEBROOK J:

Okay, and it's unlawful why? Because it's a residential restriction? I'm sorry, I'm just getting the argument. It's not –

MS McCALL:

Yes. No, I'm just – what I'm trying to avoid saying is that it's a residential restriction because it's not because that's not the condition that was imposed but if the person –

GLAZEBROOK J:

No, sorry, but you say it was unlawful because it wasn't the condition imposed and you couldn't – and it wasn't the condition imposed because you weren't able to impose a residential restriction.

MS McCALL:

Because it was being administered as if a residential – yes.

GLAZEBROOK J:

Is that – I'm not trying to put words in your mouth. I'm just –

MS McCALL:

No, no. What it would be would be that the Department would be unlawfully administering a condition because they would effectively be administering a condition which had not been imposed.

WINKELMANN CJ:

So your submission is it wasn't – there was no residential restriction imposed.

MS McCALL:

Yes.

WINKELMANN CJ:

I'm taking you back to the summary of facts because I think I'd like to see those but do you also say that if it had been they could have done it, the Judge could have done it, could have imposed a residential restriction?

MS McCALL:

No.

WINKELMANN CJ:

Right, so you're not arguing in support of what the Court of Appeal said? You don't argue that a residential restriction can be imposed? Well, a restriction which is in substance a residential restriction.

MS McCALL:

Two points, I suppose. The first is we say that what was imposed here was not in substance a residential restriction, first of all, and then second of all the point is, I think, to refer the Court to section 15 of the Sentencing Act.

WINKELMANN CJ:

I'm just trying to get your...

MS McCALL:

Yes, we did not argue in the Court of Appeal that the Court could impose effectively a residential restriction.

WINKELMANN CJ:

An in substance restriction. Okay.

MS McCALL:

The point is we said that this was not that.

GLAZEBROOK J:

So you accepted in the Court of Appeal that the Court couldn't have imposed what was in substance a residential restriction, is that what you said? Sorry, I just missed it.

MS McCALL:

Pardon me. So what we said in the Court of Appeal was what was imposed here was not a residential restriction.

GLAZEBROOK J:

Yes.

MS McCALL:

If the Court was to look at section 15 of the Parole Act what we said was residential restrictions require all five of those characteristics in section 33.

GLAZEBROOK J:

Yes, I'd understood that.

MS McCALL:

And that some of them appear elsewhere in section 15(3) and that a combination of those which didn't amount to a residential restriction was not an unlawful combination of conditions.

WINKELMANN CJ:

So you would conclude the requirement that they carry the licence thing would be...

MS McCALL:

And the requirement that they stay at a specified address, for example. I'm not sure that any of the conditions in this case could be said to have specified a particular address. They just said reside somewhere where you've been approved to reside.

GLAZEBROOK J:

So you can provide a specific address, can't you, under section 15?

MS McCALL:

You can but that's not what was done in this case.

GLAZEBROOK J:

Well, they sort of did because they absolutely knew that this was the only place to which he was going to be able to go. They mightn't have said so there but in practice there was nowhere else.

MS McCALL:

Right, in practice and in the administration of the conditions there was nowhere else but in terms of what was actually imposed on a sentence appeal, I understand that it's a – I'm...

GLAZEBROOK J:

It's a very, very fine line.

MS McCALL:

I'm walking a fine line there, Your Honour.

GLAZEBROOK J:

Also because in fact it would have been quite irresponsible, I would have thought, of the Court to leave it at large in the way that might be suggested in the sense that there were obviously quite a number of concerns about this person.

MS McCALL:

And I think that the –

GLAZEBROOK J:

Legitimate concerns.

MS McCALL:

Well, yes, and I think that the point to be made about that is that, at the risk of giving evidence from the Bar, that sometimes people will be put up in Corrections' residences where there is no alternative accommodation because in the case of a person in this appellant's position it wasn't like you could decline parole and have them remain in prison if there was no appropriate address. They were to be released and so there was no, apparently no alternative.

WINKELMANN CJ:

Can you take us to the summary of facts because it says in the summary of facts, doesn't it, at page 14, volume 3?

MS McCALL:

Yes, so this is volume 3 of the case on appeal, page 14, and the bit to which I was referring is the third paragraph down there, "On Sunday

23 September 2018 at about 8.15 pm victim two received a phone call from the electronic monitoring company stating the defendant was not at his address.”

