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IN THE SUPREME COURT OF NEW ZEALAND SC 33/2023

I TE KŌTI MANA NUI O AOTEAROA [2023] NZSC Trans 15

BETWEEN **DAVID CHARLES RAE**

Appellant

AND **COMMISSIONER OF NEW ZEALAND POLICE**

Respondent

Hearing:	12 October 2023
Court:	Winkelmann CJ Glazebrook J O'Regan J Williams J Kós J
Counsel:	Appellant appears in Person (via AVL) S Jones and S B McCusker for the Respondent Y Y Mortimer-Wang and J J Kim as Counsel to Assist

CIVIL ORAL LEAVE HEARING

WINKELMANN CJ:

Mr Rae, tēnā koe. Mr Jones?

MR JONES:

E ngā Kaiwhakawā, tēnā koutou, ko Jones ahau. Kei kōnei māua ko McCusker. If it please the Court, counsel's name is Jones and I appear alongside my learned friend, Mr McCusker and we appear on behalf of the respondent.

WINKELMANN CJ:

Tēnā kōrua, Mr Jones and Mr McCusker.

MS MORTIMER-WANG:

E ngā Kaiwhakawā, tēnā koutou, ko Mortimer-Wang ahau. Kei kōnei māua ko Kim. May it please the Court, counsel's name is Ms Mortimer-Wang. I appear together with my learned junior, Mr Kim, as counsel assisting.

WINKELMANN CJ:

Tēnā kōrua, Ms Mortimer-Wang and Mr Kim.

So thank you, counsel and Mr Rae, for your written submissions. They have been of great assistance to us. In light of them, we do not need to hear any oral submissions on leave against recall, so whether leave can be granted against recall, or on the issue of extension of time to give leave against the substantive Court of Appeal decision, but what we would like to hear from is the issue of leave and the substantive appeal issues which, of course, are clearly connected.

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We note that the names of the corporate entities R and S are suppressed and just remind counsel of that and you also, Mr Rae, although I doubt you need reminding, and in terms of timing our expectation is that this matter can be dealt with by lunchtime, clear expectation. We're interested to hear from Mr Rae and counsel on whether pursuant to the agreement which was reached with the United States authorities whether the money that they had agreed should be paid has been paid because that is not clear from the materials, and also we understand that the application, freezing order applications were made on the basis of an intention that charges be laid in New Zealand. That may or may not be right in our understanding. We're interested to know whether charges have in fact been laid in New Zealand. Right, Mr Rae, are there submissions you wish to make? Are you on mute probably at the moment.

MR RAE:

So good morning, your Honours, and I've prepared a submission which is largely in line with what you've just said. And I hope you – can you hear me okay?

WINKELMANN CJ:

Very clearly.

MR RAE:

Great. Thank you very much. Well firstly, I mean I would like to express my thanks to the Court and the court staff for permitting me to attend remotely via this link. I've read the submissions of the Commissioner and counsel assisting and I do not want to repeat orally what I've submitted in writing. What I'm seeking to do with these oral submissions is to address what I believe are the key points raised by the Commissioner and counsel assisting. I've prepared this and I'm speaking now to try and ensure what I say is focussed, not repetitious and assists the Court.

In terms of the jurisdiction points I do not believe that I could add much further orally to what's been said in the written submissions. If I've read the room correctly it would seem to be the case that the parties agree that even if the

Court does not have jurisdiction to hear the recall application, my application should be treated as an application to appeal out of time. I've respectfully asked the Court to proceed on that basis and allow my appeal to proceed by either route. Equally, in terms of leave criteria, I have nothing further to add to my written submissions. I therefore propose to focus on the substantive merits.

By way of overview, the present appeal arises from a decision in the Court of Appeal where the issue under consideration was the discharge of a freezing order. The Court of Appeal applied a five-step approach in assessing the discharge of the order where each step carries significant weight in the determination. In this appeal the appellant submits that the Court of Appeal erred in its application of the two steps of the approach which had a material impact on the final outcome. Those two steps appear at paragraphs 47(a) and (b) of the Court of Appeal ruling. As will become apparent, my submissions are primarily focussed on 47(b). That appears to also be where counsel assisting considers the focus should be. See paragraphs 39 onwards of her submissions.

The Court of Appeal pointed out at paragraph 48 that the parties' submissions appeared to presuppose that Cooke J adopted egregiousness as a standard, test or touchstone rather than applying the prescribed five-step approach. However, the Court of Appeal itself did not interpret Cooke J's approach in that manner.

It is important to clarify that the intention of this appeal is not to challenge the validity or applicability of the five-step approach itself. The five-step approach as formulated draws from established case law and offers clear and valuable guidance for the resolution of similar cases in the future. I fully recognise and respect the legitimacy of this approach and I do not seek to contest it.

The crux of this appeal centres on the contention that the Court of Appeal in its application of the five-step approach committed an error in the interpretation and application of the established facts of this case. Specifically, it is my

argument that the facts were not correctly aligned with the principles underlying the five-step approach.

I turn to the origin, nature and effect of the mistake in more detail. The appellant's position is that had the facts been accurately applied to the principles inherent in the five-step approach the conclusion drawn by the Court of Appeal would've been different. In essence, this appeal seeks to rectify the perceived misapplication of established facts to the established legal framework rather than challenging the framework itself. That approach to the appeal ensures the preservation of the established legal precedents and principles that underpin the five-step approach. It emphasises that the appeal is not intended to disrupt or dilute valuable guidance provided by the five-step approach to address the specific misalignment of facts in the application of that framework in this case.

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It is useful to briefly recap the five-step approach prescribed by the Court of Appeal for assessing the discharge of a freezing order. Those are contained at paragraphs 47(a) to (e) and I summarise them as follows. (a) Good faith, which is step 1, whether the applicant acted in good faith. Step (b) Significance of missing information. Step 2, the importance of any missing information. (c) Identity of the applicant. The identity of the applicant, especially if it's a law enforcement agency or a Crown entity. (d) Interest protected and the duty of candour. Step 4, the interest being protected and the duty of candour. And (e), the public interest. Step 5, consideration relating to the public interest.

The key ground of appeal, centred on the Court of Appeal's application of step 2, the significance of missing information. It is the appellant's contention that a critical misunderstanding took place during the assessment, leading to a flawed determination. In the Court of Appeal's reasoning, it was erroneously believing that the freezing order had been discharged at the outset. In fact, the order had not been discharged but rather a variation was sought and granted in relation to only one of the three bank accounts subject to the order.

The distinction between discharge and variation is a fundamental one in freezing order proceedings. A discharge implies complete removal of the freezing order while a variation implies a modification of the order's terms or scope, allowing for certain assets to be made accessible.

The error in the Court's analysis had a profound impact on the outcome of this case. If the correct understanding had been applied, the appellant would have prevailed (inaudible 10:12:12) on the overall assessment.

In light of the aforementioned, it is clear that the Court of Appeal's misapplication of step 2 in the five-step approach warrants review by the Supreme Court. Correcting this error would lead to a different outcome and avoid a fundamental miscarriage of justice.

At this juncture I intend to address the helpful points made by counsel assisting.

When dealing with paragraph 50(b) in my written submissions she states the obvious challenge is that a balancing exercise is not an arithmetic equation of three versus two. "Plainly, the Court of Appeal could have assigned different weight to different factors." For the following reason, that submission, respectfully, does not stand up to scrutiny. The key point of contention revolves around the interpretation and application of the Court of Appeal's five-step approach to assessing the discharge of the freezing order. Whilst counsel assisting correctly observes that a balancing exercise may not be straightforward mathematical equation, it is important to clarify the principles underlying the Court of Appeal's prescribed factors and the manner in which they were applied in this case.

The Court of Appeal's five-step approach is not a random assortment of factors and nor is there any suggestion in the formulation of the factors and the application to the facts that the Court applied or intended to apply different weight to different factors. The formulation of the judgment suggests that each of the five factors is important. Each carries equal weight and the Court should

apply its mind to each factor individually and then determine where the balance of any discharge would lie.

The five-step approach was the product of careful, detailed analysis of relevant case law which has evolved to guide the Courts in making reasoned and just determinations when evaluating the discharge of freezing orders. Each factor within the framework is rooted in established legal principles and precedents.

In the case at hand, the Court of Appeal meticulously, but ultimately erroneously, applied the prescribed factors to the specific facts and circumstances. At no point in the wording of the judgment is there an indication that different weights were assigned to these factors. Instead, the Court of Appeal's decision is based on a comprehensive analysis of the case's particulars, seeking a balance that reflects the principles inherent in the prescribed approach.

The strength of the Court of Appeal's approach lies in its uniform application of these factors across the board. This consistency ensures that the assessment of the discharge of the freezing order is not arbitrary or capricious but rather guided by established principles of law.
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In essence, the Court of Appeal's judgment is an outcome of the considered and balanced application of the prescribed factors, each of which plays a distinct role in the overall evaluation. The Court's approach is not to alter or assign arbitrary weight to these factors, but to consider them collectively with due regard to the specific facts of the case to achieve a fair and just result.

