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IN THE SUPREME COURT OF NEW ZEALAND SC 21/2023

I TE KŌTI MANA NUI O AOTEAROA [2023] NZSC Trans 9

BETWEEN **JOSHUA PERA VAN SILFHOUT**

Appellant

AND **UDAYA LAKSHMAN AGAS PATHIRANNEHELAGE**

Respondent

Hearing:	18 July 2023
Court:	Winkelmann CJ O'Regan J Ellen France J Williams J Kós J
Counsel:	D A Ewen and A L Hill for the Appellant No appearance by or for the Respondent D J Perkins, Z R Hamill and I M McGlone for the Secretary for Justice as Counsel to Assist

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CIVIL APPEAL

MR EWEN:

Tēnā koutou e ngā Kaiwhakawā. May it please the Court, I appear with my learned friend Ms Hill on behalf of the appellant.

WINKELMANN CJ:

Tēnā korua.

MR PERKINS:

E te Kōti, tēnā e whakakanohi ana mātou e te Pou Whakarae mō Te Ture. Your Honours, my name is Perkins. I use the pronouns he/him/Mr, and I appear with my colleagues Ms Hamill and Ms McGlone. They use the pronouns she/her/Ms, and we appear on behalf of the Secretary for Justice.

WINKELMANN CJ:

Tēnā koutou. Mr Ewen. Now I should say both you and Mr Perkins have filed excellent submissions. They're very helpful and you traverse the issues in a coherent and full manner, so we feel quite familiar with the issues. So we leave it to you as to how you take us through the matters, but we should say we envisage this won't take more than a half day.

MR EWEN:

Yes, thank you your Honour. I have to start with an apology for the late filing of my submissions.

WINKELMANN CJ:

Well, we survived the experience Mr Ewen.

MR EWEN:

I fell down the rabbit hole that was the Armed Forces Discipline Act 1971.

WINKELMANN CJ:

We tried to warn you not to do that.

MR EWEN:

In my respectful submission, the resolution of this appeal is either very simple or very, very complicated. The Prisoners' and Victims' Claims Act 2005 either does exactly what it says it does, or there is a need to engraft substantially from both the Parole Act 2002 and the Armed Forces Discipline Act in relation to machinery that the PVCA simply does not advert to at all.

It's perhaps helpful to start with what the PVCA does. It defines a "sentence of imprisonment" in section 4 that is an exclusive definition, it "means a sentence of imprisonment imposed before or after the commencement date of this Act under any one or more enactments or other rules of law (for example, under the Armed Forces Discipline Act 1971, or the Sentencing Act 2002.)"

Now the word "imposed" is important because of course the Sentencing Act is the machinery for imposing sentences. The Parole Act does not impose sentences. The Parole Act provides a means of administering sentences.

It defined the word "offender" as it is used in the Act, but defined it twice, and section 5 provides a limitation specific definition of the word "offender" which is only used for limitation purposes, which requires both the entry of a conviction for the offence that gives rise to the claimant's claim in the Victims' Special Claims Tribunal, and the imposition of a sentence of imprisonment before it.

It also defines the word "accused", and this I have to say it took a long time for me to get my head around about what the purpose of defining accused separately was, but once I came to the end of it, it actually demonstrates that the PVCA in respect of people who are on remand in respect of a charge, it confirms that time has not ceased to run on the limitation clock in respect of these people. It cannot, and that's for two reasons. One, they don't meet the section 5 specific definition of "offender" for limitation purposes, but they don't meet the general definition of "offender" either, and this is relevant because of the provisions of section 28 of the PVCA, which is the provision for filing claims. Subsection (1)(b): "In the case where money is required to be paid into trust for an accused, the accused is an offender." What this means is that whilst someone on remand may have a specified claim settled, and the money is paid

into the PVCA Trust Account, the only people who can make claims against it are past victims of that offender, not the complainant in the proceeding in which they are accused. In fact, section 28 goes further, it precludes the filing of claims against people who are accused in respect of the charge they are accused. You simply can't file a claim with the Tribunal until at the very earliest they have entered a guilty plea or been found guilty.

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So it means that when someone is on remand, accruing pre-sentence detention, the limitation clock is still running. The Court of Appeal accepted that pre-sentence detention was to be applied to the meaning of serving a sentence of imprisonment in section 64. It would have to be done retrospectively because it, simply the fact of being on remand is not enough under the Act to trigger the suspension period, and in my submission the retrospective, change of status that the Court of Appeal's judgment and the High Court judgment required, is something that requires very specific language in the legislation which simply isn't there.

What didn't the PVCA do? Well, it didn't mention pre-sentence detention once. Even obliquely. In fact, if one takes the definition of "accused" and the reason why accused was put into the legislation in the first place, the PVCA confirms that pre-sentence detention does not stop the limitation clock. It is hard to see the justification for putting in a specific definition of "accused" and making it clear that time is not ceasing to run, and then in the oblique language interpreting words in section 64 of serving a sentence of imprisonment for the offence in a prison, penal institution or service prison, it is hard to see how the words can be read in, in sections 90 and 91 of the Parole Act, and the reason why, in my submission, this is significant is actually I'm just going to deal briefly with the parliamentary materials that my learned friends have helpfully put in their submissions –

WILLIAMS J:

Can you just tell me the meaning of section 28?

MR EWEN:

Section 28 is the provision for filing claims for the Tribunal.

WILLIAMS J:

That's right.

MR EWEN:

It makes –

WILLIAMS J:

It distinguishes between accused and offender and says if your person is only an accused…

MR EWEN:

The only person who can file claims in respect of an accused person is some past victim of theirs. In respect of an offence they have pleaded guilty or been found guilty of.

WILLIAMS J:

Right, so you can only make a claim if there's been a relevant conviction. You can't make a claim in respect of an accused?

MR EWEN:

Actually, it's not triggered by conviction, it's actually triggered by guilty plea. Because in section 28, the usage of the word "offender" in the broader sense in section 5 of the Act which is someone who has pleaded guilty or is found guilty of an offence, presumably that is to preserve the ability to make claims in respect to people who have been discharged without conviction.

WILLIAMS J:

Right, so finding of guilt or an entry of a guilty plea?

MR EWEN:

Yes.

WILLIAMS J:

Right. So, you can't make a claim until you've got to that point.

MR EWEN:

And –

WILLIAMS J:

What do you draw from that?

MR EWEN:

Well, it means that an accused person even though they are within the meaning of the PVCA, it means that in respect of the charge you are accused, the time up until you enter a guilty plea to that charge, because once you enter a guilty plea, you're no longer an accused, you're an offender within the wider definition.

WILLIAMS J:

Correct.

MR EWEN:

And it's only at that stage that a claim can be filed. Limitation does not cease to run at any point. Well, the ability to file a claim doesn't commence until that point, far less the triggering events in section 5(1) of being convicted and sentenced to imprisonment for it.

WILLIAMS J:

So how do you say that fits with limitation?

MR EWEN:

Well, it shows, in my submission, that an accused person, which we are dealing with accused people if we're dealing with pre-sentence detention, it means the triggering event for limitation, the limitation clock ceasing to run has got no relevance for them at all. If you are accused, limitation is still the limitation clock on any claim. It's still running in respect of that charge.

WILLIAMS J:

But you can't make a claim?

MR EWEN:

But you can't make a claim until that person either pleads or is found guilty during the notice period between when notice is given under section 17 of the Act and the end of the notification period. That's actually dealt with in section –

WILLIAMS J:

I would've thought they'd count it against you.

MR EWEN:

I can't see how, your Honour.

WILLIAMS J:

Because otherwise, a person who has been wronged in some way is barred from making a claim and then is subject to the vagaries of the criminal justice process as to whether they can, when they eventually can make a claim, abide by limitations.

MR EWEN:

Well, let's stake that one through the heart right now, your Honour, because there's absolutely nothing –

WILLIAMS J:

Well, okay, you could be gentler than that on me.

MR EWEN:

There's nothing preventing them making a claim in the District Court or the High Court. It is their ability to avail themselves of the special procedure under the PVCA.

WILLIAMS J:

Yes.

MR EWEN:

The shortcut which is triggered – the shorthanding of the evidence procedure in front of the Tribunal because the Tribunal can basically take very wide notice of anything that happened in the sentencing court as proof of the claim.

WILLIAMS J:

Yes, you don't can't avail yourself of the friendlier forum. The criminal justice, the victims are criminal in the Weathertight Homes Tribunal.

MR EWEN:

But it does not mean that claimants cannot make claims. They can make claims, and if they've got a limitation clock looming, they probably should make a claim in the District Court.

KÓS J:

Can we just clarify this. So we're dealing here with a threshold, the ability to file the friendly claim?

MR EWEN:

Yes.

KÓS J:

But the limitation provision in section 64 applies to whether it's a District Court claim or a friendly Tribunal claim?

MR EWEN:

Absolutely. It applies across the board whether it's in a common law court or in the Tribunal. It's just the – the PVCA creates no new form of claim. It still relies on a claim based in tort based on the offence committed, and there is absolutely nothing stopping someone filing a claim in the District Court in respect of a conviction for the offence given that a differential standard applies.

WINKELMANN CJ:

So can you just clarify for us again how you say this helps your argument?

MR EWEN:

Because in my submission, when one is dealing – it just makes it clear that an accused person, if on remand in custody, that time has not ceased to run on the limitation clock in respect of any claim based on the charge of which they are accused.

WILLIAMS J:

So the Act understands the difference between “accused” and “offender”?

MR EWEN:

Yes.

WILLIAMS J:

Yet in limitations it hasn’t drawn – it hasn’t mentioned “accused”, it’s only mentioned “sentenced prisoners”, and therefore offenders.

MR EWEN:

Yes, the limitation clock only stops, we’re using the section 5(1)(a) definition of “offender” once you have pleaded or been found – been convicted, and then subsequently sentenced to imprisonment, which is why I say, so the answer very much to the question lies in section 5 because until those two events have happened, you are not an offender within the meaning of the Act.

WINKELMANN CJ:

So your point is that this is actually pretty coherent, section 28 maps neatly onto section 64?

MR EWEN:

Absolutely because until you meet at least the broader definition of “offender”, you can't make a claim to the Tribunal. Until you meet the narrow definition of “offender” the limitation clock is still running. It requires the reverse application from the date of sentence backwards in time to apply pre-sentence detention to a sentence that doesn’t exist at the time. Now briefly dealing with the parliamentary materials, because as with the assembly instructions of flatpack

furniture, it gives a broad impression but is not very good on the detail. The parliamentary materials indicate, as my friends correctly point out, a rather broad approach to any time a person is in prison, but what the parliamentary materials simply cannot be reconciled with the text of the Act, the speech of Mr Barker was actually the interpretation adopted by the Victims' Special Claims Tribunal Judge which everyone said was wrong, that any sentence of imprisonment for anything in the intervening period will do. That clearly is wrong and can't be reconciled with the language of the statute itself. So the parliamentary materials are broad brush and don't help with the detail about pre-sentence detention.

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KÓS J:

There's a kind of logic though, isn't there? I mean, it may not be what Parliament's ended up with, but there's a kind of logic in saying that if a person's imprisoned for anything, then the concern that Parliament identified, which was the difficulty of actually having any funds to impress the claim upon, exists.

MR EWEN:

Oh, yes, and I accept that it is a matter of broad principle. You could shoehorn in under the underlying policy thrust of the PVCA pre-sentence detention, but just because it is available on a very broad analysis of the underlying policy doesn't mean to say that that's what the statute meant. This is an exercise in statutory interpretation on, in my submissions, entirely orthodox principles when one is dealing with the intrusion to property rights and the requirement for very specific language in order to get that effect.