WINKELMANN CJ:

Because the first lines says, “Is subject to electronic monitoring at an address on Fergusson Avenue, Christchurch.”

MS McCALL:

Well I suppose the thing I'd say about a police summary of facts is that they are drafted in such a way that perhaps the nuances about the sorts of things that we're talking about today might not be fully appreciated.

WINKELMANN CJ:

But they were, the police were called there because they weren't at the address in terms of the order that had been imposed so far as Corrections was concerned.

MS McCALL:

Yes. And so far as Corrections is concerned being the operative part of that sentence Your Honour in my submission.

GLAZEBROOK J:

Can I just go back to how it could be unlawfully administered if you say that it was actually because you require all five to amount to a residential restriction, how can it be unlawfully administered if, in fact, you don't have all five?

MS McCALL:

Well as I understood Your Honour's question was, if the person was required to stay at the house at all times, in circumstances in which the conditions that were imposed on the appellant were imposed, we say a residential restriction was not imposed, but if it was being administered as if a residential restriction had been imposed, that would be unlawful.

GLAZEBROOK J:

I'm sorry, this is far too subtle for me. An order, you can impose it as long as you don't include a licence, so you can effectively have 24 hour detention and as long as you don't have a licence it's not detention. But, if it's administered as if it's a 24 hour detention, even though there's not a licence, that's unlawful. I'm sorry, it's too subtle.

MS McCALL:

What we say about that affidavit is that what Mr Maclean was speaking to was a condition –

GLAZEBROOK J:

Sorry, I'm not looking at Mr Maclean at this stage. What I'm really trying to understand is, what would be an unlawful administration of this sentence, and you said it would be unlawfully administered if it was a functional residential condition imposed, but you also say that the Court could impose a functional residential restriction as long as it didn't include the licence.

MS McCALL:

I don't say the second part of that.

GLAZEBROOK J:

Sorry, maybe you need – because in the Court of Appeal you said, I've written down, you argued that you require all five and a combination of those that don't amount to all five aren't a residential restriction. So was that not the argument?

MS McCALL:

No that was, I mean, that was the argument.

GLAZEBROOK J:

So therefore if you have all four without a licence, that's not a residential restriction and lawful.

MS McCALL:

I don't think I would say that. I think I would say that in this case we didn't have all four.

WINKELMANN CJ:

No but are you arguing that or aren't you, because the Court of Appeal –

O'REGAN J:

Well that's what the High Court said, that's the law at the moment, until someone overturns it.

WINKELMANN CJ:

Yes, but you're supporting that reasoning, which is the Court of Appeal's reasoning that it's not a residential restriction because it doesn't have all those five elements. It doesn't matter that you restrict someone's movement, it's not a residential restriction. Are you supporting that, that's the simple question?

MS McCALL:

Yes.

WINKELMANN CJ:

Yes, that's what I understood.

GLAZEBROOK J:

What I can't understand there then is the next step that says if they're administering it as if it's a residential restriction, then it can still be unlawful.

MS McCALL:

What the Department of Corrections will have done in that case is unlawful, but the conditions –

GLAZEBROOK J:

But how could it if the Court of Appeal's right and you can impose a 24 hour/seven detention effectively?

WINKELMANN CJ:

I think Ms McCall's point is that it hasn't been imposed though.

GLAZEBROOK J:

But I'm trying to get the argument...

O'REGAN J:

But we're only deciding the lawfulness of the order. It doesn't matter. It doesn't matter if it's what Corrections, how Corrections administer it, does it?

GLAZEBROOK J:

Sorry, I was just trying to understand, because the argument is that you'd administer it unlawfully, I was trying to understand when you'd be administering it unlawfully. So I can't see how you can be administering it unlawfully if you can lawfully impose what is effectively a residential condition minus the licence.

MS McCALL:

You can't impose what is effectively a residential condition minus the licence. What –

GLAZEBROOK J:

But if you can, if you can do all four but don't have a licence and it's not a residential restriction.