I turn to the basis of the error and how it came to pass. It is clear on the face of the judgment that the Court of A-p0peal proceeded on the basis that any account related to R Limited had been discharged. It had therefore not understood or appreciated that there was more than one bank account held by R Limited. In fact, R Limited had a GBP account, a US dollar account and a New Zealand dollar account.

Cooke J was fully aware of that because of his involvement from the without notice stage and thereafter. Equally, it is clear from each of his rulings that what he did was not discharge R Limited from the restraining order but varied the restraining order to release the funds and only from the New Zealand dollar account. That was to enable the appellant to secure legal representation for the fundamental challenge as to whether the Court had been materially misled and therefore whether the restraining orders as a whole, ie, that both S Limited and what remained in R Limited should be discharged.

Accordingly where in paragraph (b) the Court of Appeal found that: "Cooke J rescinded the order in relation to R Limited long before the contested hearing on 20 and 21 October 2020," that is plainly wrong.

Where the Commissioner then suggests that this is a descriptive error: "As to the number of bank accounts in the name of R," that is plainly incorrect. It is clear that the Court of Appeal fell into error in three material respects: (a) it did not reference the fact that R Limited contained three bank accounts, (b) it proceeded on the basis that the restraining order on R Limited had been discharged, thereby releasing any and all funds, (c) the judgment does not refer to the fact that there was a variation as opposed to a discharge which only released the New Zealand dollar accounts, nor the reasoning behind it, which was to allow the appellant to secure legal representation for a future hearing to challenge the restraint order for both R Limited and S Limited.

Had Cooke J rescinded the order regarding R Limited as per paragraph 50(b), any future hearing would have only involved S Limited. The hearing on 20 and 21 October 2020 proceeded to hear detailed evidence as to both R Limited and S Limited. It is perhaps trite to observe that where one party seeks to restrain funds, it normally does so by reference to all bank accounts held by that entity, whether that is an individual or a corporate structure. That is exactly what happened here. The United States Government sought to include R Limited within the plea agreement. The appellant objected. The US Government took R Limited out of the draft plea agreement and then the appellant signed it.

Thereafter, the US Government sought to correct the position in New Zealand as soon as it realised that R Limited had been referenced in its affidavit. It is therefore wholly misconceived for it to be suggested by the respondent that some differential is to be drawn between the US dollar account and any other account within the entity that is R Limited.

How the error occurred. When dealing with how the error occurred, that is more straightforward. The Court heard no submissions about R Limited or indeed S Limited in relation to the number of bank accounts held within each entity. That is entirely understandable given the grounds of appeal and the respective skeleton arguments submitted. Furthermore, the Court did not invite any submissions on that subject for precisely the same reason. There is therefore no discussion at all about the mechanics of the order at the time of the variation by Cooke J. Had there been, the appellant would submit that any misunderstanding would've been dealt with there and then and negated that risk of the misunderstanding finding its way into the judgment. Thus, there was no misleading of the Court, but there has been a crucial misapprehension about the position of R Limited and the judgment is based on R Limited having been discharged from restraint, when in fact the Court made a variation only and the restraint remained otherwise fully in place against both R Limited and S Limited. 1020

Counsel assisting makes reference to the point that no submissions were made to the Court of Appeal regarding R Limited and S Limited. That is readily and simply explained by the fact that there was no need to. Neither party proceeded in the Court of Appeal on the basis that R Limited had been discharged because both well knew it had not. There had simply been a variation. Had the Court of Appeal asked or suggested that had been discharged during submissions, that misunderstanding would have been addressed by the parties. The mistake was inadvertent and apropos of no submission for the simple misapplication of the facts.

In summary, had the established and agreed facts been applied by the Court of Appeal to the factors it chose to outline, a different result would have ensued.

The Court of Appeal decided that Cooke J was, my wording, correct to have discharged R Limited because "the exclusion of that account by the US authorities would presumably have led to that aspect of the restraining order being declined". It went on to say: "But Cooke J rescinded the order re R Limited long before the contested hearing… So, this aspect had already been remedied". In other words, the Court of Appeal was saying that R Limited's exclusion in the US, regardless of the underlying reason, would have led to any restraint in New Zealand being declined and Cooke J corrected it, but Cooke J had not corrected it and left that issue for the later hearing.

The Court of Appeal's five-step process is unchallenged, but, if its reasoning and rationale is true to the already established facts of this case, R Limited should have been declined at the outset and thus logically declined, whether at the first hearing or as part of his ruling in October 2020.

My primary submission is that R Limited ought to have been discharged and should be discharged from the present restraint order.

My secondary submission relates to whether the restraint order as a whole ought properly to be discharged for the reasons set out in my written submissions. The Court may consider that it can sever R Limited and S Limited. It may consider that the Commissioner thought that the misleading information re R Limited was so significant, hence why the Commissioner was so reluctant to have the correcting affidavit from the US government filed, that the whole of the application for restraint is critically undermined and thus the restraint order as a whole should be discharged.

If I may assist the Court further, I will do my best to do so with these submissions.

The charges in New Zealand, I am not aware of any charges being brought against me. With regards to the payment of the US confiscation, that has not been paid. I offered to pay it out of the restraining funds in New Zealand but the Commissioner and the US government have refused.

The Court may also wish to know of the evidence given by US Attorney Ward before Cooke J and I'm going to read you this short question and answer from Ms Mortimer-Wang's cross-examination. Counsel: "And my question to you is is it your position that the funds in S Limited's account were proceeds which has a nexus with Mr Rae's criminal offending but on the other hand he isn't allowed to use the funds in that account to meet his forfeiture order of USD 1.775 million?" Barbara Ward's answer: "He doesn't own them and so he can't use someone else's money to pay his obligation." Counsel's next question: "And again I'll refer you to schedule B, if you sort of flick through it to page 36, yes, and that's noted there that the S account and the Cargill account, (inaudible 10:24:25) also the case I have misunderstood the US case that Mr Rae also doesn't have any ownership of the funds in the Cargill account." US Attorney Ward: "Okay, under this, I think this is the best way I can answer your question, under US forfeiture law at the preliminary stage, at this stage, at the preliminary order stage which divests the defendant his interest, the defendant is giving up his interest, but the extent of his interest, if any, is not determined until the second part, and so a defendant can give up his interest, agree to give up an interest and could be determined that he is just a nominee or a straw owner. It just means he won't make a claim. The fact that it's listed here is that he will not make a claim in it doesn't make it his property." Counsel enquiring on behalf of myself: "So the assets listed here are not being used or not listed here to ensure the Court that there is sufficient property to meet the money judgement figure, is that your position?" US Attorney Ward: "Correct. We have many money judgements that are not collected. I mean the money judgement figure is – it is an amount equal to the amount of money laundered which is 1.650 to the DME scheme and 50,000 as a result of the FBI undercover laundering transaction, that was charged in the district of New Jersey, and the third one is 75,000 laundered through on behalf of an FBI undercover agent that was charged in the district of South Carolina." So the 1.775 million is an amount equal to the amount of money he laundered.

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Both New Zealand and the US Government know I have no other funds to use to pay for my US confiscation.

That concludes my submissions to the Court. If there's anything else I can assist the Court with, I'll try my best to do so. May it please the Court.

WINKELMANN CJ:
Thank you, Mr Rae.

KÓS J:
May I ask a question? Justice Kós, Mr Rae. I'm just puzzled about the position that the US attorney you've just cited in the cross-examination was taking because in the affidavit of the FBI agent Mr VanZetta he says at paragraph 5.23 that you established R Limited and that you controlled R Limited and that although the beneficial owner was your wife, she never contributed to that. So who controls R Limited?

MR RAE:
R Limited is controlled entirely by Sarah Rae. It was set up for her and the children as the beneficiaries through a trusted provider in Wellington and the – and this was explained to the US authorities in its entirety and I believe that's why R Limited was removed from the US proceedings.

KÓS J:
Right.

MR RAE:
I wouldn't sign it because it wasn't something I had control or power over and I was unable to include it and they removed it accordingly when I explained all that to them.

KÓS J:
All right. So you're not seeking to pay any of the amount that's due to the American government out of R Limited's accounts?

MR RAE:

No.

KÓS J:

Thank you.

WINKELMANN CJ:

Mr Jones?

MR JONES:

Your Honour, Mr McCusker will address you in relation to the merits of Mr Rae's application.

WINKELMANN CJ:

Mr Rae, perhaps you can just put your computer on mute now if it isn't already. Right, Mr McCusker?

MR MCCUSKER:

Thank you, your Honours. My submissions will be dealing with the leave grounds and the merits of appeal. Before I start, I do have to apologise, I know the entities whose names are under suppression by their actual names. I've looked at this file for about three or four years now so I'll do my best but I might lapse.

WINKELMANN CJ:

Well you'll have to do your best because it's suppressed, so just don't speak them.