KÓS J:

Just to dig into paragraph 39 of Justice Cooke's judgment or the rationale for this provision. As I understand it, the difficulty is not suing someone who's in prison. I mean, they are capable of being served in the usual way. It's simply the fact that they don't earn anything while they're in prison.

MR EWEN:

Classic rule number 1 of litigation, is there anything in the pockets? Who's got the deepest pockets? Is there anything there? It all comes down to a windfall ability on the part of claimants and extending that period because generally speaking, they will be suing people who are without means, although there is nothing stopping them from doing so. But again, matters such as the presumption of innocence, matters such as the separate definition of accused, matters of principle have to be taken into account here.

Now, I accept that there are certain aspects of the Parole Act that really have to be imported into the Prisoners' and Victims' Claims Act as a matter of necessity, but not nearly to the extent of bringing in the practical effect of the Parole Act rather than what the language of the statute actually says. Because the three key provisions the Court has to deal with in the Parole Act when it comes to pre-sentence detention are sections 89, 90 and 91. But section 90 of the Parole Act is really quite –

WILLIAMS J:

Just before you go on to section 90, can you help me with – and I'm just trying to keep up with you here.

MR EWEN:

Oh, sorry.

WILLIAMS J:

No, no, no. It's not you're going too fast. It's that I'm going too slow, so bear with me, please. Section 64B?

MR EWEN:

Section 64B relates to further potential suspension of the limitation period between the notification of victims under section 17 of the Act which can be done in one of different ways. First of all, the Tribunal's unit trawls through the Victims' Notification Register to see if there are identifiable victims in respect of the –

WILLIAMS J:
So this happens after guilt or conviction, does it?

MR EWEN:
Well, it –

WILLIAMS J:
Does section 64B only apply to offenders, not to accused?

MR EWEN:
Section 64B only applies from the period that the money is paid into the Prisoners' and Victims' Claims Act Trust Account held by the Secretary.

WILLIAMS J:
Right, so the offender has won an award or the accused has won an award. It's been banked.

MR EWEN:
Yes.

WILLIAMS J:
Section 64B which cross-references to section 28 appears, and you'll understand this Act much better than me, to apply to accuseds as well as to offenders. Is that not right? Can you explain to me why?

MR EWEN:
No, section 64B cannot apply to an accused in respect of that which they are accused. It can only apply in respect of previous offence if they've been committed and been dealt with, but –

WILLIAMS J:
Really?

MR EWEN:

Yes, that's because both section 28(2) and section 64B use the word "offender". An accused, as defined under the Act, can never be an offender in respect of that which they are accused, that on which they are accruing pre-sentence detention.

WILLIAMS J:

So I guess it begs the question of what happens when the accused becomes the offender.

MR EWEN:

When the accused becomes the offender under the broad definition, first of all they can lodge a claim with the Tribunal, and the effect of section 64B is in the period between the money being paid into the Trust Account by whoever was successfully sued, usually Corrections, to the Secretary for Justice under section 17, the period between that payment and the end of the notification period, which is either done through the VNR, through advertising in the three major dailies, and also by the Ministry of Justice's website, which has a list of offenders paid compensation for the purposes of notification, section 64B suspends the limitation period between the section 17 paying end date and the end of a notification period. It's a further period of suspension. It's not triggered in a case like this. But again, if the accused became an offender during the notification period, that six months' window, then they become an offender and section 64B would operate to suspend the limitation period during that notification period.

WILLIAMS J:

From what date?

MR EWEN:

From the date of the payment in under section 17.

WILLIAMS J:

So retrospectively?

MR EWEN:

No, it's not – well. It can't, well, in respect of an accused that becomes an offender it can only be from the date they became an offender.

WILLIAMS J:

Okay.

MR EWEN:

Because as I say, all the section 64 provisions use the tight definition of "offender", which requires the conviction and the sentence of imprisonment.

It is important, in my submission, to appreciate what section 64 says it does. The limitations to which this section applies cease to run while an offender is serving a sentence of imprisonment. It does not add on the term of imprisonment to the limitation period. It simply means that during the currency of that sentence of imprisonment time is not running. Now that dovetails with the language, actually, of the Limitation Act 2010, which talks about time periods running. That's why I say in my submission the proper legislative context of the PVCA at section 64, the section 64 provisions, is actually the Limitation Act and the limitation regime and limitation principles because those are what the PVCA modifies. It doesn't modify the Parole Act –

ELLEN FRANCE J:

So what's the significance of that?

MR EWEN:

Well, it means, your Honour, that coming to the example that I put in my submissions, if something has already run its course you can't then have a future date say that time has ceased to run retrospectively. "Cease to run" is inherently, in my submission, operates prospectively. It would require the most crystal clear of language for "cease to run" means this applies to time that has already gone by. So the example I used in my written submissions is if the limitation period has already expired whilst you're on remand, how can a subsequent prison sentence for that offence revive it if the effect of that

subsequent prison sentence is merely for time ceasing to run from the date that it commences.

KÓS J:

Presumably you say added to that is the fact that "cease to run" applies to an offender who is serving a sentence.

MR EWEN:

Yes, and –

KÓS J:

So you say these are three points in your direction?

MR EWEN:

And that is something that, with respect, the Court of Appeal glossed over completely. The logical and natural interpretation of the word offender, given its statutory prescription, is that until the two triggering events, the conviction and the prison sentence have been imposed, you're not an offender and therefore under section 64, section 64 can have no application until you are an offender, and time will then cease to run, but time can't retrospectively cease to run.

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WILLIAMS J:

Although, if you're found to be an offender at trial or by guilty plea, you're an offender at the date of the offence, too. That's essential, isn't it? That's what the finding is. On such and such a date, the offender did this. It was an offence.

MR EWEN:

That, in my submission, is not what the PVCA is about in respect of its definitions of the word "offender".

WINKELMANN CJ:

Your point is that it's a defined term in the Act.

MR EWEN:

Yes, it is a defined term. What is the point of having defined terms in legislation, especially exclusively defined terms, if you have to look through another statute entirely? To engraft the provisions and effect of that statute into what is a defined term, it simply makes a mockery, in my submission, of the whole point of having defined terms in the first place.

Again, there is the issue about how pre-sentence detention is actually applied under the Parole Act and how that would impinge on limitation because, in my submission, it's a straightforward and uncontroversial proposition that someone who has a claim should know if time is running or if it is not. Because whether they choose to make a claim or not is contingent on them knowing, is the claim still alive? If one has the situation where there is the Lazarus resurrection of a limitation period, that is entirely conditional on one, a prison sentence being imposed, but a prison sentence of sufficient duration to retrospectively capture a previously expired limitation date. There is so much that is contingent on complete uncertainties, it would not be fair on claimants for them to be uncertain as to what the potential of getting a claim is.

ELLEN FRANCE J:

Well, isn't the choice then, it's either conditional in that way or ultimately, they can't make a claim? The end result of your approach is being unable to make a claim because it's outside time. One of these claims, I mean.

MR EWEN:

Well, using the special procedure, yes, but that is going to happen. The Court will be aware that there are species of criminal offending where it can take complainants a long time to complain, when all the limitation factors are actually known, and they have to be aware that if that is the case and they wish to make a claim, they're going to have to file in the District Court to preserve their ability to get a judgment for whatever, but I say that there is no necessity in using the provisions of the PVCA. It is significantly advantageous as it is to claimants by the extension of normal limitation periods and the short-circuiting of the evidential process. Again, we should be under no illusions about who has the

benefit of the windfall here. It's not the prisoners who have been abused by the State giving rise to a claim, it's the complainants who get to extend what was otherwise been and gone because of that. There's –

WINKELMANN CJ:

Windfall might be a bit of a tall, a big expression to use in that circumstance.

MR EWEN:

Well, as I said, the PVCA is premised on the fact that what's the point of suing people who don't have money, but that is the same situation that everyone is placed in when they've been done a civil wrong by someone else. It's the prisoners who are being singled out for special treatment under the Act, and I'm not here to argue the whys and wherefores and underlying policy of the Act.

WINKELMANN CJ:

No, it's legislation.

MR EWEN:

But it simply means, the backdrop is this is sufficiently as it is significantly beneficial to claimants as it is. There needs to be a balancing of rights, and that requires, in my submission, the clearest of language that simply isn't there in the Act. But as I was saying about how pre-sentence detention is actually applied, my friend makes the point that –

WINKELMANN CJ:

Can I just ask you, are you going to take us to section 90?

MR EWEN:

Yes, I was just going to –

WILLIAMS J:

He was doing that, I distracted you.

MR EWEN:

I was just going to deal with how section 90 actually works, and my friend makes the point in his submissions that the Chief Executive has got the responsibility under the Act for calculating the key dates of sentence, and that as a general proposition is correct, and whilst the sentence commencement date is in the definition section, described as one of the key dates, it's not a date that the Chief Executive calculates. It is a date that is fixed in law by section 76, and the starting point for section 76 is a prison sentence starts on the day that it is imposed. It may be deferred for a number of reasons set out in the subsequent sections, none of which have much relevance, but it starts on the day it was imposed, and that was confirmed –

WINKELMANN CJ:

Are you saying that it's not one of the – section 90, that the prison start – the sentence start date is not one of the key dates?

MR EWEN:

It is described in the Act as a key date, but it's not one that is calculated, it's fixed by law.

WINKELMANN CJ:

Okay.

MR EWEN:

And the Chief Executive's job is to navigate from that sentence commencement date to calculate the key dates, and they're all prospective, so that's why section 90 itself says –

WILLIAMS J:

Don't you have to read the end of subsection (1) alongside section 76? Because it does seem to modify that.

MR EWEN:

Well, subsection (1): "…an offender is deemed to have been serving the sentence during any period that the offender has spent in pre-sentence detention."

WILLIAMS J:

Yes.

MR EWEN:

Yes. So the important point, in my submission, is looking at the purpose of section 90 and the purpose is concrete, expressly in there, "for the purpose of calculating the key dates" which means from the sentence commencement date the Chief Executive has to calculate the minimum non-parole period, if any, statutory release date and sentence expiry date.

WILLIAMS J:

Why do you say, in terms of the statutory language, "start date" is important? The term, the phrase?

MR EWEN:

Well sentence commencement date, because all key dates are calculated by reference to the start date. Sentence commencement date.

WILLIAMS J:

Yes, but it's not a word in the relevant statutory language, not a phrase in the relevant statutory language. What we're trying to work out –

MR EWEN:

I think "sentence commencement date" is actually a defined term.

WILLIAMS J:

Yes, I get that but what we're trying to work out is what's meant by serving a sentence of imprisonment, is that the phrase?

MR EWEN:

It is a deeming provision.

WILLIAMS J:

Quite, quite.

MR EWEN:

It is only a deeming provision. It does not, in my respectful submission, serve to change the character of remand type.

WILLIAMS J:

No, but you're hanging your hat on the start date proposition, but start date is not a phrase we're interpreting. It's serving a sentence of imprisonment is the phrase that we must interpret.

MR EWEN:

Yes.

WILLIAMS J:

And the end of section 90(1) has the deeming effect that is clear on its terms.

MR EWEN:

For what purpose your Honour, and for one purpose and one purpose alone, to determine what the future dates are. It does not operate to retrospectively say you are, whilst you are a remand prisoner you are actually a sentenced prisoner.

WINKELMANN CJ:

It's actually a simple point, and perhaps I'm completely wrong about this, that it doesn't actually, even the deeming effect of section 90 doesn't push the start date back. It just says that when you come to calculate time served at the end you deduct pre-sentence off the beginning – off the end.