WINKELMANN CJ:

Now I'm confused. I thought your submission was that you can. I thought you upheld the Court of Appeal's approach which is you can impose restrictive, not using the – you can effectively impose a curfew, require a combination in fact that you must stay at a particular residence and that you must be there from X to X you can impose that because it's not a residential restriction in terms of the Parole Act.

MS McCALL:

Yes, although I think the Court of Appeal acknowledged, or at least Justice Williams in the Court of Appeal acknowledged, that what X and X are in that case might affect the lawfulness of it. If what you were saying was other than the licence you must be at this property at all times, 24 hours a day, which is not what was imposed in the appellant's case, it might get closer to looking like what was being done in substance was residential restrictions.

WINKELMANN CJ:

I don't think that was what Justice Williams held. I think he thought that, he held that it was a residential restriction. You looked at the "in substance" aspect.

MS McCALL:

Pardon me, perhaps it was the majority.

WINKELMANN CJ:

It was the majority.

MS McCALL:

Yes.

GLAZEBROOK J:

I think my point really is I can't see how you could unlawfully administer it if it was rightfully imposed.

ARNOLD J:

One way you could obviously do it is with the GPS, if you attach a condition to it to monitor compliance at the house, as far as I'm concerned anyway at the moment that seems obviously unlawful.

MS McCALL:

Yes.

GLAZEBROOK J:

Sorry, I can understand. My question was really how can it be unlawfully administered if it can actually lawfully be imposed.

WINKELMANN CJ:

Can I just have a go at summing at what you're saying so we can see if we can – your point is that there was no residential, any kind of restrictive residential condition imposed by the Court?

MS McCALL:

Yes.

WINKELMANN CJ:

And therefore if Corrections – you concede if Corrections was actually monitoring in a way which restricted, which enforced the appellant to stay at this residence for X hours, that was an unlawful administration because there was no condition to that effect?

MS McCALL:

Yes.

WINKELMANN CJ:

But you say that if the Court had wished to it could have imposed such a, if it was satisfied it was appropriate to, it could have imposed a restrictive regime based around a residence, because you're upholding the Court of Appeal's finding. You're arguing to uphold the Court of Appeal's finding, aren't you?

MS McCALL:

Yes...

WINKELMANN CJ:

Or not.

MS McCALL:

Yes. I mean our submission is that residential restrictions are a combination of all five of the conditions in section 33.

GLAZEBROOK J:

So therefore if that had been imposed Corrections couldn't have been unlawfully administering it.

O'REGAN J:

I just don't think we're getting anywhere. Can we just leave it and move it on to the...

GLAZEBROOK J:

Yes.

WINKELMANN CJ:

Right, so we're talking about intensive monitoring now.

MS McCALL:

And what we say about that, Your Honours, is to point out what the definition of intensive monitoring is in the Parole Act. It requires a person to submit to being accompanied and monitored by another person on a person-to-person basis for up to 24 hours a day. The conditions that were imposed by the District Court in this case at no point required the appellant to be monitored on a person-to-person basis by anybody else, and for that reason the conditions did not amount to intensive monitoring. The condition that Judge Farish refused to impose may well have amounted to intensive monitoring, but the Judge appropriately said, "I'm not able to impose that condition," and declined to impose it.

WINKELMANN CJ:

And that's really your submission on that, isn't it?

MS McCALL:

It is really my submission on that Your Honour. Well, perhaps just to add the point that – no, I won't add the point actually. I'll just rest on that.

WINKELMANN CJ:

Do we have the application documents?

MS McCALL:

Sort of. Well, yes. So volume 1 of the case on appeal, tab 4 is the application to vary release conditions. Page 50. That application refers and relies on the affidavit that is at tab 5 starting at page 52.

WINKELMANN CJ:

So the application for a variation actually – the Judge's orders are responding to this?

MS McCALL:

Yes.

WINKELMANN CJ:

So whereabouts is – it's rather imprecise, isn't it?

MS McCALL:

Yes.

WINKELMANN CJ:

And really when you look at the application form it goes further than the applications then, doesn't it?

MS McCALL:

Pardon me, what goes further than the application form?

WINKELMANN CJ:

Well the 8.00 am to 8.00 pm stuff, where is that in –

MS McCALL:

It's at the end of the affidavit at page 55, which is the list of conditions that were sought and you'll see that the second one is crossed out, that's the one that Judge Farish declined to impose.