MR MCCUSKER:

I'll do my absolute best but I'm just forewarning this.

WINKELMANN CJ:

Well just think before you speak.

WILLIAMS J:

Is that a plea in mitigation on contempt proceedings?

MR MCCUSKER:

It's a pre-emptive plea in mitigation, Sir, and I will address your Honours' questions at the end as well.

WINKELMANN CJ:

Well you could address them up front if you like, get them out of the way.

MR MCCUSKER:

I'm happy to address them up front if that would assist.

WINKELMANN CJ:

It would.

MR MCCUSKER:

The first question is probably the easiest one to answer which is whether criminal charges have been laid and to my understanding the answer is no. I understand, thinking a few years back, there may have been some suggestion that there was an investigation but certainly I don't think it's resulted in charges in any way.

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KÓS J:

But the basis for the application for the restraining order was Mr Rae's alleged money laundering in New Zealand, wasn't it?

MR MCCUSKER:

That's right.

KÓS J:

So it's not sought to support the US plea agreement?

MR MCCUSKER:

No, no. So the –

KÓS J:

So it's based on criminal activity here?

MR MCCUSKER:

That's right. So –

KÓS J:

Well you haven't brought charges in three years?

MR MCCUSKER:

That's right. So under the Criminal Proceeds (Recovery) Act 2009 criminal proceedings are not necessary for a forfeiture order to take place. So they can take independently of any criminal charges. So this proceeding in New Zealand is predicated on domestic criminal activity, as it's called under the Act. It doesn't necessarily need criminal charges to stem from that.

KÓS J:

Well it's a pretty strange situation, Mr McCusker.

MR MCCUSKER:

It's fairly common under the Act, Sir, at least with New Zealand-based offending. So –

WINKELMANN CJ:

But not in a situation where someone's already been – pleaded guilty and served time overseas for the selfsame and reached a payment agreement for the selfsame money.

MR MCCUSKER:

I can't think of any examples to hand but certainly it's something which the Act to my knowledge doesn't prevent.

KÓS J:

Well I don't think it entirely encourages it. I mean this is a situation where what you're really doing, it seems to me, if you're not going to bring charges here, is seeking this restraining order to support the US Government's position, not in relation to section 283 offending here.

MR MCCUSKER:

I don't think that's entirely true, Sir. The Commissioner is – he has a statutory responsibility to use the Act to prosecute, well not prosecute, but to at least enforce significant criminal activity in New Zealand as defined under the Act.

KÓS J:

Which you haven't charged?

MR MCCUSKER:

Which hasn't been charged but, as I said, Sir, it isn't strictly necessary under the terms of the Act which is really what comes back to what Justice Cooke said in the High Court judgment which is this is something which the Act contemplates. It does contemplate the initiation of separate civil proceedings in New Zealand on the basis – in relation to offending which has occurred overseas.

WINKELMANN CJ:

So this is not – these amounts if forfeited are not going to be paid over to the US authorities?

MR MCCUSKER:

No and I can take you to the Court's, High Court's observations around that because that's where it was most of a live issue, and I have a share link up. So this follows on from the submission made in the High Court around whether these proceedings were an abuse of process and the argument was that the Commissioner was acting as some sort of agent or privy of the United States Government and that wasn't accepted by the High Court as a matter of fact. And then the Court goes on to note at 75: "This then leads to the second point,

which is that the Commissioner has determined to advance his own case in this proceeding. The Commissioner has decided not to simply enforce the foreign forfeiture order. He has made his own contentions that offences under section 243 of the Crimes Act 1961 have been committed as a consequence of conduct overseas that is regarded as an offence under New Zealand law. He takes on the additional burden on proving that offending before the New Zealand Court in these proceedings. The amount to be forfeit if he succeeds is then determined by the Act. It is an independent process from the one that has taken place in the United States. It follows that there is no abuse of process in the Commissioner advancing that argument rather than enforcing the United States forfeiture order. That is exactly what the Act contemplates."

KÓS J:

It was reading that passage that made me assume that you were going to proceed against Mr Rae here. It seems to be the assumption.

MR MCCUSKER:

I don't necessarily read that, Sir, and once again there's no prohibition under the Act in pursuing these proceedings independent of criminal charges. Now that's also clear from section 15 of the Act as well which doesn't require criminal convictions or charges before proceedings can be initiated.

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KÓS J:

Well, I understand that, but these proceedings are three years old. Now, are they not? It's about three years.

MR MCCUSKER:

Three and a half, yes.

KÓS J:

So where do you see all this going? If you were to succeed in retaining the restraining order, there would then be a final hearing about the proceeds orders.

At that stage a decision would be made with Mr Rae still neither charged nor convicted in New Zealand.

MR MCCUSKER:

Right, that is how the Act works. It doesn't require criminal convictions or criminal charges. It's fundamentally concerned with significant criminal activity which is its own species under the Act. It doesn't require any criminal convictions or charges for the Court to make a forfeiture order.

WILLIAMS J:

So, frankly, I doubt that this situation was in contemplation at all when this legislation was enacted because you've got parallel proceedings in another jurisdiction and a deal being cut which included both charges and forfeiture. So, the underpinning question to, I take it, the fact that there is no plan to file any charges at all in respect of the alleged New Zealand offending, is the danger that deals cut in international criminal proceedings, wherever they originate, are worthless, and that would be true for New Zealand as it is on your argument for the US.

MR MCCUSKER:

I don't think that's –

WILLIAMS J:

Why would alleged offenders cut deals if they knew the deal meant nothing in respect of funds elsewhere, even when the funds elsewhere were part of the deal?

MR MCCUSKER:

But that's just the nature – I understand that but that's the nature of international money laundering.

WILLIAMS J:

That's tough, huh?

MR MCCUSKER:

In a sense.

GLAZEBROOK J:

Well, would you say that that's not within substantive proceedings in any event? It's not, in fact, an argument before us at the moment?

MR MCCUSKER:

Well, I would submit that I'm trying my best to answer these questions, but it kind of goes back to what – the submission was made in the Court of Appeal, actually, around the complications that will result from enforcing two civil forfeiture orders, and that was the main ground of appeal in the Court of Appeal around abuse of process, and Justice Cooke's sense was that, well, this could be dealt with in the context of a forfeiture application and making an application for relief from forfeiture, and that is also what the Court of Appeal found and I can take you to that aspect of the decision as well.

WINKELMANN CJ:

It's all a very strange chronology, isn't it? So Mr Rae did not pay US authorities but he was allowed to return to New Zealand one assumes, and then the US authorities approached the Commissioner of Police. One assumes that they were hoping to get the money.

MR MCCUSKER:

No. In terms of the chronology –

WINKELMANN CJ:

The chronology would be helpful, actually.

MR MCCUSKER:

Yes. I can bring it up. I'm just hesitant to bring this up on the screen, Ma'am, because it does – I guess this was pre-suppression orders which does make –

WINKELMANN CJ:

Well, can you tell us where it is in the – or we don't know? Is it attached to submissions?

MR MCCUSKER:

I don't think there was a chronology filed by the Commissioner in this matter, but certainly the affidavits that were filed by the Commissioner's representatives in the High Court set out the chronology as to how this proceeding came about, and it began with Mr Rae's indictment and his arrest on charges in the United States, at which point there was a communication between the trustee in New Zealand who provided a suspicious activity report under the AML CFT Act. That was then picked up by the police Financial Intelligence Unit.

WINKELMANN CJ:

The trustee, which trustee?

MR MCCUSKER:

The trustee of S Limited and R Limited.

WINKELMANN CJ:

Okay.

MR MCCUSKER:

That was then picked up by the police Financial Intelligence Unit and it then went to the police Asset Recovery Unit who is the unit of the police which has responsibility for enforcing the Criminal Proceeds (Recovery) Act in New Zealand. There was then a step taken by the Commissioner's representatives to reach out to the US authorities for the purposes of undertaking domestic action under the Criminal Proceeds (Recovery) Act, and that is what set the rest of the events into motion. There's then discussions around an affidavit for the preparation of the New Zealand proceedings and in parallel to that Mr Rae's criminal proceedings in the United States are being resolved. So the factual position does support the Commissioner's contention that this was a New Zealand-initiated proceeding, and that's also corroborated

by the documentary evidence and I would refer you to the affidavit of Alex Macdonald dated the 27th of July 2020. It's all suppressed so I can't bring it up on screen but that sets out the steps taken.

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WINKELMANN CJ:

I think we have that.

WILLIAMS J:

Which part of that affidavit?

MR MCCUSKER:

Sorry, Sir?

WILLIAMS J:

Any particular part?

MR MCCUSKER:

Actually I apologise, Sir, there are two affidavits from the Commissioner's representatives and the one that deals with the first part of this investigation is the affidavit of Brent Andrew Murray also dated the 27th of July, and section 2 deals with how these proceedings were initially contemplated and the intentions of the Commissioner in pursuing this application from reaching out to the American authorities and the discussions around the preparation of the affidavit in the proceeding, and this is case on appeal reference 201.0417 for reference.