MR EWEN:

Yes, it does not change the prior character of the remand time.

WILLIAMS J:

No, no, of course not.

MR EWEN:

That's the argument I tried to –

WILLIAMS J:

It just means you load it into the calculator. But it would be a little strange if having loaded it into the calculator that way, you then ignore it for all other purposes, or particularly for this purpose.

MR EWEN:

Well, in my submission you have to ignore it for all –

WILLIAMS J:

Because the prisoner is pretty interested in that calculation.

MR EWEN:

Absolutely, but in my submission for other purposes you have to ignore it because it is a limited purpose section. It says it's a limited purpose section.

WILLIAMS J:

Yes, yes, I get that.

MR EWEN:

And then to try and convert a deeming provision that has one particular function, and one function only, into a broad principle, into an extrinsic act, in my submission, is just simply not how we interpret statutes. That is taking context as the interpretive tool, in my submission, into absolutely unknown territory until this case.

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WILLIAMS J:

Kind of understandable though because this person is in jail.

MR EWEN:

It's understandable, but is it right?

WILLIAMS J:

In jail and even more disabled than they would be if they were serving prisoner, as the phrase goes, right? So you can see why, as a matter of common sense, it would make sense to include that in the calculation because the prisoner is operating under even tougher conditions.

MR EWEN:

Well, I'm not sure that the fact that the remand is harder time than serving time necessarily mandates increasing a limitation period, but –

WILLIAMS J:

No, but it makes it difficult to pretend that this person is not in penal servitude, because they are.

MR EWEN:

Are they in prison? Yes, they certainly are, but the question is are they serving a sentence of imprisonment at the time they are in the remand wing, and the answer is undoubtedly no. They simply cannot be. As I say, I think a great deal of the interpretation from the lower courts has been driven by the, well, it sort of makes sense. But that's not what the legislation either says and it's not what the principles for interpretation which I say are applicable would mandate as the outcome.

ELLEN FRANCE J:

It is the same language, isn't it? I understand your point about the purpose, but it is a deeming provision, and it then uses exactly the same language, "serving the sentence".

MR EWEN:

Yes, and we can get onto that when it comes to the Electoral Act 1993 and see what devastating consequences the same language would have on the

Electoral Act. Again, the point of the Court of Appeal in *Barrie v R* [2012] NZCA 485, [2013] 1 NZLR 55 is just because you're using the same language as between two statutes does not mean to say you are dealing with the same thing, and it is inherently dangerous to do that kind of cross-application exercise, especially when serving a sentence of imprisonment under the PVCA is a defined term. I mean, to work out the meaning of a defined term by looking at another Act entirely without the definition section actually referring to the other section, in my submission, is very much points against looking up the other Act at all.

ELLEN FRANCE J:

But you do accept, am I right, that some provisions cross-apply?

MR EWEN:

In relation to sentence commencement date, parole – well, no, parole eligibility date hasn't got much meaning under the PVCA. Actual, the parole date, does. Statutory release date and sentence expiry date. Statutory release date, in some respects, is far more important than sentence expiry date. Under a long duration of sentence, they're the same. Under short duration, of course, the SRD is at half. Because it means SRD is the date that you have to be let out and the date obviously under the PVCA when the limitation clock will restart.

WINKELMANN CJ:

But your point is that these come in by necessity?

MR EWEN:

Absolutely. Pre-sentence detention just fails the necessity test. It might be a good idea had they included it. Could it be defensible on Pont's grounds? Well, possibly, but the fact is they didn't. But the reason I wanted to go – following Justice Williams' point about why the start date of the sentence is important, is because of how pre-sentence detention is actually applied, because from the start date, the sentence as imposed is added on to the start date, and then pre-sentence detention deducted. It does not, in the eyes of the argument that I tried and failed in *Prince* says that, well, logically, the start date has to be your

first day in pre-sentence detention given that in section 90, it says you are deemed to be serving a sentence of imprisonment every day you are on remand. Justice Edwards disagreed. No, you have to start with – a sentence can't expire before it's been imposed, which will be, in Mr Prince's case, what would have actually happened. That was on the sentence indication – I'm not going to go into Mr Prince's case –

WINKELMANN CJ:
No.

MR EWEN:
– it's just one really after another, but it was the example that not all pre-sentence detention is necessarily going to apply towards a sentence. It cannot go back further in time than the date the sentence is actually imposed, and anything that's left over is simply written off. Now, if pre-sentence detention is supposed to apply under the PVCA, why does that time written off logically not count. There are so many inconsistencies –

WINKELMANN CJ:
Not your best point, I don't think.

MR EWEN:
Well, yes, unfortunately –

WINKELMANN CJ:
I know there are inconsistences, I see your point, Mr Ewen.

MR EWEN:
There are so many rabbit holes it is possible to fall down with this piece of legislation.

WINKELMANN CJ:

Well, if you apply the approach on your submission the Court of Appeal applied, Mr Perkins will say against you that there are other inconsistencies if you apply your approach.

MR EWEN:

There is one inconsistency that has been pointed out, and that originally by Ms Casey in the High Court, of the situation where you've got two offenders. One has got pre-sentence detention, the other doesn't, they both get the same sentence but end up with different limitation periods. That is an inconsistency I accept.

WILLIAMS J:

I didn't think it's an inconsistency in fact. It doesn't seem to me to be nonsensical at all. Given the underlying drivers.

MR EWEN:

Yes, it's –

WILLIAMS J:

You're at home.

MR EWEN:

I accept that one person has a longer limitation period than the other, but as Mr Perkins points out in respect of concurrent sentences, which the Act doesn't touch at all, that's just the effect of the PVCA. It has created an inconsistency. There is nothing unusual about that in New Zealand statute law. But one inconsistency does not drive an interpretation to iron out that particular wrinkle. How many more creases are put in the sheet.

I want to touch briefly, because I think in large most of the Court has got where I'm coming from, the point about the Electoral Act which, as Justice France pointed out, uses materially the same language of serving a sentence of imprisonment in relation to who can and who can't vote, because on my

reading, and if I'm wrong, I'll no doubt be corrected, the Electoral Act does not make any reference to the voting rights of remand prisoners. What it does do is say that people who are serving a sentence of three years or less are eligible to register as electors, and from that it maybe a – it can be assumed that if you are a remand prisoner, that you have the right to vote because you're not in the prohibited category of serving more than three years.

WINKELMANN CJ:

But it couldn't really have that meaning, could it, because you're applying it like this, it's not something like a calculation of time, so the question is whether you've got a voting status at a particular time. So a retrospective application is nonsensical.

MR EWEN:

Well except, one of the classic ways to tip over a vote in a disputed count, say that the person was not entitled to register as an elector in this electorate.

KÓS J:

Yes, but that's fixed at the date of registration. It's very clear.

WINKELMANN CJ:

I mean you're just actually making my point, I think. Chaos would ensue if there was a retrospective application.

MR EWEN:

Yes, if the prisoner is by the time they are a remand prisoner on voting day, but serving three days one day on the official count, applying the Court of Appeal's attitude towards the retrospective application, it would mean that retrospectively when they were a remand prisoner, they were actually deemed to be a sentenced prisoner.

KÓS J:

It's simply a matter of status and if they don't have the status on the date they register, which could be at any date, they're eligible to vote.

WINKELMANN CJ:

It's a different context. It's not a time calculation, it's a status context.

MR EWEN:

Well, I think in large measure the PVCA is about status, what is your status, are you serving or are you remand, but, look –

WILLIAMS J:

Yes, I mean your argument is that this essentially says if you are a serving prisoner, if you are retrospectively deemed to be a serving prisoner, on this analysis then section 86A doesn't work if the sentence you ultimately get is more than three years?

MR EWEN:

On the date of the official count?

WILLIAMS J:

Yes.

MR EWEN:

If you get more than three years, the question would arise, on the Court of Appeal's analysis given your status is retrospectively changed, on the official count date.

WILLIAMS J:

Yes, your point is you can't have it both ways.

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MR EWEN:

It's just another example that importing definitions across statutes can cause problems, and here, significant ones. But I'm not going to labour the point. I'm not going to talk about the Armed Forces Discipline Act, because candidly I do not understand it. It's just I know nothing about it but it does seem that there are forms of pre-sentence detention available under that Act and if the Parole

Act goes in then so must the AFDA because they are pari materia for PVCA purposes.

WILLIAMS J:

It's clearer in, as far as I can tell, in the Armed Forces Discipline Act because you are the review process under whatever the section is, part 3 or whatever it is, starts specifically from the date of your incarceration not from the date of your sentencing.

MR EWEN:

Yes, well this – but what forms of detention there are because there seem to be variety from close arrest to –

WILLIAMS J:

Yes, well it –

MR EWEN:

I said I'm not going to go into it, so I'm not because I –

WINKELMANN CJ:

Confined to barracks.

MR EWEN:

Yes. I simply don't know –

WINKELMANN CJ:

Yes.

MR EWEN:

– and that whereof we do not – that whereof we shouldn't speak, he said, badly paraphrasing Wittgenstein.

I'm going to just skip, frankly, to the doctrine of legality, which is the last point that I raise where I say, as the Court's pointed out, the big comprehensive submissions filed –

WINKELMANN CJ:

No, we understand your submission on that and what is said against you by Mr Perkins as well, that if it applies both ways, it applies both to the victim and to – they have a property right which is their chosen action.

MR EWEN:

Yes. What becomes stark however is the difference in treatment and the doctrine of legality in my submission is not rights-enlarging, it is –

WINKELMANN CJ:

It's right-protective.

MR EWEN:

It is restrictive of the infringement of rights, and here, the claimant's right to make a claim is entirely unaffected by the PVCA in general terms because they can't make a claim at any stage after the six years. In my submission, the chose in action for the claimant is not restricted by the Limitation Act, it is defined by it. It means that this chose in action has a shelf life. It is inherent and applies to everyone, that everyone faces the six-year limitation period.

Here, we have an Act that makes exceptions to it, and also that there is – the PVCA interferes on multiple basis with the chose in action because first of all there's chose in action that is the claim which then merges on settlement into contract, a claim in contract that there's a settlement deed. It merges for the cause of action if there is a judgment. That chose in action is then converted into a statutory trust which the ability of the beneficiary is strictly limited in terms of accessing and entirely contingent on anything being left over at the end of the claims process.

It means the restrictions on the defendant's rights or the offender's rights are greater than they ever could be for those on the claimant, and those restrictions on the claimant are broad in general and apply to everyone. It means if, in my submission, if the language is to be read in as further extending the incursion into that right by the inclusion of a further limitation period it really did require

express language in the statute in order to bring that about. Because as I say, I mean – and there is one point that I have missed that I can deal with quickly.

Not all forms of pre-sentence detention as defined in the Parole Act in section 91 meet the definition of serving a sentence of imprisonment in a penal institution prison or service prison. Now, that is a point the Court of Appeal accepted. I think my learned friend is digressing from that acceptance by the Court of Appeal, but in section 91(2) it goes through extensively all the different places in which pre-sentence detention can accrue, but only one meets the definition of a prison, and as the definition is serving a sentence of imprisonment in a prison, all these other places where pre-sentence detention which would qualify for cross-crediting, are not in a prison and therefore would not qualify.