WINKELMANN CJ:

What about the fact that 55(4) says, "Not to stay away overnight from your residence without the prior written approval of a probation officer." I mean isn't that the order she's making?

MS McCALL:

Yes, that's the curfew.

WINKELMANN CJ:

So she's ordering it?

MS McCALL:

That he be at the residence. The 8.00 pm to 8.00 am curfew condition, yes.

WINKELMANN CJ:

You can't just look at the words that she's, you've got out in your submissions, can you, to combine them with this. Would you say that's a fair way of assessing what orders she's made?

MS McCALL:

Well she does say at paragraph 11 of the sentencing remarks, "I am imposing these conditions." So we took them from the sentencing remarks rather than – but yes, the curfew condition was between 8.00 pm and 8.00 am the following morning, and to the extent –

GLAZEBROOK J:

It really does say something about your whereabouts. You have to be somewhere. I know it seems to be a term that other people are using but in fact where – he has to be there at that particular time.

WINKELMANN CJ:

And he's not asking about, he's not seeking an order in relation to Palmerston North, is he? He's actually talking about a residence. So she's not dealing with Palmerston North when she's talking about GPS monitoring.

MS McCALL:

No, because the Palmerston North condition was already imposed by Judge Rowe so what is being sought at this point is additional conditions.

WINKELMANN CJ:

Additional? Okay.

MS McCALL:

Just on that term "whereabouts condition", a whereabouts condition is set out in section 15(3)(e) of the Parole Act. A whereabouts condition is a "condition prohibiting the offender from entering or remaining in specified places or areas at specified times or at all times". So that's a prohibition on a person being in a particular place. Electronic monitoring may be imposed under section 15 to monitor compliance with that. The curfew condition, in my submission, is authorised by section 15(3)(a) of the Parole Act which provides that conditions may be imposed to include, without limitation, conditions relating to an offender's place of residence, and while it doesn't specifically say including a curfew as to what number of hours you must or may be required to stay there, it is within the purposes of, the purposes for which conditions can be imposed.

WINKELMANN CJ:

It just seems a rather remarkable thing that Parliament would have authorised someone to be detained in a residence through this rather indirect means. I mean that's authorising, on your submission, 15(3)(a) authorises continued detention of someone after their term of imprisonment is at an end.

MS McCALL:

On one view, although my submission is and has always been that the purpose of release conditions are to attempt to prevent the person from

re-offending and to rehabilitate them. So the Crown doesn't view a curfew condition as a form of detention in that sense. It's a means of preventing –

WINKELMANN CJ:

The Courts have said it is though, haven't they? The Courts have said that it is. I mean home detention is a form of – home detention is detention. The Courts give credit in sentencing for time spent on restrictive bail conditions because it's a form of detention.

MS McCALL:

Yes, but there are cases going the other way in, for example, the context of habeas corpus applications where people on bail conditions are not necessarily subject to detention. There was a recent decision of the Court of Appeal in the *Nottingham v Ardern* [2020] NZCA 144 (4 May 2020) case, that the level for lockdown wasn't a detention and that required everybody to stay at their residence for all the time that they were not exercising.

WINKELMANN CJ:

But it didn't, I think is the point of the judgment. It allowed them to move around, go to the shops, et cetera.

MS McCALL:

Yes. I mean I think that the question of what is a detention is a sort of facts and circumstances dependent coin is what I'd say about that and in this case the Crown says that a curfew condition requiring a person to remain at an address between certain hours fulfils those purposes of release conditions, in particular preventing a person from re-offending.

WINKELMANN CJ:

And what do you say about the argument, Ms Wham's argument, that section 15(3) like conditions means it's not looking for word-perfect transposition, it's looking for an in substance, it's looking to prevent an in substance restrictive residential regime? She focused on those particular words in section 15(3).

MS McCALL:

Section 93 of the Sentencing Act.

WINKELMANN CJ:

Yes, might have been actually.

MS McCALL:

Of a kind described. Is that...

WINKELMANN CJ:

No. Now I've lost the...

MS McCALL:

Pardon me, section 15(3). "The kinds of conditions that may be imposed as special conditions include, without limitation". "Kinds of conditions"?