WINKELMANN CJ:

Don't know we have that.

MR MCCUSKER:

I don't know if your Honours have a copy of the case on appeal which might be handy.

WINKELMANN CJ:

I don't think we do, no.

O'REGAN J:

We should have that.

GLAZEBROOK J:

Yes, we should have.

WILLIAMS J:

We don't, we don't, I guess because it's a leave hearing.

GLAZEBROOK J:

Well it isn't a leave though.

WILLIAMS J:

No.

MR MCCUSKER:

I actually might be able to bring this up, and just checking if there's anything privileged, but I think – would that be useful to your Honours if I could just go through that?

WINKELMANN CJ:

Well you can give us the reference and we'll get the case on appeal and read it.

MR MCCUSKER:

201.0417, that's the affidavit of Brent Murray, and 201.0117, that is the affidavit of Alex Macdonald and both of those deal with the contemplation of these proceedings four or five years ago. I have lost my train of thought a bit, your Honours. Do you have any other questions around that?

WINKELMANN CJ:

No, that's really helpful, thank you. So we were at the point where you were making the point that Justice Cooke had specifically contemplated and addressed this issue and said: "Yes, it's permissible use of the Proceeds of Crime legislation to bring such proceedings even though the criminal charges

are not being brought," and that in terms of the Act it's sufficient if you prove that it's connected to criminal activity on the basis civil standard.

MR MCCUSKER:

That's correct. There's also a decision of the Court of Appeal called *Rodriguez v Commissioner of Police* [2020] NZCA 589 which did deal with a similar scenario to this and I think the Court of Appeal decision was issued the same date as the High Court judgment in this matter, but that might be of some assistance as well. I'm a bit rusty on the background to that but that deals with a situation where you have essentially foreign predicate offending and you have the Commissioner in New Zealand initiating domestic proceedings under the Criminal Proceeds (Recovery) Act and whether or not the Commissioner is barred from initiating domestic proceedings under the Act. So that might be of some assistance as well.

WINKELMANN CJ:

It would be because actually the Act contemplates not just New Zealand proceedings, that the application can be parasitic on New Zealand proceedings, it also contemplates, on New Zealand offending, contemplates it can be parasitic on overseas offending if it will be an offence in New Zealand, is that right?

MR MCCUSKER:

That's right and that's where the Commissioner came unstuck a bit in the High Court and the predicate offending is in a sense the New Zealand offending. So in the United States the offending was violations of a specific anti-kickback statute around providing medical equipment and the use of the Medicare system, but the actual predicate offending has to be established in New Zealand which would likely be obtains by deception or some other fraud offence of that nature.

WINKELMANN CJ:

So the predicate offending can be overseas offending but it has to be – meet the requirement of double criminality?

WILLIAMS J:

Has to be double criminality.

MR MCCUSKER:

That's right. So that's more of a Crimes Act issue than a Criminal Proceeds (Recovery) Act issue.

WILLIAMS J:

And you'll – yes.

MR MCCUSKER:

In terms of I guess how the statute sets out those requirements.

WINKELMANN CJ:

Operates, yes.

WILLIAMS J:

That judgment you cited, the Court of Appeal judgment, what's it called?

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MR MCCUSKER:

Rodriguez v Commissioner of Police.

WILLIAMS J:

It's not in the bundle?

MR MCCUSKER:

No it's not because this wasn't really mooted as a ground of appeal.

WINKELMANN CJ:

Can you spell the *Rodriguez*. Is it R-O-D-R-E or R-O-D-R-I?

MR MCCUSKER:

R-O-D – can I just get my phone your Honours.

WINKELMANN CJ:

Sure.

WILLIAMS J:

It must be 2023.

KÓS J:

Will you call your friend Mr McCusker.

WINKELMANN CJ:

Yes, this is your one call.

MR MCCUSKER:

Unfortunately the Wi-Fi wasn't working so I'm sort of stranded without my assistance.

GLAZEBROOK J:

And we do have the case on appeal by the way.

WINKELMANN CJ:

Yes, we've received it now. It's been emailed to us. No, we've been advised it's in our files.

MR MCCUSKER:

My learned friend has provided me the citations. It's [2020] NZCA 589, and I think *Rodriguez* is spelled R-O-D-R-I-G-U-E-Z.

WILLIAMS J:

Did you say 589 or 09?

MR MCCUSKER:

Sorry Sir. 589.

GLAZEBROOK J:

Sorry, I still haven't quite caught the case name?

MR MCCUSKER:

Rodriguez.

WILLIAMS J:

What troubles me about this situation is the potential effect on law enforcement here. That is if that's true in New Zealand, that a deal cut elsewhere counts for nothing, then it's also true for, it's also true in the reverse. That a deal cut here would count for nothing offshore. The potential structural effect of that is defendants would be advised by their legal advisors not to cut deals.

MR MCCUSKER:

Or you could cut a really good deal in one jurisdiction.

WINKELMANN CJ:

But that's quite hard because there's so many moving parts. It's taken years.

MR MCCUSKER:

Well in the Commissioner's defence it might have taken years but he's filed his forfeiture application promptly. It was filed two and a half years ago now. It is awaiting hearing. The High Court has directed it be heard from three months of the resolution of this appeal.

WILLIAMS J:

No but you said, your suggestion of a deal, to cut a really good deal, would mean cut a deal that involved both or all jurisdictions, or don't bother, because you have no protection.

MR MCCUSKER:

I think –

WILLIAMS J:

Now is that really a good idea. For New Zealand's purposes, I'm not thinking about the US at all.

MR MCCUSKER:

That would, I guess for New Zealand's purposes you'd have to have a money launderer in New Zealand who was laundering funds offshore.

WILLIAMS J:

Correct, the reverse of this situation.

MR MCCUSKER:

Right.

WILLIAMS J:

Is that good for New Zealand's criminal justice system, let's not worry about money laundering, but any situation where there is double criminality. A deal cut here means nothing overseas.

MR MCCUSKER:

It comes back to this being the nature of it being international money laundering. I'm not sort of saying "tough". I'm not saying that at all. But the issue is, and you could say the inverse is true as well, if in this case we were to suggest that the Commissioner was barred from pursuing $6 million or $7 million which has allegedly been laundered into this country because of criminal offending which he alleges has taken place here. That's also not good for the justice system. It's complicated and there are mechanisms under the Act ultimately to resolve it.

WILLIAMS J:

Well it may or –

WINKELMANN CJ:

Cleaning up abuse of process.

MR MCCUSKER:

Abuse of, that's the key one.

WILLIAMS J:

So the way to resolve the nuances of this is to go to a full hearing, at which point you would say that was a live issue to be considered?

MR MCCUSKER:

The issue of any potential hardship.

WILLIAMS J:

Well hardship is a big idea. I'm talking about the deal that was struck and its relevance to the final forfeitures.

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MR MCCUSKER:

Well, that is what essentially the Court of Appeal has directed in its judgment because the initial submission was, well, there are issues here with two conflicting forfeiture orders, and the Court of Appeal's position was essentially that there are mechanisms. So there is an application for relief from forfeiture under the Act. That's the first one. The other one, which I think the Commissioner suggested in the Court of Appeal as well, is that the Commissioner has the, or the Court has the power to reduce a claimed unlawful benefit for a proper forfeiture application off its own motion. So the Court has a variety of levers it can push and pull.

WILLIAMS J:

Yes, my question to you is is the, what I call the tough scenario, a relevant matter for the consideration of the trial court dealing with the final forfeiture orders or release against forfeiture?

MR MCCUSKER:

It'll be relief, and you often have a substantive forfeiture heard in parallel with relief application.

WILLIAMS J:

Sure. The overall substantive resolution of the merits, shall we call it?

MR MCCUSKER:

Yes.

WILLIAMS J:

You accept that that's relevant?

MR MCCUSKER:

Yes.

WILLIAMS J:

All right.

KÓS J:

I mean the perverse structuring here is that the restraining order is sought, not in support of the American deal, but is based on criminality in New Zealand. The actual, the real victims here who might be expecting to gain some benefit from the funds that are here, they're not really here; they're in the States.

WINKELMANN CJ:

That's not how proceeds of crimes work though.

KÓS J:

I know. I appreciate that's not how it works but that's the oddity we've got ourselves into with the way – I mean for some reason, I don't quite know why, you're running the restraining order application, it's your decision, or your client's decision, on a non-supported basis.

MR MCCUSKER:

You mean non-supportive in the sense there's no criminal charges?

KÓS J:

No, on a non-supported basis in the sense it's not in support of the US forfeiture orders or the US forfeiture deal.

MR MCCUSKER:

All right, but that comes back to the observation that Justice Cooke made in the High Court which is that's a decision the Commissioner has made and it's one the Act allows him to do. Now for better or for worse, that is the situation. He's taken on that risk. He's taken on that burden. But it is something that the Act contemplates. It doesn't prohibit, and –

WILLIAMS J:

I – yes?