It means calculating what amount of time in pre-sentence detention was in a prison, what was in any other facility, and that's not something that the Chief Executive is necessarily going to do because the Chief Executive just needs to know when you went in and when you were sentenced, effectively, in order to do the calculation under section 88. It means that in order for a PVCA specific definition of "pre-sentence detention" to be arrived at, it can be a tremendously complicated calculation when again the language of the statute simply provides no – the PVCA provides no means of determining qualifying pre-sentence detention and non-qualifying pre-sentence detention.

The last thing I have to say, your Honour, is in relation to the somewhat vexed interest of costs.

WINKELMANN CJ:

Yes, so you have not made a claim, yes, legal aid approval, but you have not actually put in any invoices for legal aid. Your concern, however, is that we now – is your concern about the possibility of a clawback, that we have the Secretary for Justice represented.

MR EWEN:

Well, it's not that the Secretary is now represented. Had I made a claim under the legal aid grant, that $10,000 sitting in the PVCA trust fund would be charged with a payment of that, subject to a write-off subsequently –

WINKELMANN CJ:

But you have not made that claim?

MR EWEN:

I haven't made it because the write-offs are discretionary, can be difficult to obtain, and I will not see the fees necessary, well the work necessary to vindicate Mr Van Silfhout's right, meaning that he ends up with no money at all simply because legal aid has clawed into relatively modest compensation to start with.

WINKELMANN CJ:

So why do you need an order writing it off if you've not lodged any fees. That's what I'm finding difficult to…

MR EWEN:

Well, because I don't want to have my bill paid and then subsequently discover that they won't write it off –

WINKELMANN CJ:

Oh, so you wish to submit a bill?

MR EWEN:

I've wished to submit a bill for some time now, but it would've had the effect of potentially annihilating his compensation and I'm just not going to do that. One of the grounds that the Secretary, yes just the Secretary, can write-off legal aid bills if it's just and equitable to do so, and if the Court were so minded to include a paragraph as to whether it would be, in the Court's view, just and equitable that Mr Van Silfhout should not have to foot the bill for clarifying a very important point in relation to the PVCA.

WINKELMANN CJ:

And that's your position win or lose? There's no need for it if, well…

MR EWEN:

Well, there's no real difference either way, winning or losing, but as I say I do not wish this to impact on him.

WINKELMANN CJ:

It would be your position win or lose because, in fact, there's a balance, isn't there?

O'REGAN J:

He still gets $5,000 even if he loses?

MR EWEN:

Well not if I put a bill in that doesn't get written off.

O'REGAN J:

No, no, I know, but that's what you're trying to avoid?

MR EWEN:

Yes.

WINKELMANN CJ:

We're following you. It may not seem so, but we are.

MR EWEN:

Yes, it's an indulgence I realise, but unless I can assist the Court further, those are my submissions.

WINKELMANN CJ:

Thank you, Mr Ewen.

MR PERKINS:

Tēnā koutou. Your Honours, it's our proposal to divide the argument, and I'll just indicate how we propose to do that. I'll be dealing with some of the contextual issues, and that is the principles of limitation more generally, and that corresponds to paragraphs 25 to 30 of our submissions. I'll also be dealing with the doctrine of legality points, and that's paragraphs 83 to 87 of our submissions. I'll deal with the PVCA legislation and the parliamentary materials at a level of generality, and that's paragraph 31 to 45 of our submissions. We propose that Ms Hamill will deal with some of the more technical aspects of the interaction of the PVCA, the parole and sentencing legislation, and that roughly corresponds to paragraphs 46 to 82 of our submissions.

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The Secretary of Justice appears as counsel to assist the Court by providing responsible argument to contradict the appellant's position in the absence of an active respondent. Your Honours, I think it's trite to say that the task of statutory interpretation is about text in light of purpose and context. We say that section 64 of the Prisoners' and Victims' Claims Act must be construed in light of its purpose and its context. Its purpose is to greater facilitate the claims of victims, and the context is the general law of sentencing and parole, and specifically the law of sentence calculation and sentence administration. It is our submission that when understood with that purpose and that context in mind, section 64 makes sense, and it can be made to work as Parliament must have intended.

Your Honours, you'll see in our submissions we've stood back somewhat before diving into some of the more prosaic aspects of the PVCA, and invited the Court to reflect on the policy tensions that exist in any statute of limitations, and we thought that was helpful to just recapitulate that a limitation is, in essence, a statutory construct, and while the idea of limitations is common across nearly all legal systems, it is not a principle of constitutional law or a foundational principle. It is a legislative judgment on the right place to strike a balance between the interests of intending plaintiffs and intended defendants. We say it is interference with a plaintiff's legal right to bring what is otherwise a

deserving claim, and in doing so it subordinates the truth of the claim to higher principles of justice.

We thought it was helpful to just remind the Court of some of the policies that are principally advanced underlying the limitation statutes. The first one, which we see reflected in the purpose provision of Limitation Act, is this idea of incentivisation. That limitation periods incentivise plaintiffs to pursue their rights rather than sleeping on them, and acknowledges a societal interest in settling disputes promptly rather than letting them drag on.

The second policy rationale that's often advanced for limitation statutes is the desire to avoid the stale evidence problem. It protects defendants from the injustice of having to defend claims that are brought long after the event, when the quality of evidence they can call to defend themselves may well have deteriorated.

The third principal policy argument advanced for limitation statutes is that of certainty. Defendants ought to be able to know where they stand in terms of their liabilities to others, and most often that's thought about in commercial and insurance contexts. We thought in the absence of an active respondent it is useful to reflect on how those policies apply in the present circumstances. There is no real suggestion that this respondent was sleeping on his rights. Most victims of crime are not necessarily aware of their rights to sue the perpetrators of those crimes in tort, or consider it particularly worthwhile to do so. Here it may be noted that this respondent exercised his right to claim within two months of having been notified by the Secretary for Justice that there were funds available that may make it worthwhile to do so.

Turning to the stale evidence problem. There's no real suggestion that –

KÓS J:

But this is the peculiarity of this legislation. I mean if the prisoner is a wealthy person, then one would assume that a well organised plaintiff would issue their proceedings reasonably promptly, and then we'd be away, and we wouldn't be

waiting for this. This legislation is all about effectively splitting the benefit of the prisoners' claims part of the legislation, with the person they perpetrated the offence against, and yet the timeframe isn't based on the date of payment of the prisoners' claim, it's based on some kind of weird process of calculation that seems to be all over the place and which, if it's minded, it's based on the idea that prisoners are hard to sue, which they're not, or that prisoners are – it's pointless suing until they have money, includes pre-sentence detention on your argument in some cases but not, for instance, if they're in a mental hospital where presumably they're not earning money either. I mean, my point is simply it's a highly erratic application as opposed to the simpler course which might have been simply to create a special limitation period from the date in which the prisoner's claim was paid.

MR PERKINS:

So, your Honour, there's several points I'd make in response to that. One, it's not the Secretary's argument that the PVCA's a paragon of drafting virtue.

KÓS J:

Well, I think we could all agree on that.

MR PERKINS:

Secondly, it's a point that I think is well made in the Court of Appeal's judgment and it was advanced by Ms Casey who took on the counsel to assist role there, and the Court of Appeal records that my friend Mr Ewen wholeheartedly agreed with it, and that goes against the concession or the agreement he offered to the Chief Justice earlier which is there is a significant degree of difficulty using one subpart of the PVCA to inform interpretation of other parts of the PVCA. The PVCA's doing at least three things at the same time.

Firstly, and this roughly maps onto the different subparts of part 2. Subpart 1 is doing what we call the restrict and guide approach, so it sets out a number of factors to which the courts would have regard before making awards of compensation for rights breached to prisoners, and on some views you might

just say there are a statutory codification of the *Baigent* principles for Bill of Rights Act 1990 damages.

Subpart 2 provides for any funds awarded to a prisoner to be made available to satisfy their liabilities to the State first and prisoners second, so we see deductions being made for, not necessarily in this order, but legal aid bills, reparations and fines, and then the fourth call on that money is victims. So, it is ensuring that there is an ability for those claims to be satisfied before the funds reach the prisoner and are possibly dissipated.

The third purpose which is across subparts 2 and subpart 3 is the facilitation of victims to make claims, and that's done through at least two things. One of those is the simplified claims process through the Tribunal, the friendly jurisdiction point that was discussed earlier, and the second way it does that is extending limitation periods.

So, I think with that brief overview of what the Act's trying to do, hopefully the Court will see that there are a number of different purposes, and in fact the purpose provision of the PVCA specifies different purposes for different subparts, and it's trying to do a lot of things in the same piece of legislation. In fact, that was a criticism that was levelled at it at a select committee by a number of the submitters, was that it was trying to do too much and potentially contradictory things in the same piece of legislation.

The point I was making a bit earlier about what the Court of Appeal said, and I'm taking this from paragraph 18 of the Court of Appeal's judgment, and just for the assistance of the operator of the materials on the screen, I'll let him get to that. That was to say, and this is starting at line 4 of the quote: "Indeed, in the context of the single appeal issue raised by subpart 3, Ms Casey cautioned us against endeavours to obtain guidance from provisions in the other subparts, advice which Mr Ewen wholeheartedly endorsed." So that goes to the point that the Chief Justice put to Mr Ewen which was section 28 and section 64 of the PVCA might map quite nicely onto one another.

I would caution the Court against leaping towards this view of how the Act might work as a coherent whole, because I think it would be admitted by all that there are tensions pulling in different directions across the different purposes and the different subparts.

So, coming back the principal point made by Justice Kós, one can imagine any number of other ways that the policy intention of Parliament could be executed, and with respect, that's not the statutory interpretation task. It must be to try and make sense of what Parliament has actually enacted, and sometimes to arrive at that point, what Parliament must have intended, it is useful to hold out counterfactuals about how Parliament may or may not have expressed itself in other circumstances, but fundamentally we must come back to the point, what did Parliament mean when it enacted these provisions?

I think it is fair to say, reading from the parliamentary debates, there are a number of assumptions being made about the typical type of offender and the typical type of prisoner, and indeed the policy intent of there being a certain degree of futility in suing prisoners is premised on an expectation that most prisoners are not persons of means, and most prisoners would not necessarily have lawful income, apart from their awards of compensation, and but for those awards of compensation, that would make it worthwhile to sue them.

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So, I think it doesn't necessarily assist the statutory interpretation exercise to consider the position of the wealthy prisoner, or the prisoner of means, or the prisoner detained at a mental hospital. By far and large, the vast majority of prisoners who this Act is contemplating would come into awards and whom against him it may be worthwhile for victims to claim, are not persons of means in respect of whom it would be futile, and whose sentences of imprisonment and pre-sentence detention are structured in the ordinary way, that all of you as trial judges would have experienced, sentences of imprisonment with a period of pre-sentence detention spent in a remand wing of a prison. That is the usual way in which most prisoners serve periods of pre-sentence detention

and their imprisonment post-conviction, and that's the fundamental premise upon which the Act is based, that mindset on that approach.

KÓS J:

So given that that's the broad purpose, then it seems in a very curious way and given also that Parliament was quite clearly aware from the passages cited in your submissions, of the issue of remand or pre-sentence detention, seems an extraordinary curious way to go about trying to achieve that purpose using these particular words. They're fundamentally unsuited to the purpose you've identified.

MR PERKINS:

With respect your Honour, I think it might be overstating things to suggest that Parliament was acutely aware of the issues posed by remand. You see that the Bill as introduced by the government did not make, well, part 1 in relation, subpart 1, I should say, in relation to the restricting and guidance, is phrased at a level of generality. It's all, it's persons under control and supervision. So that obviously includes remand prisoners. But when you move through to subpart 2 as it was introduced into, and this is in version 1 of the Bill that was included in the bundle of authorities, there's no reference in the simplified claims process in the, what I call a form of statutory trusteeship, where the Secretary takes the money and disburses it to meet State liabilities, only referred to offenders, and it was only at select committee stage that the conception of accused or offender was introduced throughout subpart 2.