WINKELMANN CJ:

Yes, maybe. I don't why I seem to have managed to lose it. It's quite a phenomenon. Well, it's the point that Ms Wham made.

MS McCALL:

I suppose the question is what would constitute an in substance imposition of a residential restriction. My submission is that a curfew does not amount to an in substance residential restriction.

WINKELMANN CJ:

Yes, but you actually argue further. You say it's not enough that it's in substance, you say that it has to be an absolute word-perfect match up really, including the carrying of the document, or don't you say that? Do you accept that it does stop you in substance imposing a residential restriction, because I think your submission is that it's, that it has to, it's a transposition. Well I thought that was the first submission you made.

MS McCALL:

I think it depends on what your definition of “in substance” is, Your Honour. What we say in terms of the conditions imposed in this case is that they don’t amount in substance, or otherwise, to a residential restriction. If hypothetically a combination of conditions was imposed that sort of came so close to what is set out in section 33 that there was really no principle basis for making a distinction, then maybe we would have to accept that that was prohibited by the Act, but the conditions in this case, we say, don’t come anywhere near –

WINKELMANN CJ:

Right, so you’re not arguing for what Justice Woolford said, it’s not a residential restriction unless you have all five things?

MS McCALL:

Yes, if the question is, do you look at it in substance or in form, then we would accept that you’d have to look at it in substance.

WINKELMANN CJ:

Yes, right, that’s good, thank you.

MS McCALL:

But the question of whether something is of a kind of condition that is in substance for residential restrictions, that wouldn’t rise to the level that would be prohibited.

O’REGAN J:

I think the “of a kind” wording in section 93(2)(b) is relating to the conditions in 15(3) generally.

MS McCALL:

Yes.

O'REGAN J:

The exception is then for a residential condition referred to in section 15(3)(ab), so that is more specific rather than just referring to "of a kind".

GLAZEBROOK J:

Can I just check on this "whereabouts" issue, because if you look at section 15(3)(f) whereabouts does seem to include having to stay at a particular residence, otherwise the reference to (ab) doesn't make any sense. It's not just a stay out of, it's actually stay in.

MS McCALL:

Mmm.

GLAZEBROOK J:

Which doesn't detract from whatever point you were making, I think, about that but it's not a term of art that means stay out. It actually means, includes stay in.

O'REGAN J:

It's prohibiting –

GLAZEBROOK J:

No, no, because if you look at (f) it says a condition, "Imposed under paragraph (ab) or (e) that relates to the whereabouts of the offender," if you look at (ab) –

ARNOLD J:

Yes, it's residential, yes.

GLAZEBROOK J:

Yes. And it's not a stay out, it's a stay in.

WINKELMANN CJ:

But you can't impose residential restrictions –

GLAZEBROOK J:

No, I thought the submission was that whereabouts was defined as a stay out of rather than a stay in, and that doesn't seem to be the case.

MS McCALL:

I think it depends on the way that you parse that provision, because the way that I had always read it was conditions requiring the offender to submit to the electronic monitoring of compliance with any release conditions, or conditions of the ESO imposed under (b), and then –

GLAZEBROOK J:

That relate to the whereabouts of the offender.

MS McCALL:

– or (e) but (e) relating to the whereabouts rather than (ab) or (e).

GLAZEBROOK J:

Well they've got commas around it so you can't possibly read it like that, can you? Its conditions that relate to the whereabouts of an offender, imposed under those two paragraphs.

MS McCALL:

I just am not sure that that's what it was intended to do because within residential restrictions you already have electronic monitoring so to say you were permitted to impose an electronic monitoring condition on a residential restriction which includes within it electronic monitoring, that's why I read it out.

WINKELMANN CJ:

Well no, but that's the definition of residential restrictions so if we do then impose electronic – it is a little bit circular here so anyway.

MS McCALL:

No, I appreciate that's an available interpretation of the section, yes.

GLAZEBROOK J:

It's just that it's an ordinary word that means where somebody is.

MS McCALL:

Yes.

GLAZEBROOK J:

And it doesn't actually terribly easily translate to be where somebody isn't to be.

MS McCALL:

Yes.

WINKELMANN CJ:

Right, so are those your submissions on residential restrictions?

MS McCALL:

I think I've said everything that I'd like to say about that, yes. Thank you, Your Honour.