MR MCCUSKER:

The thrust of the *Rodriguez* case and what Justice Cooke was saying in the High Court is you can't necessarily read in limits in the Act which aren't there, and –

WINKELMANN CJ:

And the abuse of process is the thing that controls it.

MR MCCUSKER:

Absolutely.

WILLIAMS J:

Do you agree with Mr Rae that ironically he cannot now pay the American authorities out of the frozen accounts?

MR MCCUSKER:

Well, that's fundamentally a matter for Mr Rae. There is a judgment of Justice Churchman in the bundle about Mr Rae's means as well and the assets he has at his disposal, so I don't necessarily know if that's the case or not. I understand that that –

WILLIAMS J:

No, out of the frozen accounts is my point.

WINKELMANN CJ:

So that's not fundamentally an issue for Mr Rae because he can't pay them out of the frozen accounts.

MR MCCUSKER:

No.

WINKELMANN CJ:

And he says he would pay it out of the frozen accounts were they not frozen.

GLAZEBROOK J:

Well, the US, from what he was saying, isn't seeking that in any event.

WINKELMANN CJ:

From R Limited.

MR MCCUSKER:

At least from the R Limited funds.

GLAZEBROOK J:

Yes.

WILLIAMS J:

Yes. It seems very strange indeed.

GLAZEBROOK J:

Yes.

WINKELMANN CJ:

So he wants to pay it out of S Limited, I think.

MR MCCUSKER:

Yes.

WINKELMANN CJ:

And is there any reason why the Commissioner of Police wouldn't – I mean that could be done in a way which doesn't create the risk that it's just dissipated. Is there any reason why the Commissioner of Police would oppose that? Has the Commissioner of Police addressed that? You probably have no instructions.

MR MCCUSKER:

I would have no instructions today to order the payment of $1.75 million, Ma'am.

WINKELMANN CJ:

No, no, but it may have been I just – we are asking you because it may in fact have been addressed. So we're not asking you to turn your mind to it now, whether that issue has been addressed in the past, because that does seem – if the deal that was struck in America involved the disgorging of the improperly obtained funds and then in New Zealand it's frozen under a separate regime so that payment can't be made, the improperly obtained funds, ex hypothesi, then that does seem harsh.

MR MCCUSKER:

Yes, but that's ultimately a matter to advance, as I've said before, it's submitted before, in the context of an application for undue hardship and that's what the Court of Appeal has suggested is the appropriate route. I believe Justice Cooke in the High Court suggested that as well.

But the other point that was noted in the High Court judgment is that the issue around repatriation of funds is fundamentally an issue for the executive in a way once a forfeiture order has been made. It's not necessarily made by the Commissioner. It's a decision, I think, for Cabinet, was the position at the time of a High Court hearing –

WILLIAMS J:

Really?

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MR MCCUSKER:

– on the making of a final forfeiture order. So whatever arrangements are in place are really determined after the fact and if –

WILLIAMS J:

Why is it a decision from Cabinet? Cabinet doesn't exist in constitutional law.

MR MCCUSKER:

I'm not – I'm just trying to recall. It –

WILLIAMS J:

It has to be a Minister.

WINKELMANN CJ:

Your point is no arrangement exists though?

MR MCCUSKER:

No arrangements and they happen after the fact and it's a decision that's made independent of the Commissioner.

WINKELMANN CJ:

That's of no relevance to us, I think. So long as there are no arrangements now, something like that.

MR MCCUSKER:

No arrangements now and that was the thrust of what Justice Cooke found in the High Court which is that there aren't any secret arrangements to repatriate all of these funds surreptitiously and to abuse the Court's processes in that. It's fundamentally an issue you make, a decision you make at the conclusion of proceedings.

WILLIAMS J:

One downstream issue here is that Justice Cooke released the smaller R account to fund the defence, shall we say, to the applications, and that seems

to have run out, and he's acting for himself. Doesn't that call for another release?

MR MCCUSKER:

No, because section 28 of Criminal Proceeds (Recovery) Act is quite clear that legal expenses can't be paid out of restrained funds.

WILLIAMS J:

So what Justice Cooke did, because that's why he did it, was unlawful?

MR MCCUSKER:

I wouldn't say it was unlawful…

WILLIAMS J:

Really?

WINKELMANN CJ:

Is that so, because back when I was a High Court Judge we used to allow funds to be paid out of restrained funds all the time to pay for legal fees.

O'REGAN J:

That was a different Act though, I think.

WINKELMANN CJ:

Was it?

WILLIAMS J:

It happened in *Kim Dotcom*, from memory.

WINKELMANN CJ:

Has the Act changed?

MR MCCUSKER:

Under the Proceeds of Crime Act 1991 I think there was case law that suggested you could fund legal expenses out of restrained funds, and then

there was a new suite of amendments that came in with the new Act and it restricted it. I believe it's –

WINKELMANN CJ:

What year was that?

MR MCCUSKER:

2009, I believe. I'll just have a look.

WINKELMANN CJ:

Well, no, we were still doing it after 2009 with the –

O'REGAN J:

Yes, but the proceedings would have been commenced under the 2009 Act.

WILLIAMS J:

Didn't we do that in *Kim Dotcom*?

GLAZEBROOK J:

Well, we didn't.

WILLIAMS J:

Somebody did.

GLAZEBROOK J:

No, it was done at first instance, I think.

KÓS J:

It's very curious because it enables the payments, release of funds to pay the reasonable business expenses of the respondent but not his legal expenses, and, indeed, we're – the Court's specifically precluded from doing so under section 28(2). So it's a triumph for access to justice.

WINKELMANN CJ:

Right, well, we've ranged widely but can we bring you back now, give you the opportunity to respond to Mr Rae's appeal grounds?

GLAZEBROOK J:

Well, we don't have anything in front of us in terms of an application for that anyway, so…

WINKELMANN CJ:

No, we don't. So Mr Rae says – he raises two points. One, that there was material non – there was non-disclosure which I think, although he didn't advance it in his oral submissions, is relevant, I think he says, to the good faith point, and the second point is that there was – the nature of that non-disclosure was misunderstood by the Court of Appeal.

MR MCCUSKER:

Right. I can deal with both of those now. So the first one relates to paragraph 50(b) of the Court of Appeal's decision. I've got the paragraph up there. But the key paragraph is: "The exclusion of that account by the United States authorities would presumably have led to that aspect of the restraining order application being declined." I note that the word "presumably" here is probably doing a lot of work. In a sense the Court of Appeal is speculating on what the High Court might have done back in June when it released those funds to Mr Rae.

There's no real dispute though that there is a factual error and I think the issue is, well, what significance do you attach to it.

WINKELMANN CJ:

Well, no, this is the first. The first one is that there's not the factual error but the non-disclosure, the significance of the non-disclosure, or are you saying – are you linking the factual error to that?

MR MCCUSKER:

Is this in relation to one of the grounds, Ma'am? There's two matters in issue from the appeal submissions, I understand. There's 50(a) and 50(b). Would you rather we deal with 50(a) first?

WINKELMANN CJ:

Yes, that's it, which is non-disclosure. 50(a) of the Court of Appeal judgment are you on?

MR MCCUSKER:

Yes, that's right.

WINKELMANN CJ:

No, 50(a) of the High Court judgment. Which 50(a) are you on? I'm confusing you.

KÓS J:

No. It's the CA judgment.

O'REGAN J:

It's 47(a) of the –

MR MCCUSKER:

The Court of Appeal judgment.

WINKELMANN CJ:

27(a).

O'REGAN J:

Oh, no, it's 50(a).

KÓS J:

It's 50(a).

MR MCCUSKER:
50(a).

WINKELMANN CJ:
58?

MR MCCUSKER:
50(a).

KÓS J:
50, 5-0, (a).
1100

WINKELMANN CJ:
Thank you. Yes. Yes, that's what I'm talking about.

MR MCCUSKER:
Yes, so this is the one that says the Commissioner acted in good faith. "He did not know there had been a formal agreement between Mr Rae and the United States authorities, and therefore did not know those authorities had excluded the R Limited bank account. Relatedly, the misleading information provided by the United States authorities was 'not the consequence of bad faith' for the reasons explained by the Judge. We add that unlike the applicant in *Green Way*, the Commissioner accepted – "

WINKELMANN CJ:
I can't hear you.

MR MCCUSKER:
Sorry.

WINKELMANN CJ:
I was just going to say in a strange twist of fate it's also addressed in 50(a) of the High Court judgment, which is way the confusion.

MR MCCUSKER:

Interesting. "We add that unlike the applicant in *Green Way*, the Commissioner accepted these shortcomings once they were identified," and this aspect of the appeal turns on that last sentence, which is the acceptance of the shortcomings by the Commissioner. Mr Rae has referred to an exchange between the US authorities and the Commissioner post the making of the without notice restraining order as to the timing of the filing of a supplementary affidavit which corrected the position around one of the accounts, and the Commission's position here is really that there isn't an error. What the Court of Appeal is saying is that before the High Court the Commissioner acknowledged that there was material non-disclosure. He didn't hide from that fact, he accepted it, and the focus of the hearing was more what were the consequences that would attach to that.