So your Honour is right to note that from parliamentary debates it does appear that most Members of Parliament were under the impression, or certainly the policy intent of Parliament was to include remand prisoners, and I think what you see in subpart 3, and your Honour suggested it's a curious or inept way to deal with it, is a striking of balances here, and that's what limitation of actions is all about. It's about findings way to strike balances between intended plaintiffs and intended defendants, and the way Parliament has struck the balance here, in our submission, is to note that if you're an accused who is, gets charged, against whom charges are withdrawn, or an accused who is

found not guilty, that that pre-sentence detention period would not constitute a suspension of your limitation. It's only if you get to the point of having been convicted and sentenced to a sentence of imprisonment that there is any reaching back to include that pre-sentence detention period in the limitation suspended period.

WINKELMANN CJ:

So where do you get that from the language of the legislation?

MR PERKINS:

Well we say, we do note that the terminology of "accused" is not used throughout subpart 3, and there was some discussion between his Honour Justice Williams and my friend on that point, and we say that that is perfectly consistent with our interpretation to not refer to accused there because this extension of the limitation period only crystalises upon there being a conviction and sentence to imprisonment imposed, and so there's no point at which whilst one is an accused, and only an accused, and has no previous offending, your limitation period continues to run. There is no point at which it is suspended. It is only at the point of conviction and sentence of imprisonment being imposed that section 64 has any work to do, and is enlivened, because at that point you become an offender who is serving a sentence of imprisonment and when we say interpreted against the background, as it must be, of the parole and sentencing rule, that the pre-sentence detention suddenly has this additional consequence of the limitation period having been suspended during that time.

WILLIAMS J:

Mr Ewen says against you that the deeming provision, he said that to me, just after he was going to stab my proposition in the heart with a stake, that the deeming provision in section 90(1) relates to only one purpose, and doesn't at any stage declare remand, the status of remand, to change to serving a sentence of imprisonment. It just informs the calculator not the status of the incarceration. What do you say to that?

MR PERKINS:

Well, I say two things. First of all, I accept as I must that the introductory words of section 90(1) do say, for this particular purpose, the calculation of key dates, non-parole periods, release dates, parole eligibility dates, and it doesn't say for the purposes of the PVCA, and I must accept that. We say that it is possible though, and it doesn't exclude that it can also be used for that other purpose, and we say that the PVCA makes no sense if you don't read it against the background of general sentencing and parole law. So, the fact that the PVCA didn't amend the Parole Act and insert it for this additional purpose, for the purpose of calculating, undertaking the section 64 calculation, an offender is deemed to have been serving, blah blah blah, the fact that it doesn't say those things we don't say counts against that that is the background against which it must be understood.

WINKELMANN CJ:

Can I just pick you up on that? You said that the Act makes no sense unless you go to the Parole Act, but this provision makes sense without going to the Parole Act. There are two quite sensible meanings, so it makes sense.

MR PERKINS:

It makes sense, but produces arbitrary outcomes, and I think Justice Williams thinks they're not necessarily arbitrary outcomes, but they were outcomes identified by the Court of Appeal and Justice Cooke as arbitrary from the point of your victims, which is that where they have served their – any period prior – after being charged but prior to being convicted and sentenced has a significant impact in, for instance, Mr Van Silfhout's situation where they've had a 15-month difference on the duration of limitation period.

So when I say doesn't make sense, there – another way in which we say you must have regard, and the Act actually directs you to have regard to the general sentencing and Parole Act regime, is, if we turn to the definitions section of the Prisoners' and Victims' Claims Act and the definition of –

WINKELMANN CJ:

Are we taking you into Ms Hamill's part?

MR PERKINS:

I don't think she'll mind me making just one point, which is if we look at the definitions section, the definition of sentence of imprisonment. So, we'll just wait for it to come up on the screen.

WINKELMANN CJ:

This is in the Act? Not in –

MR PERKINS:

In the PVCA itself.

WINKELMANN CJ:

Yes.

MR PERKINS:

So, paragraph (a) of that definition section necessarily refers you or says "Means a sentence of imprisonment imposed before or after the commencement of this Act and under any one or more enactments or other rules of law", and then gives some examples, the Armed Forces Discipline Act and the Sentencing Act. So, we say this is a statutory indication that this Act is intended to be interpreted against the background of general sentencing and parole law. Also, against the background of general military justice, and this is a statutory indicator that it is intended to be understood against those backgrounds.

WINKELMANN CJ:

You don't really need that though you?

MR PERKINS:

No, I'm just saying it's –

WINKELMANN CJ:

I mean, I don't know that it gets you any further than sentencing law is obstruse and you always have to look at it in the context of the Parole Act. That's really your fundamental proposition.

MR PERKINS:

That is, and I was trying to respond to the point which your Honour made –

WINKELMANN CJ:

Mmm.

MR PERKINS:

– which is – and in fairness to my friend Mr Ewen, the Act is possible, it is capable of *a* construction. The question is, it is the construction that Parliament intended? So, the fact that Mr Ewen can make a construction of the Act which he says makes perfect sense and is internally coherent, doesn't necessarily mean it's what Parliament intended.

WINKELMANN CJ:

Mmm.

WILLIAMS J:

Well, the point is that the technique Parliament used to deal with remand prisoners and final sentence was a reverse deeming rather than a change in status in relation to that earlier incarceration.

MR PERKINS:

Correct.

WILLIAMS J:

Which may mean that if you – Parliament wanted to have the effect, wanted to give effect to the effect that's wanted, it needed to grapple with that and it hasn't done so, and it's a step too far to ask us to amend the Act by interpretation.

MR PERKINS:

I accept, your Honour, that this case raises issues of the permissible boundaries of statutory interpretation and when the judicial tasks shaved into the legislative task. In this case, really, in its essence, boils down to how far are you prepared to go?

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So, what I would say, and it's the point I made to Justice Kós earlier, which is one can think of other ways Parliament could have expressed itself with greater clarity in relation to this particular provision. It could have said "and serving a sentence of imprisonment includes any deemed period pursuant to section 90(1) of the Parole Act". Could've said those things. It didn't. The question is, does that tell us that's not what Parliament intended? That's got to be what we fundamentally come back to.

WINKELMANN CJ:

So you're not conceding that you're asking us to go a long way?

MR PERKINS:

Well, certainly, I don't think that the High Court or the Court of Appeal found it was a bit of a long way to go.

WINKELMANN CJ:

No.

MR PERKINS:

We would say this is trying to make sense of a text in light of context and purpose, and when you look at those three things together, this is where you are driven, is my submission.

KÓS J:

What I think you're saying is that – could you look at the words in section 64(1)? That the words "cease to run" mean, do not include any period, and we insert

the words, effectively, after the words “while the offender is serving”, we insert the words, or that’s the implied meaning, “or deemed to be serving”?

MR PERKINS:

Mhm.

KÓS J:

I think that’s what your argument comes down to saying that’s how we should construe it and that’s what Mr Ewen says is a very substantial engrafting.

MR PERKINS:

Your Honour, at the risk of asking a question back to you, I accept the second of the propositions you put in relation to that “deeming” part. I’m just not sure I appreciate the significance of changing the words “cease to run” into the formulation your Honour used?

KÓS J:

Well, only that “cease to run” seems to me there’s a whole lot of suggestions in section 64(1) that it’s prospective in nature. The use of the word “offender”, the use of the word “cease to run” and “is serving”. Those are three textual indicators towards prospectivity.

MR PERKINS:

Rather than looking back or –

KÓS J:

Correct.

MR PERKINS:

– a retrospective deeming task. I can accept that, but I think this comes back to a point, the broader point I was making about the importance of thinking about this in the broader context of limitation law, and this concept of time ceasing to run is actually a formulation that you do see or is kind of familiar when you think about this as limitation law, rather than as sentence

administration law, and so that's why we would say that limitation, and I think as my friend Mr Ewen agrees, the limitation is the relevant context here, to think in the relevant way to begin thinking about these questions. So, I would suggest that that might just be a term of art in the limitation context rather than having, necessarily, that prospectivity association with it. But I can accept that it would be clearer if it was described in the way your Honour suggests.

WINKELMANN CJ:
I mean, isn't there a possibility that they didn't turn their minds at all to this issue?

MR PERKINS:
It's entirely possible. What you do get a sense of from the parliamentary debates, and this comes through most clearly in the statements made by the Minister of Justice at both the first and second readings, is that Parliament intended to take the most expansive view possible of when limitation periods would be suspended. Your Honours, I caution you of at least two things before engaging too deeply with the parliamentary materials. One of – well, three things.

Firstly, the Parliamentary Privilege Act 2014 and the importance of not questioning or repeating proceedings in Parliament. Secondly –

WINKELMANN CJ:
Well, not even relying on them to reach a view.

MR PERKINS:
Well, they can be relied on for interpretative purpose, for the interpretative task.

WINKELMANN CJ:
Yes.

MR PERKINS:
And so I think that is legitimate to bring them to the Court's attention –

WINKELMANN CJ:

Yes.

MR PERKINS:

– to help us guide the interpretative task, but that needs to be understood in the proper limits of parliamentary privilege.

The second point I'd make is, I think it's fair to say that the debates in Parliament did not necessarily – well, it appears that Ministers and other contributors to the debate didn't necessarily align some of the more political points they were making with the actual language of the Bill they were debating. So you do see some disconnect between the more rhetorical statements made in the parliamentary and political context, and the actual text that is involved. I think that's – if you take them at their most expansive, and this is at – I've got some quotes in our submissions. So if your Honours turn to paragraph 40 of my submissions, and this is the statement made by the Justice Minister at first reading. The final sentence of that quoted section: "The bill will address this" – sorry, I'll go back a sentence: "Clearly, this puts victims at a particular disadvantage in enforcing their rights. This bill will address this by providing that, for victim's claims against offenders, the 6-year limitation period will be suspended during all periods that the offender is in prison."

Then just scrolling down to the next paragraph. Same Minister at a different stage in the debates. The key section here again is the final sentence: "The bill will address that by providing that for civil claims by victims against offenders, the 6-year limitation period will be suspended whenever the offender is in prison."

Now, taken literally, you might end up with what my friend Mr Ewen identified Judge Blackie did in the Tribunal, which is any time a prisoner is in prison, the limitation period is suspended. That's not what Parliament actually did. There must be a relevant nexus between the offence in respect of which this victim is claiming and the time being spent in prison. That's not just any time that the

prisoner goes into prison, it's when they are in prison serving a sentence of imprisonment for the offence in respect of which this victim is a victim.

So that's an example of where you might need to temper a little bit of what's said in the ministerial statements and the other parliamentary materials against what was actually enacted in the Bill.

WINKELMANN CJ:
Mmm, have to assume too that they're not using their word, for your argument, you have to assume that they're not using the word "offender" in its statutory definition sense.

MR PERKINS:
Yes. It must also include accused.

WINKELMANN CJ:
Mmm.

MR PERKINS:
Obviously, the parts of those quotes which we reply upon are during all periods and whenever.

WINKELMANN CJ:
Yes.

MR PERKINS:
To indicate the expansive view that the Parliament was taking.

The third point I'd make about the parliamentary debates is there is a degree of hyperbole or rancour to them, so I think they – we haven't included all of them and there are different statements by members of different parties which go further in respect of some of what's being proposed. What we've confined ourselves to in terms of what we do rely upon are the statements made by Responsible Ministers in those key set piece parliamentary debates rather than

some of the interjections or speeches made by non-government members or during the committee stages where things get a bit more fluid.