WINKELMANN CJ:

And are those your submissions?

MS McCALL:

Yes, thank you.

WINKELMANN CJ:

Thank you. Anything by way of reply, Ms Wham?

MS WHAM:

Thank you. I'd just like to address two issues in reply, first, in respect of the judicial review appeal distinction and what information can be taken into account on a sentence appeal and, second, whether the purposes are sufficient to justify a position of seemingly otherwise unlawful conditions.

My submission is that in respect of whether we are limited to looking at the conditions on their face in respect of reference to the sentencing orders only, in my submission not only would be it be artificial to not incorporate the extra information in respect of the affidavit or a pre-sentence report, it's actually impossible. The sentencing orders themselves both of Judge Farish and Judge Saunders refer to other documents and they don't make sense without being read alongside either the affidavit of Mr Maclean or the pre-sentence report that Judge Saunders referred to. Certainly Judge Saunder's decision he imposes conditions on page 6 of the pre-sentence report and that's how he articulates his order. So it's impossible to understand those conditions on the face of if you're just referring to the notes on sentencing.

ARNOLD J:

Just on that, the statement of facts in relation to the absence from the house which led to the assault or threatened assault against the two caregivers suggests that the caregivers were somewhere else at the time, in other words, he left the house, was free to leave the house except that monitoring picked them up.

MS WHAM:

That's in respect to the second summary of facts, Sir, but I draw your attention to the first summary of facts which refers to the defendant being supervised 24/7 and in fact the allegations or the offences he was convicted of was assaulting his supervisors so clearly they were there. So I would submit that that is quite plain that he was being supervised even though the second summary of facts does refer to him leaving the property and it would seem that his supervisors weren't right there at the time so I'd submit that the first summary of facts demonstrates that he was being supervised.

ARNOLD J:

I thought we were told that the supervisors lived in a house two doors down the road.

MS WHAM:

They did and that's why they weren't – they were to hand but not right there when the appellant walked out the gate. But that was the second set of offending. The first set of offending the summary of facts refers to are the appellant being supervised 24/7 in –

WINKELMANN CJ:

What page is that?

MS WHAM:

That's at the third bundle at page – the first summary of facts starts at page 12 of the bundle.

So he's pretty plainly in the presence of the supervisors at his address at 2.45 in the afternoon on the day that he assaulted the supervisors.

In respect to the purposes of special conditions, it's accepted in this case that the appellant is a pretty high-needs individual. He's had what can probably only be described as a tragic life so far and does need a lot of support. In my submission the purposes of special conditions are necessary but not sufficient to justify imposition of extraordinarily restrictive conditions where other parts of legislation provisions which I suggest that they're not available for the Court. Otherwise, in my submission, it's unjustifiable judicial paternalism. Just because a condition can be related back to a need isn't sufficient to justify it's imposition and in this case, given the appellant's offending whilst in the care or under these conditions, it almost suggests that those conditions didn't actually assist in reducing his risk of re-offending.

ARNOLD J:

It's not simply a matter of judicial paternalism. As Justice Young has pointed out, these are also aimed at protection of the public.

MS WHAM:

Yes, Sir, and as I said I'd accept that this appellant is quite high needs in that respect, but in my submission it's not for the Court in a criminal proceeding to step into the lacuna left for someone who might otherwise or should otherwise be in a psychiatric facility instead or have health needs rather than needs that should be addressed by the justice system.

GLAZEBROOK J:

Well, you say in fact that it was actually unlawful to impose these. It wouldn't have been unlawful if the proper procedures had been gone through under the Mental Health legislation. But you can't replicate that under the criminal justice system without express authority which there wasn't here. Is that...

MS WHAM:

Yes, Ma'am. It's unfortunate that the Court was put in the position that it was, especially at such short notice as Judge Farish had to deal with the application, but that, in my submission, doesn't mean that it was lawful even if it might have seemed necessary at the time.

WINKELMANN CJ:

All right.

MS WHAM:

Thank you.

WINKELMANN CJ:

Thank you, counsel, and very nicely timed. Thank you, all counsel, for your submissions and thank you for putting up with our intense questioning. We'll take some time to consider your submissions and release the judgment in the usual way.

COURT ADJOURNS: 12.59 PM