WILLIAMS J:

The point is that I thought the chronology indicated there was intentional non-disclosure. I maybe wrong about that, but that was the impression I had.

MR MCCUSKER:

That was the submission in the High Court, that this was deliberate. I'm not sure if the issue of the specific affidavit was ever put in issue in the High Court or the Court of Appeal. There was certainly, the submission that was made in the High Court was that there were some I guess secret backchannels between the US and the Commissioner where the Commissioner was effectively agreeing to forfeit more funds than were, I guess, allowed for –

WINKELMANN CJ:

But that's in our, isn't Mr Rae's fundamental point that there is clear evidence that the Commissioner persisted in the non-disclosure when it was pointed out. Is that not what's said against the Commissioner?

MR MCCUSKER:

I don't think you can really take that exchange to that level. What the representatives –

WINKELMANN CJ:

From the affidavit evidence?

MR MCCUSKER:

– were saying in that affidavit – were referring to was the US asked the Commissioner to file the supplementary affidavit. The Commissioner's representative said there's ongoing discussions between Mr Rae and the Commissioner, and they decided to defer it. The US said, please file it, and the Commissioner did.

WINKELMANN CJ:

Why, if the, why would the Commissioner not immediately file it, because the obligation is not just to Mr Rae, the obligation is to the Court to correct the record.

MR MCCUSKER:

I would agree with that and I think the fundamental issue with this proceeding, and it's recorded in the High Court judgment, is that there was a lack of appreciation by the Commissioner as to his obligations as an ex parte litigant, and that is reflected there, and it's also reflected earlier on when the application was being made. There was a fundamental misunderstanding as to what his roles and his obligations were, and there's no real denying that. But there's also nothing to really suggest on the evidential record that that was the product of bad faith, and I don't think it was ever really suggested to the Commissioner's representative in cross-examination at the time that there was any malign intentions on his part.

WINKELMANN CJ:

Yes, and this is –

WILLIAMS J:

It was an intention to gain an advantage in the discussions with Mr Rae by avoiding putting this clarifying affidavit on the record.

MR MCCUSKER:

I don't think you can really read anything into that. There's nothing to suggest that.

WINKELMANN CJ:

That's what Mr Rae read into it?

MR MCCUSKER:

I know, and we are just confined by the Court's findings in the High Court around bad faith, and the Commissioner wasn't acting in bad faith, and this was all ventilated at the time.

WILLIAMS J:

I don't think we're confined by those. We just have to respect them.

MR MCCUSKER:

Well, no, but also I'm just saying that there's nothing to really suggest otherwise, and the findings of the High Court are pretty clear. It's not a good look for the Commissioner in terms of his understanding as to his roles and responsibilities. But certainly there was no bad faith on his part.

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WINKELMANN CJ:

This isn't a black and white assessment, is it. It's not just no bad faith then it's fine. It's not just no bad faith and it's then okay for them to say, oh, sorry, I've got it wrong, as if it never were, you know, it's shades of carelessness, isn't it, I mean to persist once it's been pointed out to you that it's not disclosed is a different thing to just making an omission. So it's one up from simply having not disclosed it, then it's pointed out to you and you don't immediately respond. That's in the category of gross negligence, isn't it? It's beyond – because it's carelessness not to disclose. It's extreme carelessness not to disclose when you've had it pointed out to you.

MR MCCUSKER:

I just don't – I mean from, at least from the record on the evidence I don't think it ever really, the Commissioner really appreciated his obligations to the Court to correct the position at the time, and look, certainly, as Justice Cooke has found, there were significant lapses in standards here, absolutely, and this is another reflection of that. But I wouldn't suggest it goes beyond that into something more serious.

WILLIAMS J:

It's a competence issue, not a conspiracy?

MR MCCUSKER:

There's no conspiracy.

WINKELMANN CJ:

But that doesn't answer my fundamental point, question to you, which is about it's not just – are you saying so long as it's – is the (a), the first part of that five-point test, simply concerned with good faith or is it a more nuanced assessment of the extent of the neglect or dereliction?

MR MCCUSKER:

I would say, you know, were we acting in good faith or bad faith is – well, acting in good faith is not determinative of anything and I think that's the point that the Court of Appeal is making as well, and there were certainly the submissions before the Court of Appeal that simply because one acted in good faith doesn't necessarily mean that the order can stand. As you say, it is more of a nuanced assessment. But what the Court of Appeal has found is that the Commissioner did accept the shortcomings once they were identified. He did acknowledge it. He didn't argue the point. That's ultimately what the Court of Appeal is saying there. But I would agree with your Honour's question that simply acting in good faith isn't determinative.

WINKELMANN CJ:

Yes. I mean certainly it wouldn't give me much comfort if there's a persistent non-disclosure, if a person just when they're called to account for it says: "Oops, sorry."

MR MCCUSKER:

No, and I think this has been, for the Commissioner anyway, a very significant learning experience as to his roles and obligations.

WINKELMANN CJ:

I don't imagine it's the Commissioner individually. I imagine it's some part of the team.

MR MCCUSKER:

Absolutely, and I think the High Court judgment isn't great reading. It's the type of judgment you open up and it makes you wince every time you look at it. But there's no doubt here there were lapses in standards and the Commissioner accepts that. But ultimately, when it comes to the Court exercising its discretion, the fact that the applicant acted in good faith is just one factor among many. It's not decisive.

GLAZEBROOK J:

And you'd presumably say the same thing applies if there's a finding of bad faith?

MR MCCUSKER:

No, I –

GLAZEBROOK J:

Although it wouldn't –

MR MCCUSKER:

I would probably – I think if the Commissioner acted in bad faith then I think that's probably going to result in a discharge of an order I would expect, that there'll be a serious matter, but that hasn't happened here.

So those are my submissions on that point, if you have any further questions.

WINKELMANN CJ:

On that point, no.

KÓS J:

So you're now back to 50(b)?

MR MCCUSKER:

50(b).

KÓS J:

So can I ask you about that passage you took us to before, the one that reads: "The exclusion of that account by United States authorities would presumably have led to that aspect of the restraining order application being declined"? it seems to me that's a mistake too for two reasons. The first is that Justice Cooke knew about the exclusion when he made the judgment, so I don't know why we have to make an assumption about that. He made his decision in the face of all the information that we have.

MR MCCUSKER:

That's right.

KÓS J:

And secondly, it doesn't explain – it might explain it if this was an application for a restraining order in support of the US agreement, but it's not. This is a restraining order sought in relation to money-laundering funds that you say have entered into the country, and you say that's at – it raises a 283 Crimes Act

criminality issue, in which case the exclusion of R Limited's funds seems neither here nor there.

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MR MCCUSKER:

That's right. That's right, and I think my friend mentioned it in her submissions but she described what Justice Cooke did at the time as sort of a procedural response more than anything. He wasn't adjudicating on the propriety of restraining the R Limited accounts. There's only really two real ways that might have been relevant. If there was acceptance by the United States that the funds weren't criminally tainted, that might perhaps undercut the substantive basis for the restraining orders, but as my friend pointed out, there's no evidence really to suggest that. The other point where it might be relevant is the potential abuse of process, but also that doesn't arise here given the Court of Appeal accepted those findings.

WINKELMANN CJ:

So the point that's made against you is that the Court of Appeal wrongly assumed when it was assessing the significance because they had more facts than Justice Cooke had as to the – had they got more facts as to the extent of the non-disclosure by the time they considered this, or was it simply as Justice Cooke saw it?

MR MCCUSKER:

Yes, so in terms of the carriage of the proceeding, the minute that Justice Cooke issued in June, that was made in a list at the first call of the application. After that the Commissioner filed further evidence as to his knowledge at the time the application was made. So those are the affidavits of Brent Murray and Alex Macdonald I referred to.

WINKELMANN CJ:

Yes.

MR MCCUSKER:

So the High Court had all that material as to the Commissioner's knowledge.

WINKELMANN CJ:

Yes, and Mr Rae had appealed to the Court of Appeal on the basis that Justice Cooke had underestimated the significance of the Commissioner's dereliction, hadn't he. That was part of his appeal?

MR MCCUSKER:

That's right. I think the argument was that there was almost like a fetter on his Honour's discretion in the High Court, and that he erred in that way.

WINKELMANN CJ:

So Mr Rae's point now is that when the Court of Appeal's considering the proportionality of the procedural response to that non-disclosure and mistaken evidence by Justice Cooke, they're looking at, in a way that Justice Cooke never, did not have the opportunity to because he got something wrong, when they're looking at it they're getting something wrong about what Justice Cooke did, and that's his point. That no one's really looked at this clearly to date. Justice Cooke got it wrong and then the Court of Appeal got it wrong.