But we do say that the parliamentary intention, or certainly the government's intention, is sufficiently clear from these statements made at these significant points during the parliamentary debates.

WINKELMANN CJ:
Right, thank you.

MR PERKINS:
Your Honours, I just note the time, and I wonder whether that might be –

WINKELMANN CJ:
Yes, well did you want to take – are you going on to a new subject?

MR PERKINS:
I was going to move onto a new point so that might be a convenient point.

WINKELMANN CJ:
What's the new point you're moving onto, Mr Perkins?

MR PERKINS:
I was going to reflect on what new point I would move on to. Thought I'd take 15 minutes to do so.

WINKELMANN CJ:
All right, well, you can do that. We'll take the adjournment. We'll take a bonus two minutes from you, thanks Mr Perkins.

MR PERKINS:
As the Court pleases.

COURT ADJOURNS: 11.28 AM

COURT RESUMES: 11.48 AM

MR PERKINS:

Your Honours, I'll deal with three points briefly and then invite Ms Hamill to address, the first of which is to correct something I misspoke earlier. When I was describing what I had termed the "statutory trusteeship" which the Secretary exercises over any money paid into the Prisoners' and Victims' Claims Trust Account, and that's done by means of subpart 2 of part 2 of the PVCA, I said that the earliest charges before victims have an opportunity to claim against it, were it in relation to legal aid, reparation and fines. "Fines" was a misspeak. In fact, there are three earlier charges before the victims get an opportunity to claim, and these are outlined in section 18(1) of the PVCA. The first charge is legal aid in relation to that particular – it refers to a specified claim. The second claim is any amounts of reparation owed at all by the accused or offender, and then the third charge is relevant orders made by the Victims' Special Claims Tribunal in previous proceedings. So there's no ability for fines to be paid out of those funds as part of the statutory trusteeship process.

The second set of points I was going to make were in relation to the doctrine of legality. I don't propose to recapitulate what's in our submissions because –

WINKELMANN CJ:

I think it's a principle. Everyone's referring to it a doctrine.

MR PERKINS:

Principle of legality. Yes, quite right, your Honour. But I apprehended from the Chief Justice's comments earlier that the points that we were making that really, limitation is a double-edged sword –

WINKELMANN CJ:

Yes, and Mr Ewen had a response to that because he said that it's not the kind of the same – the same right's not in play, so you're trying to expansively read legislation to protective property right, but the principle of legality is not an expansive principle, it's a restrictive reading principle.

MR PERKINS:

It's a principle of statutory interpretation and a constitutional principle, I think it's fair to say as well.

WINKELMANN CJ:

Mmm.

MR PERKINS:

I think the point that we're trying to make in that context is that this isn't a situation where the State is legislating to take away rights and therefore if it's proposing to do so, it must do so with unambiguous clarity. What we are saying is that this is the State striking a balance between the respective claims and property rights of plaintiffs and defendants. So it's not the typical situation in which the principle of legality is employed to restrictively read what the State is doing at the expense of the individual. This is what the State is doing to balance rights between two sets of individuals, and we say that the property rights of both the appellant and respondent in this case are in play, and therefore, the so-called principle of legality is not of great utility when, really, what is happening here is a rebalancing of property rights as between two individuals rather than the State expropriating a right from a single individual.

WINKELMANN CJ:

So although protection of property is actually where the principle of legality originated, it's not something – we don't often hear it cited in that context in New Zealand.

MR PERKINS:

I think that's an accurate characterisation, Ma'am.

WINKELMANN CJ:

Mmm. But you don't dispute that it exists as a principle in relation to property?

MR PERKINS:

Not for present purposes, and I think my friend cites in his submissions authority to that point as well.

WINKELMANN CJ:

I don't know that he does, but…

MR PERKINS:

That's in a footnote, if I recall.

WINKELMANN CJ:

You do?

MR EWEN:

Just as I'm reading *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551.

WINKELMANN CJ:

Ah, nice. Thank you.

MR EWEN:

The third matter that I wish to deal with, if there were no questions from the Bench in relation to the principle of legality or further discussion, was in relation to the points my friend made about the Electoral Act, and that's a piece of legislation with which I have more than passing familiarity.

Three points I wish to make about that. Firstly is to be very clear that section 80 which is the principal section dealing with qualification and disqualification uses different terminology from what's used in the PVCA. We are in the terminology of "detained under a sentence of imprisonment", not "serving a sentence of imprisonment in prison". So it is important to understand that, and then we do make this point in our submissions, is that there are really carbon copies of the phraseology of serving a sentence of imprisonment in a prison across the statute book. There are slightly different permutations across different statutory provisions, and each of those needs to be understood in their own context and

what that particular legislation is trying to do, and it is not the Secretary's submission that whatever interpretation of the defined term "serving a sentence of imprisonment in a prison" this Court reaches in relation to PVCA, that that has automatic flow-on effects across the statute book. We say that each of the other references to that terminology or an analogous terminology needs to be understood in its own context. Quite often, it uses slightly different terminology. Here, "detained in prison under a sentence of imprisonment" is the terminology they've used. So it is different in that respect.

The second point I wanted to make was that the suggestion was made by my friend that there is a right of all citizens and permanent residents to register to vote.

WINKELMANN CJ:
There's no such right.

MR PERKINS:
That's actually an obligation and a legal obligation. Section 82 of the Electoral Act provides that there is an obligation on individuals when they become eligible for registration to register. The section is entitled "Compulsory registration of electors".

WINKELMANN CJ:
Sorry, section, what is it?

MR PERKINS:
Section 82 of the Electoral Act, and what it does in effect is evident from its heading. "Compulsory registration of electors", so it's not so much that there is an entitlement to register, rather, there is an obligation. There is an entitlement to vote upon having registered, but the registration obligation is actually compulsory.

The third point, my friend suggested that it was only by inference that one could deduce that remand prisoners retained an entitlement to vote, and the point I'd

make against that is there is a strong constitutional presumption in favour of a right to register and vote and to stand as an elector, and that's found in section 12 of the New Zealand Bill of Rights Act. So, that entitlement could only be taken away by the most express language.

So, I put it a fair degree higher than my friend does, whereas that one only can work out by inference that remand prisoners retain their right to vote, rather, all persons who have attained the age of 18 and are residing in the same district for one month have an obligation to enrol to vote, and they're only deprived – and consequently have a right to exercise that vote at elections and they're only deprived of that by the most clear language, which section 80 does do in relation to the disqualified classes of electors.

KÓS J:

Do you agree then that's a question more of status at the time of registration? So that if, for instance, Mr Jones, remand prisoner, registers but the day after registration he is sentenced to four years' imprisonment, Mr Jones can vote?

MR PERKINS:

He can vote on the day he registers, is that the question, or have you got –

KÓS J:

No, no, between registration and voting day his sentence is imposed and it's four years, but he is still registered, or is he removed?

MR PERKINS:

There is a process by which the Chief Executive of Corrections or it might be the prison manager corresponds to the Electoral Commission to have that person removed, so upon reception each –

KÓS J:

Right, but that's a process of removal. And if he's not removed, he can vote.

MR PERKINS:

Then he can vote, yes. It may raise an issue in a disputed elections context, but because – he is on the roll, but he is found to be disqualified. He attains the status of being disqualified at the time the sentence of imprisonment is imposed.

WILLIAMS J:

Not before?

MR PERKINS:

No.

WINKELMANN CJ:

Can I ask you a question because you mentioned the Bill of Rights Act and it has been hovering around on my mind. Section 21: "Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise." Is that an enactment of the principle of legalities for protectiveness of property?

MR PERKINS:

Well, the section – I don't know if this Court has fully explored yet the extent to which section 6 of the New Zealand Bill of Rights Act and how that coincides and whether it's precisely coterminous with the principle of legality.

WINKELMANN CJ:

No. Well, we've explored it loquaciously but not resolved it. But we've also not really explored – I don't think, but I might be wrong, whether the relationship of this section 21 in relation to the right to be secure against unreasonable seizure, what relationship that has to the common law principle of legality and the right not to have property taken.

WILLIAMS J:

I think the drafter's view was that this was not a general property right.

WINKELMANN CJ:

Well, but that's a –

WILLIAMS J:

That idea was rejected and therefore the unlawful seizure was not about the right to own but affected by its surrounding terms, search and –

WINKELMANN CJ:

But that's not – doesn't really answer the question though, does it?

MR PERKINS:

I'd be reluctant to –

WINKELMANN CJ:

Embark?

MR PERKINS:

Upon –

WINKELMANN CJ:

Right, well, we'll say –

MR PERKINS:

Probably a point of some quite fun learning when I'm aware that behind me in the gallery is some individuals who have very fine learning on these sorts of points.

Your Honours, I can't remember if Justice Williams you had a question in relation to Electoral Act that I completely answered?

WILLIAMS J:

Yes.

MR PERKINS:

I think you asked, the prisoner who's not disqualified prior to their conviction and imposition of sentence?

WILLIAMS J:

So the remand prisoner who votes during the period of remand and is subsequently sentenced to more than three years' imprisonment.

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MR PERKINS:

They don't lose their qualification to vote until the time of the entry of the – or, the recording of the sentence of imprisonment.

KÓS J:

Can you just take me to where in the Electoral Act that's provided for? Because I'm scanning it and I can't find it.

MR PERKINS:

The provision for the Chief Executive of Corrections –

KÓS J:

For removal of their qualification.

MR PERKINS:

Section 81 I think we brought up – talks about a prisoner being received into prison. Within the first seven days, "…the prison manager must forward to the Electoral Commission a notice stating their name, previous residential address and date of birth; and the name and address of the prison", and that serves as a trigger for the Electoral Commission to act upon their disqualification which took effect up to seven days prior.

KÓS J:

Well, that's disqualification from registration, but the man is registered. So where's the provision for removal of his name for registration?

MR PERKINS:

I expect that somewhere in the provisions earlier there is a –

MR EWEN:

It was later in the 80s.

KÓS J:

Well, I'm sure Ms McGlone will be working hard on this point. We'll come back to it.

MR PERKINS:

If I can elucidate that point any further, I might come back after Ms Hamill's addressed you.

KÓS J:

Yes, thank you.

MR PERKINS:

Thank you, your Honours.

WINKELMANN CJ:

Thank you, Mr Perkins.

MS HAMILL:

Tēnā koutou. So as Mr Perkins indicated I will attempt to take your Honours through some of the more technical aspects of how the Parole Act and the PVCA can or might apply on the Secretary of Justice's argument.

Now, my learned friend Mr Ewen acknowledged that the Parole Act does provide some context to the PVCA, so to an extent the issue is how much context? How much does it need to be read in?

Now, to answer that I would like to take a step back and look at how a sentence is ordinarily managed and make a few elementary points about that. It is

imposed under the Sentencing Act for a specific duration, but the administration of that and the calculation of key dates is created and governed through the Parole Act. This means, as we know, that section 90 will apply to take off any pre-sentence detention that can be taken into account and deem that to be part of the sentence imposed.

Now, it doesn't change the duration of the sentence imposed by the sentencing court, it just determines that that can be part of the sentence, can count towards the period time served. The reason why I've just walked through that sequence of steps is because under the interpretation provision of the PVCA under section 4, as Mr Perkins took your Honours to, sentence of imprisonment is defined, and includes relevantly for our purposes, a sentence imposed under the Sentencing Act, and that is of course what we are dealing with here.

So, the Secretary for Justice's submission is that the sentence imposed under the Sentencing Act is the sentence in the PVCA, it's the same thing, and the interpretation put forward by the Secretary for Justice is one that essentially asked the Court to undertake the same exercise that would happen under the Sentencing and Parole Act in the ordinary course of events. When the sentence is imposed, section 90 will come into play. If pre-sentence detention exists it will be taken into account.

So, it's not so much a question of asking the Court to infer wording into section 64, but it's asking the Court to apply the context of the Sentencing Act and the Parole Act in the same way that it does to sentences of imprisonment under those Acts, and the Court can do this because the PVCA makes that link in its definition section.

WINKELMANN CJ:
Where's the link?

MS HAMILL:
The definition of sentence of imprisonment, which includes a sentence imposed under the Sentencing Act.

WINKELMANN CJ:

But doesn't say "and administered under the Parole Act".

MS HAMILL:

It doesn't, but the Sentencing Act and the Parole Act were enacted at the same time and this Court, Justice William Young in the minority decision of *Booth v R* [2016] NZSC 127, [2017] 1 NZLR 223 noted that they need to be read as working together.

Section 82 of the Sentencing Act reinforces that. It prohibits the sentencing court taking into account time spent in remand in custody or pre-sentence detention when imposing the sentence, and it does that because section 90 of the Parole Act takes that role. So the Acts do work together and must be read together in the Secretary of Justice's submission.

WINKELMANN CJ:

I must say, I find it hard to get all of that out of them, just the Act defining a sentence as being one imposed on the Sentencing Act.

MS HAMILL:

It comes about because they are essentially the same sentence. That's what the definition provision does, and I don't mean to overstate or read in too much to that but rather it's the context. It's not reading in words to section 64, it's looking at the context in which section 64 operates, and that is it is talking about a sentence imposed under the Sentencing Act. A sentence imposed under the Sentencing Act cannot take into account pre-sentence detention because the Parole Act does.

What, of course, this will mean is that a sentence imposed under the Sentencing Act, which might also be one that's subject to the PVCA, on the day it's imposed will be subject to the calculation undertaken by the Chief Executive for Corrections, and may be at time served because of the amount of pre-sentence detention. But that doesn't mean that the offender under the Sentencing Act has simply not served a sentence, because of course taking

account of pre-sentence detention doesn't alter the duration of the sentence. It operates as a deeming provision to take account of that period of time. Rather than change its legal status, it takes account of that period of time and counts it as part of time served. It does that, effectively, in a way that prevents an offender from spending more time in a custodial environment than the sentence actually imposed. Again, this was a point made by this Court in *Booth* when dealing with the operation of section 90 in a slightly different context. If pre-sentence detention is not taken into account in the way that this Court said it should be in *Booth* then an offender can spend more time in custody than the sentence imposed. Of course, that's now how section 90 works.

So again, the purpose of outlining these points is to demonstrate the context and the practical application of section 90 for sentencing purposes, and to then carry that into the PVCA, that same interpretation can be applied because the PVCA deals with sentences of imprisonment under the Sentencing Act. It's not dealing with a different beast, and it can also be applied because it avoids the kind of arbitrary results that might arise if it doesn't. For example, if a sentence is time served at the moment imposed, then there is simply no limitation period at all for that offender suspended. But, a co-offender who's subject to the same sentence but was remanded on bail for the entire period will experience a suspension of his or her sentence when that sentence is imposed, the anomaly that my learned friend Mr Ewen pointed to in his submissions.

KÓS J:

Justice Williams suggests that's no anomaly because during the bail period the prisoner is able to, or, the offender is able to work, and that seems to be the distinctive qualification that parliamentarians identified, capacity to earn.

MS HAMILL:

Yes. Yes, that is one way of looking at it, but it does ultimately turn on the question of remand rather than the question of when a person is – when their sentence is being served under the ordinary rules, the rules that apply as an ordinary course under the Sentencing Act and Parole Act, and are the context to what's happening here.

WINKELMANN CJ:

Can I just ask you this? Justice Kós put to Mr Perkins that the interpretation that is being intended on behalf of the Secretary for Justice involves reading in the words "or deem to be served", and you say it doesn't involve reading in words? What else – can you put in a sentence what the approach to interpretation you say is in terms of this relevance to the Parole Act?

MS HAMILL:

It requires applying the same approach as is applied under the Parole Act and nothing more. So –

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WINKELMANN CJ:

But that approach as said against you is only applied for the purposes of calculating release from prison?

MS HAMILL:

Yes. So, to walk through that a little bit more, the pre-sentence detention is taken into account for the purposes of calculating those dates, but what that then means is that those dates are brought forward if pre-sentence detention is taken into account, and pre-sentence detention therefore is deemed – doesn't change in terms of its legal status in time, but it's deemed to be part of the sentence that's served. That is why those dates come about. So, as I think your Honour Justice Williams said, you do ultimately take pre-sentence detention into account at that part of the calculation.

What Mr Ewen's interpretation asked the Court then to do is disregard it for the purpose of the PVCA, insofar as it shortens that period of time. So, we're happy with the clock starting at the date the sentence is imposed and finishing without enquiry at the date calculated by the Chief Executive for release, and we just simply don't look behind why that happened. But, the reason why that happened, if there was pre-sentence detention, is because of the pre-sentence detention.

WINKELMANN CJ:

But the Parole Act doesn't change the fact that the sentence starts on the date that it's imposed?

MS HAMILL:

Generally speaking, no, it doesn't, unless that sentence is, for example, made cumulative on another sentence.

WINKELMANN CJ:

Mmm.

MS HAMILL:

Then it will be an earlier point in time.

WILLIAMS J:

There is quite an argument to say that the provisions here are such a shemozzle, some clear words would be very helpful.

MS HAMILL:

Yes, and I think my learned friend Mr Perkins made the point that the Secretary for Justice's position isn't that this is a paragon of perfect drafting, and I would beg to repeat the point. But –

WILLIAMS J:

Well, it might be appropriate for the courts to simply indicate to Parliament they need to fix it.

KÓS J:

Mmm.

MS HAMILL:

That might be, but when you walk through the way the Parole Act would apply here, the Secretary for Justice says that it applies in no particularly different way than it does to a sentence as a matter of course, and that there's nothing offensive about that and what's more, it wasn't required of Parliament to make

that expressly clear, one of the reasons being that the Parole Act and the Sentencing Act are very large and complex Acts and are better left to address those questions.

WILLIAMS J:

Yes.

MS HAMILL:

It would be very difficult to in fact expressly refer to all of the provisions of the Parole Act that might apply.

WILLIAMS J:

Well, it could have been achieved by just having in section 64 and a period on remand be treated as a period of serving a sentence of imprisonment for the purposes of PVCA where the remandee is subsequently convicted and sentenced to a term of imprisonment.

MS HAMILL:

It could be.

WILLIAMS J:

We wouldn't be here if that were the case.

MS HAMILL:

Indeed, we wouldn't.

O'REGAN J:

It would need to be limited to where the remand was in prison though, not –

WILLIAMS J:

Sure.

O'REGAN J:

– in a mental hospital or institution.

MS HAMILL:

Well –

WILLIAMS J:

But see, the argument is that working hard to get this over the line does involve, by statutory fiat, the imposition of a disadvantage on a prisoner which that prisoner would not have but for this provision that you're asking us to carry over the line, because ordinarily the limitation period would be the limitation period and that's the end of the game.

MS HAMILL:

In that way of seeing it, yes, but the prisoner has received the advantage of pre-sentence detention counting towards his or her sentence.

WILLIAMS J:

Yes, but those are kind of incommensurables aren't they? We've got here a guy has got a bank account with $10,000 in it. He's about to lose half of that because the limitation period doesn't apply. The limitation doesn't apply because you say, look, let's just take a common sense approach to this, even though the words don't quite say it.

MS HAMILL:

The approach that the Secretary for Justice suggests is available is to simply apply the rules of sentencing for parole rather than necessarily working hard to read anything into the PVCA. The approach is to say stand back and apply those rules. Those rules determine that a sentence of imprisonment is served over a time that takes account of pre-sentence detention. Pre-sentence detention wasn't taken into account in that way, the sentence would be longer out the other end for PVCA purposes.

WILLIAMS J:

Sure, but I'm not sure that that's a particularly helpful way of interpreting it.

MS HAMILL:

But –

WILLIAMS J:

The other thing is that we take the exact opposite approach on Mr Perkins' sensible, I think, suggestion in respect of the Electoral Act because there are BORA rights involved, right? You don't read that provision retrospectively because of the sacred right to vote. So, then we're left with if we're allowed – if we're not allowed to do it in that case but we are allowed to do it in this case it's because this guy's bank account isn't as important as the right to vote.

MS HAMILL:

In my submission, your Honour, it's because the Parole Act is what determines how sentences are calculated. It is, in that sense, an important piece of contextual legislation. So, I don't seek to depart from Mr Perkins' submission in any way about the Electoral Act, and that Act must be seen in its context and its purpose of what it's seeking to achieve. It doesn't purport to administer sentences or their calculation in any way.

The reason that the Secretary for Justice says that the Parole Act can be treated in this particular, contextual way is because of what it does. It is what creates, or determines, how sentences are calculated.

WILLIAMS J:

Right.

MS HAMILL:

In other words, sentences and their administration are statutory constructs, and they're constructs in the civilian context made by the Sentencing Act and Parole Act. So, to understand how sentences work you do need to look at the Sentencing Act and Parole Act, and in fact my learned friend acknowledges that you need to do that in some respects. So it's not a question of never applying or having reference to the Parole Act, it's a question of how much you have reference to the Parole Act.

WINKELMANN CJ:

Well, he says the test is necessary, it's plainly necessary in the face of the legislation to have reference to the Parole Act. But here, it's not plainly necessary. There's a perfectly acceptable interpretation without reference to it.

MS HAMILL:

Yes, yes, he does. And my point is really that it does, it does feature. It's not like, for example, the Electoral Act which does a different job. It is an Act that looms large here, where or not it's on the application of the necessity test that my learned friend suggests or otherwise.

WINKELMANN CJ:

I think we have a sort of a grasp of all the technical ins and outs, but are there particular things you wanted to take us to? Because, as I understand the position for Secretary for Justice, it is accepted that there are two available interpretations but it's clear from the purpose what was trying to be achieved in their interpretation that Mr Ewen argues for is, is not as fully realising that purpose as the interpretation that was found by the Court of Appeal?

MS HAMILL:

Yes. Perhaps if I can just take your Honours through a few more points about section 64 and then more generally and we'll see where we get to.

WINKELMANN CJ:

Yes, great.

MS HAMILL:

Just a follow-on point from the one I was making with regard to section 64 in the context of the Parole Act, the Sentencing and Parole Acts, if we look at section 64(2)(ii) and (iii), they refer to cumulative sentences. Again, those are concepts that can only be understand with reference to both the Sentencing Act and the Parole Act.

So this, just to make the brief submission on the points, another example of where the Parole Act and the Sentencing Act aren't necessarily expressly incorporated but are needed to understand what the concept is all about.

Now, in our submissions we've noted that there is an absence of reference to concurrent sentences in this provision, but again an understanding of that can be gleaned from how cumulative sentences work. They become a single notional sentence, so there is no start date or end date to any one component part. It is all the same sentence. That is an example of where the concept of what a cumulative sentence is needs to inform subsection (2) of section 64.