MR MCCUSKER:

Well if we go back to the High Court on notice restraining order proceedings, so this is the substantive matter before Justice Cooke, which is under appeal, there were two central arguments. The first one was material non-disclosure, and the second one was abuse of process, and that stems back to the argument that there's a plea agreement in the United States. The R Limited accounts were excluded. There were a bunch of other differences between –

WINKELMANN CJ:

The R accounts.

MR MCCUSKER:

Sorry, the R accounts – and the Commissioner was barred or stopped –

WINKELMANN CJ:

We'll have to note that for excision.

MR MCCUSKER:

– from pursuing proceedings in New Zealand, and what Justice Cooke found was that the plea agreement did not act as a bar in the Commissioner pursuing both the R Limited and the S Limited accounts. And as my learned friend notes in her submissions the way the abuse of process argument was pursued in the High Court was basically on the global basis. So it was an abuse of process –

WINKELMANN CJ:

How is this relevant to the point I was asking you about?

MR MCCUSKER:

I guess because there was no specific focus in the Court of Appeal on the R Limited accounts. There was no suggestion that they were somehow special or specific and they should be excluded on that basis.

WINKELMANN CJ:

Because the Court of Appeal thought they all had the orders discharged in respect of them. What I said to you was that the grounds to appeal the Court of Appeal was that Justice Cooke had misunderstood the significance of non-disclosure in the circumstances. It was put straight in front of the Court of Appeal about the significance of the non-disclosure circumstances. They then look at it afresh, but they, and particularly to look at whether Justice Cooke's procedural response was appropriate, and they do so on the basis of a fresh set of mistakes. So the point that Mr Rae is making is no one's ever looked at it properly. No one's ever done the five-part assessment properly. Because on each occasion it's been infected by an error.

KÓS J:

Yes, although the two in section 50(b) there are two errors by the Court of Appeal. They're discrete errors in a way, but in a way they sort of cancel themselves out. I mean the assumption in that paragraph, the sentence, the

exclusion is wrong, for the reasons I gave a moment ago. Then they respond to that –

WINKELMANN CJ:

Can counsel just answer my question?

KÓS J:

Well yes, but let me put this point. But in response to that is "but Cooke J rescinded", so the two points are connected.

WINKELMANN CJ:

Okay so I'm not understanding that point. So could counsel just answer my question.

MR MCCUSKER:

Sorry, can I just go back, I got distracted Ma'am sorry.

WINKELMANN CJ:

Yes, that's the point.

MR MCCUSKER:

I apologise.

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WINKELMANN CJ:

So I had said to you, so what Mr Rae is saying is effectively that no one has ever actually done this five-part analysis on the basis of correct factual analysis, and what do you say to that?

MR MCCUSKER:

The Court of Appeal is very much wedded to the factual findings of the High Court because they were never challenged around –

WINKELMANN CJ:

Yes, but they've introduced new factual errors. They've introduced – so they've misunderstood. They're assessing whether, what is the appropriate procedural response to a significant non-disclosure and in doing so they have misunderstood the proportion of the procedural response by the High Court Judge. So their own five-part analysis is wrong. So they've thought he's excluded more than he has from the freezing order.

MR MCCUSKER:

Yes, but 50(b) is in the context of the information would not have changed the outcome had it be known save in relation to the bank account of R Limited. So that's the focus of that paragraph, that the new information didn't change or affect the order being made in the first place, and that's very much wedded to what the High Court found which is that the plea agreement did not act as a bar on restraining the S Limited or R Limited accounts. In my submission, in sort of transposing that High Court finding it's then read into that a misunderstanding about what happened earlier on by Justice Cooke back in June when he released those funds, but it's very much pegged to the finding of the High Court that the information, the new information, would not have changed the position on restraint had it been known at the time, and that's ultimately the findings of the High Court. The plea agreement did not impact upon the ability of the Commissioner to seek restraint of S Limited and R Limited. It simply misunderstood what he did, his Honour did, back in June when he released that first account.

WINKELMANN CJ:

So they've taken into account the second sentence: "So, this aspect had already been remedied by the time the Judge was asked to rescind the order in its entirety."

MR MCCUSKER:

That's right, and that's where the error comes in. It's misunderstood what his Honour did back in June 2020. But –

KÓS J:

Yes, but it's a response to a previous error they had made. That's my point about the double error. The second sentence is wrong, the assumption that it would have made a difference, and then they say in response to that, they make the third sentence and the third sentence is a second error. That's the point I was trying to make.

GLAZEBROOK J:

But wouldn't you say Justice Cooke was clearly right to restrain both R Limited and S Limited because on the basis of the proceeds of crime – or that a forfeiture in New Zealand was available in respect of both of those?

MR MCCUSKER:

That's right.

WILLIAMS J:

Do you adopt that answer?

MR MCCUSKER:

No, that's right. There's a –

WINKELMANN CJ:

I mean, because what I'm essentially asking you to do –

GLAZEBROOK J:

But that would be your answer to this. It doesn't matter whether – in terms of whether – because in terms of whether we grant leave, one of the issues is whether there's been a miscarriage of justice and if the answer to it is that, in fact, the High Court was right, whatever the Court of Appeal did, then I would have thought your argument would be leave shouldn't be granted.

MR MCCUSKER:

That's right.

GLAZEBROOK J:

Or if it is granted then the answer would be it can stay and these sort of challenges are dealt with in terms of relief against forfeiture or whatever happens in those substantive proceedings. Is that right or am I…

MR MCCUSKER:

No, that's 100% right, Ma'am, and essentially the High Court's findings around the alleged criminality in S Limited and R Limited were unchallenged. The High Court's findings around whether or not there was an abuse of process in seeking restraint of the R Limited accounts are also unchallenged in the Court of Appeal. So, and the primary submission here is that we are really dealing with the unchallenged findings of the High Court as to what the High Court found around those two matters.

WINKELMANN CJ:

So the answer to my question really must be the Court of Appeal have got it wrong so we have to look afresh to see – they've made errors, factual errors, so we have to look afresh. So your submission should be, and I think now is, that if you do the five-part analysis you end up at the same point with the correct facts.

MR MCCUSKER:

That's right, and it comes back to what my learned friend said which is you undertake the counterfactual which is: had the Court of Appeal been appraised of the correct position would its decision have changed? And the answer is no, because there's no evidential –

WINKELMANN CJ:

I don't think that's what we ask ourselves, actually. I think we ask ourselves afresh.

MR MCCUSKER:

Yes, sorry, Ma'am.

GLAZEBROOK J:

Whether the High Court was correct?

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WINKELMANN CJ:

Yes.

GLAZEBROOK J:

But you say in any event we have to take the High Court's findings on abuse of process and the criminality issue as not actually subject to the Court of Appeal decision. So the only thing is the non-disclosure is that the also the submission. I'm sorry, I started writing down what you said, so the High Court's finding on abuse of process were unchallenged in the Court of Appeal, as was the finding on the criminality.

MR MCCUSKER:

That's right.

GLAZEBROOK J:

Yes. So we would be looking at the Court of Appeal judgment in light of those findings.

MR MCCUSKER:

That's right. I will just walk it back. There was a narrow challenge to the abuse of process point in the Court of Appeal around this complications of duelling forfeiture orders as I mentioned earlier, but the substance of it in the High Court, which is can R Limited and S Limited be restrained in light of the plea agreement. That was fundamentally unchallenged.

WINKELMANN CJ:

So your submission is that the non-disclosure doesn't change what the outcomes should be applying the five-part analysis.

MR MCCUSKER:

No, it wouldn't change the outcome.

WINKELMANN CJ:

And that is because?

MR MCCUSKER:

Well fundamentally the Court of Appeal –

WINKELMANN CJ:

No, just looking at it afresh, without what the Court of Appeal did.

MR MCCUSKER:

No, it wouldn't change the outcome Ma'am.

WINKELMANN CJ:

Because?

MR MCCUSKER:

It comes back to the findings around, that the Commissioner acted in good faith, that there were obviously significant lapses on his part, but those lapses, those specific lapses would not meet the threshold for discharge, especially –

WINKELMANN CJ:

They weren't egregious.

MR MCCUSKER:

They were not egregious, which was the focus in the Court of Appeal.

WINKELMANN CJ:

Although that's not the standard, but it's relevant. Is what you read in the Court of Appeal?

MR MCCUSKER:

Yes, that's right.

WINKELMANN CJ:

And carry on?

MR MCCUSKER:

So those matters wouldn't –

WINKELMANN CJ:

I'm asking you to go through the five-part analysis.

MR MCCUSKER:

The five-part analysis. So the first part is the Commissioner acted in good faith, and fundamentally that is unchallenged save for the issue around the filing of the affidavit and, as I've submitted before, there were lapses on the Commissioner's part. This was like, this was one of them as well, but it doesn't in and of itself reach the threshold for discharge. 50(b) we've gone chapter and verse on that, I think, now so I don't –

WINKELMANN CJ:

No, can you go through it.

MR MCCUSKER:

Okay, I'm sorry Ma'am. So essentially here the key issue is the exclusion of that account by the US authorities –

WINKELMANN CJ:

It's the materiality – (b) is the, the second part is the materiality, isn't it?

MR MCCUSKER:

It's materiality and I guess the only key question here on this appeal is whether this Court would reach a different view to the Court of Appeal in relation to the issue around the R accounts and here there is –

THE COURT ADDRESSES MR MCCUSKER – SUPPRESSION REMINDER
(11:23:25)

MR MCCUSKER:
Sorry, I apologise.

WINKELMANN CJ:
It's all right, carry on.

MR MCCUSKER:
And, no, and the exclusion was never, the issue of the exclusion was never before the High Court. Sorry, never before the Court of Appeal. At the time the High Court made clear factual findings that it would've made the orders had the missing information been known at the time, and that's because the plea agreements didn't prevent the Commissioner from taking those actions and also the Court also made findings that there were reasonable grounds to believe that the funds were tainted property.

GLAZEBROOK J:
Just on (b) is the argument really related to the abuse or process findings in the High Court in the sense that there's nothing that, the fact of an agreement does not stop a forfeiture order, and if the fact of an agreement doesn't stop a forfeiture order, not knowing about the agreement makes no difference. Is that the…

MR MCCUSKER:
That's right. Sorry.

WINKELMANN CJ:
And the other grounds were otherwise made out is your submission.

MR MCCUSKER:
That's right. (c) doesn't change, the Commissioner is still the applicant. (d) around the importance of a duty of candour. That's obviously accepted by the

Commissioner as well, and (e) is the public interest, and that factor hasn't changed. So the only two, I guess, factors for the Court's consideration are (a) and (b), and the Commissioner's position would be that this Court's analysis wouldn't change with these new submissions.

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WINKELMANN CJ:

Those are your submissions?

MR MCCUSKER:

Those are my submissions, Ma'am.

WINKELMANN CJ:

Okay, thank you. Thank you, Mr McCusker. Now, Ms Mortimer-Wang. Did you want – do you have anything you feel you could usefully add?

MS MORTIMER-WANG:

Your Honours, just firstly in relation to the question your Honours asked about the US position and the New Zealand position in respect of the criminality, my learned friend for the Commissioner is right in saying that no criminal charges are required for CPRA proceedings in New Zealand but it is submitted that there are separate procedural routes under the CPRA for the restrain and forfeiture of foreign restraining orders and forfeiture orders versus that of domestic orders. The relevance of that, your Honours, is that one of the issues that was litigated in the High Court was that there was a potential misuse or improper use of the CPRA procedure where it would appear that notwithstanding the Commissioner's claim that it is seeking these orders based on domestic criminal charges, no criminal charges have been laid and that raises the question as to how genuine it is that the Commissioner's indeed seeking these orders on the basis of domestic significant criminal activity.

Your Honours, there's –

GLAZEBROOK J:

I'm assuming that's something that could be brought up at the substantive proceedings, couldn't it? Is there anything that you would think would stop that being brought up?

MS MORTIMER-WANG:

No, your Honour. It is something that can be brought up again in the context of forfeiture and consideration of undue hardship relief. I'm simply flagging these references for your Honours in case it's helpful.

In terms of the issue of repatriation of funds to the US authorities, it is fair to say that the position hasn't been entirely consistent on the part of the US authorities from when it first filed the relevant affidavits in support and to the point where the various witnesses gave evidence at a hearing before Justice Cooke. The references for that, your Honours, in terms of the first and the second affidavit of Agent VanZetta, those are at Court of Appeal case on appeal 201.0001 and 201.0024. Those two affidavits will make it clear to your Honours that at least initially the US authorities' position was very clearly that the funds will be repatriated to the US, and that was the reason why it supported the Commissioner's application in New Zealand.

WILLIAMS J:

What do you say made the – do you have any suggestion or submission about why that appears to have changed?

MS MORTIMER-WANG:

Your Honour, I can't really speculate on the reason for that but it would seem that based on further communications perhaps between the New Zealand and overseas authorities it may now be considered preferable that the New Zealand Commissioner applies for its own domestic orders and, as my learned friend has referred to –

WILLIAMS J:

Preferable from the US point of view?

MS MORTIMER-WANG:

Yes, in the sense that the CPRA procedures for foreign restraint and forfeiture orders require certain mutual assistance agreements and procedurally they can be quite complex to enter into.

Your Honours, I'm perhaps straying into areas where I don't have the evidential foundation to really provide further assistance to that question but –

KÓS J:

But Ms Mortimer-Wang, I don't see the third affidavit from Agent VanZetta doing anything other than saying they're not seeking repatriation of the R Limited funds, but I think they're still seeking repatriation of the S Limited.

MS MORTIMER-WANG:

Yes, your Honours.

GLAZEBROOK J:

And is the R Limited, from what Mr Rae was saying, it was something to do with the fact that the S Limited funds don't belong to him, which is presumably because they're in the name of his wife. Is that – do we know? I mean he took us to those aspects very quickly, but is that your understanding?

MS MORTIMER-WANG:

In terms of that being Mr Rae's position, your Honour, that is the case that R Limited accounts are under the name of Sarah Rae. In terms of what the recorded position may be in terms of the forfeiture agreement, the forfeiture agreement itself, I'm referring to the US forfeiture agreement, doesn't record the reason as to why R Limited is excluded.

GLAZEBROOK J:

Okay.

WINKELMANN CJ:

We'll take the morning tea. Do you think you've finished, Ms Mortimer-Wang, or do you think – if you've got more to carry on with we'll resume after morning tea.

MS MORTIMER-WANG:

Your Honours, if I can just double check that I've covered my points, but there may not be anything.

WINKELMANN CJ:

And then there's Mr Rae's reply. And Mr McCusker, that evidence from Agent VanZetta, sounds like the US authorities will be seeking repatriation of the S Limited funds.

MR MCCUSKER:

Can I just make one submission on that or come back at the end?

WINKELMANN CJ:

Yes, after the break.

COURT ADJOURNS: 11.31 AM

COURT RESUMES: 11.53 AM

MS MORTIMER-WANG:

Your Honours, unless your Honours have any other questions, I don't have anything else to add.

WINKELMANN CJ:

Thank you Ms Mortimer-Wang. So just before we come back to you, Mr Rae, that point, Mr McCusker, about the agent's evidence, VanZetta, and the implication from it that the US still seeks repatriations of the S Limited funds? If you can't add anything, that's fine, you can just say that.

MR MCCUSKER:

No, I did have just the findings of the High Court around repatriation, which might be of some assistance. Hopefully this works. So this is 76 of the High Court judgment. "Mr Rae contended that the Commissioner was effectively acting on behalf of the United States authorities, and in particular that any forfeited funds would be repatriated to the United States. I accept the position might be different if the Commissioner was acting as the agent of the United States government. I do not accept that he is. It is true that the United States authorities appear to have this objective in mind, but I do not accept that there has been any agreement or arrangement to that effect."

Then there is some discussion around the mechanisms by which funds are forfeited under the Act, and who is ultimate, responsibility for any decision-making, and 77 then goes on to note that it is a governmental decision and then 78 of the judgment says: "In any event I accept the evidence given on behalf of the Commissioner that no arrangement has been made to repatriate any sums to the United States authorities… I do not accept Mr Rae's argument that the Commissioner is acting as the effective agent of the United States authorities."

So that's the Court's findings around those matters, and there was further discussion in oral evidence about that as well. That's the only point I wanted to raise and clarify.

WINKELMANN CJ:

Thank you Mr McCusker. Mr Rae, you now have an opportunity to say anything in reply to what has been said to date. So that is not an opportunity, and we don't need you to repeat your submissions, but just to reply to what counsel have said in a brief way.

MR RAE:

I'll be very brief your Honour. Thank you for the opportunity again to address the Court. The essence of my appeal is the fact that the Court of Appeal worked on the basis that Cooke J had remedied the R Limited non-disclosure by

October 2020. That means the Court of Appeal's rationale was that Cooke J would have been fully justified in discharging R Limited had that happened. I would've remained in funds and been able to fund a legal team, whereas I'm now a litigant in person before the Supreme Court and facing the daunting prospect of a five day forfeiture hearing with no legal team having to give evidence and cross-examine experienced law enforcement officers. That is the practical reality of where the miscarriage of justice has led. Even if the balance of the order could have been made and survived, R Limited should, applying the Court of Appeal's unchallenged rationale at 47(b), have been fully discharged and not merely varied. I respectfully submit that the Court of Appeal's ruling logically infers that Cooke J was wrong not to discharge R Limited. There remains a fundamental miscarriage of justice, at least in relation to R Limited if it remains undischarged. Thank you your Honours.

WINKELMANN CJ:

Thank you Mr Rae. Well thank you Mr Rae and counsel. We will take some time to consider our decision and let you have it in due course.

COURT ADJOURNS: 11.57 AM