Moving on from that point. The Secretary for Justice doesn't submit that all pre-sentence detention counts. It's the sentence that is imposed that makes it come into bearing the calculation. So, for example, where a non-custodial sentence is imposed but an offender has spent time in custodial remand, that is not subject to section 90. That is taken into account in the sentence that is opposed [*sic*] at the discretion of the sentencing judge, and it won't feature as part of the sentence. But more importantly it also isn't a part of section 64. Section 64 doesn't apply to non-custodial sentences. It applies to sentences of imprisonment.

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My learned friend also touched on the case of *Prince*, which stood essentially for the proposition that not all pre-sentence detention can count if it exceeds the amount of the sentence served. That would follow in the Secretary for Justice's analysis here too. The Secretary for Justice essentially says that section 90 does exactly what it does in the sentencing context. It takes into account the period of pre-sentence detention it can against the sentence imposed, and that is the way it fixes the date that an offender will be released. If there is more pre-sentence detention that won't necessarily count for the PVCA purposes either.

Moving to another point about section 64 again, and that is the point that it refers to a service of a sentence of imprisonment in prison. This is addressed

in the Secretary for Justice's submissions too, but just to further articulate that point, at the time that the PVCA was enacted, a sentence of imprisonment would be served by way of home detention with leave of the Parole Board. So those words "in prison" do need, to an extent, need to be seen in that historic context. It is apparent that section 64 was designed to apply when an offender was serving a sentence of imprisonment in prison, not by way of the alternative that now is, in fact, a stand-alone sentence in the hierarchy of sentences.

Section 91 of the Parole Act then only, like section 90, has application to sentences of imprisonment, and in the sentencing context, again outside of the PVCA, what that means is that when a sentence of imprisonment is imposed, unlike the historical context, it will be served in prison until the release dates or parole eligibility dates apply. But section 91 deems a broader range of imprisonment – of detention to be taken into account as part of that time served, part of the time that would otherwise be spent in prison on the sentence.

Mr Ewen suggested that this could not be taken into account for PVCA purposes, that it would need to distinguish between remote remand in custody in a prison environment, and remand in other environments. On the Secretary for Justice's analysis the words "in prison" don't necessarily carry that weight in section 64, again because of that historical context. What the Secretary for Justice essentially again says is that we just apply sentencing law and parole law in its ordinary way, and that this would mean that section 91 and section 90 would also apply in the ordinary way. So in this sense on the analysis that we put forward there isn't a fundamental conflict between the way that the Parole Act operates as an ordinary matter of course and how it can be applied to the PVCA.

KÓS J:

I'm not sure I follow. Are you saying that PSD spent in a hospital or secure facility is included in the calculation under section 64?

MS HAMILL:

Yes.

KÓS J:

Even though it wasn't served in prison?

MS HAMILL:

Yes, and the reason is because the analysis applied by the Secretary for Justice is simply to apply sentences – the Sentencing and Parole Act as it ordinarily would, and the weight that is to be attached to the words "in prison" in section 64 should be seen in their context, which is –

WINKELMANN CJ:

So that's actually making your argument harder, it seems to me. It is a necessary part of your argument?

MS HAMILL:

Well, what it resolves is a question my learned friend posed, which is how should pre-sentence detention be calculated for section 64 purposes if it's different than the calculation applied by the Chief Justice to reach release dates and parole eligibility dates.

WINKELMANN CJ:

I think it would be the Secretary for Justice, not the Chief Justice.

MS HAMILL:

Sorry, the Chief Executive.

WINKELMANN CJ:

I've got a lot of jobs, but not that one.

WILLIAMS J:

"Prison" is defined in the Act. In the Parole Act?

MS HAMILL:

Yes.

WILLIAMS J:

You say despite that?

MS HAMILL:

I'm saying, and my learned friend has noted it may not be, I think I agreed too hastily without checking the Parole Act, so perhaps we can turn to the interpretation section.

WILLIAMS J:

Yes, no, it is. I just checked.

WINKELMANN CJ:

It will be defined. Because things have to be certified –

KÓS J:

"… a prison established or deemed to be established under the Corrections Act 2004."

WINKELMANN CJ:

Yes, they have to be certified as prisons under the Corrections Act. It's not a, if there's anything in our law that is a defined term, it's that.

MS HAMILL:

Yes.

KÓS J:

It seems to be a rabbit hole.

WINKELMANN CJ:

Extending your argument this way seems to be a rabbit hole. You seem to be deliberately excavating one for yourself to meet an argument, which is not, you know, it's not one of Mr Ewen's best arguments that it's a hard thing to calculate, but it's certainly an argument. Anyway. Sorry, Mr Ewen.

MS HAMILL:

Well coming back to the point made at the outset, the question is how far does the Parole Act need to apply in order to make sense of the PVCA, and perhaps your Honour's view is that it does not need to apply that far. On one view it could apply that far, but the general thrust of the argument, in any event, is that the exercise involves essentially following the same course that it followed for the sentence itself and that, of course, the sentence itself is the sentence under the PVCA. They are the same thing.

WINKELMANN CJ:

So your argument is contextually when you read this PVCA, the Act with the Parole Act and the Sentencing Act, you come to the decision that section 64 use of the word "prison" there can be extended to include all these other places?

MS HAMILL:

It can be, but perhaps the more important point is the historical one. That it is used, it was used, it was enacted at a time when a sentence of imprisonment did not need to be served in prison, it could be served by way of home detention.

WINKELMANN CJ:

What was enacted at that time?

MS HAMILL:

So at that point in time the Sentencing Act provided for leave to be given for the sentence to be served at the application to the Parole Board to be served by way of home detention. That was amended by way of a 2007 amendment to make home detention a stand-alone sentence.

KÓS J:

But PSD at home is called bail.

MS HAMILL:

The opposite of PSD.

KÓS J:

Yes, well.

MS HAMILL:

Yes.

KÓS J:

So this doesn't apply until you have a sentence of imprisonment, which then could be converted to home detention, or which is now a sentence of home detention.

MS HAMILL:

So it applies for a sentence of imprisonment, which now will always be served in prison. The test now is that a sentence of imprisonment would be the alternative to home detention, but at the Judge's discretion home detention is now imposed under section 15A of the Sentencing Act. But prior to that amendment it was capable of being served in both ways on application to the Parole Board. Now this is addressed in the Secretary for Justice's submissions –

KÓS J:

But under the Parole Act sections 90 and 91, time spent on bail is not credited, but there is a practical working approach taken by judges sometimes to give credit for highly restrictive bail conditions.

MS HAMILL:

Yes. Yes. The approach to time spent on remand in custody is effectively an administrative one under section 91 – sorry, section 90, subsection (1), and that applies to take all of that time as calculated or contemplated by section 91 into account.

WILLIAMS J:

I wonder whether that is in substance administrative because it has such a profound effect. I wonder whether you're underplaying it by saying it's merely administrative.

WINKELMANN CJ:

Your point is it doesn't have discretion attached to it, it's calculated.

1230

MS HAMILL:

Yes, yes, thank you your Honour, and that is perhaps a better way of expressing it. So administrative is used not in a sense to downplay the significance of it. If anything it is a point made by her Honour the Chief Justice which is there's no discretion. It has to be taken into account in the way stipulated by the Act, by the Parole Act, and that requires the whole period and aggregate to be applied.

WILLIAMS J:

What do you say is the relationship between those deeming words in section 90 and section 76?

MS HAMILL:

We can just look at section –

WILLIAMS J:

It's the start date provision. Start date is the sentencing date for any sentence.

MS HAMILL:

Yes. So the start –

WILLIAMS J:

Not the incarceration date.

MS HAMILL:

This was a point that was addressed by Justice Edwards in *Prince* to some extent. If we can perhaps just turn to that case, and it's in the bundle. I'll just find the paragraph references, one moment. Apologies for the slight delay, your Honours, I'm just finding my way around my own bundle.

WINKELMANN CJ:

That's all right.

MS HAMILL:

There's a point developed by Justice Edwards from approximately paragraph 33 onwards, and there her Honour talks about the way that sentencing is calculated as effectively forward-looking. Moving to section 37 – paragraph 37 rather, her Honour refers to the accounting of pre-sentence detention is essentially something that is backward-looking, that applies – exception to the general rule of sentencing. That is effectively the analysis that the Secretary for Justice would respectively adopt here as well.

WILLIAMS J:

Is it not possible to read section 76's subject to the deeming provision in section 90(1)?

MS HAMILL:

The section 90(1) doesn't necessarily change the start date, the start date is governed by these provisions, section 76 and onwards, so that it will generally be when the sentence is imposed but it will on occasions be otherwise. For example, when the sentence is made cumulative on another one that starts at that earlier start date. But what section 90 then does is that it counts time spent.

WILLIAMS J:

Yes, I understand that, but it does that by saying, by deeming someone to have been serving a sentence from the outset?

MS HAMILL:

Yes.

WILLIAMS J:

Which is not a reference to the expiry date but in fact a reference to the start date.

MS HAMILL:

It does not change the character of the sentence in its legal sense, does not make the remand period, for legal status purposes, a period when an offender was serving their sentence. It is essentially a legal –

WILLIAMS J:

It'd be in your favour if it did.

MS HAMILL:

It would be, but the Secretary for Justice doesn't try to make it do something that it doesn't.

WILLIAMS J:

Okay. You ought to try and make something else do something that it doesn't.

MS HAMILL:

Effectively, it creates something of a legal fiction which is that that period of time counts towards a sentence that was not in effect at that period of time. It came into effect at the time that it was imposed, and if it was imposed and made cumulative on another sentence then it will come into effect at a different point in time under the Parole Act. But section 90 operates to count that time towards the sentence served so that an offender does not have that remand period served separately, and in addition to the sentence that is subsequently imposed, the period of time an offender will serve on a sentence does not exceed the sentence because of the pre-sentence detention that they also served.

KÓS J:

Which is presumably why section 90(1) talks about "deeming"?

MS HAMILL:

Yes. Yes. But it doesn't therefore change the actual duration of the sentence that was imposed by the sentencing court at the outset. So the sentence will always remain the same length. It's a question of how much time is left to serve, and that is calculated through taking the pre-sentence detention period and applying it into the mix. It's not any more or any less than that.

WILLIAMS J:

Yes, I suppose the question is, what's being deemed?

MS HAMILL:

Yes, well –

WILLIAMS J:

And what effect does it have on the deemed status of a serving prisoner? You rather surprisingly say it is none.

MS HAMILL:

Well, what I don't suggest is that it means that when a prisoner was a remand prisoner, they should be seen, for all extents and purposes, as having been a serving prisoner in every possible way. What it means is that when they were a remand prisoner, when key dates are set, when the duration of the period of sentence to be served in prison is calculated, that period will apply and the –

WILLIAMS J:

Yes, yes, I understand that. But my question is whether that is an amendment both to start and expiry, I suppose. That is a deemed amendment. We all know it's a lie because it uses the word "deemed".

O'REGAN J:

But it says it's only for the purpose of calculating the release date or –

WILLIAMS J:
No, the key dates.

O'REGAN J:
– parole eligibility date.

WILLIAMS J:
For calculating the key dates which includes start and expiry, right? Although there's a statutory definition of "start", this is a deeming provision.

MS HAMILL:
Yes.

WILLIAMS J:
So we already know that it's not true.

MS HAMILL:
Yes.

WILLIAMS J:
So, I mean, one way of reading this in an administrative sense is to say all it does is bring the expiry date forward, but is that the only way of reading this? Is it not an adjustment to both start and expiry?

MS HAMILL:
Well –

WILLIAMS J:
Because the start date would otherwise have been –

O'REGAN J:
Well, it can't be to both, it has to be to one or the other, doesn't it?

WILLIAMS J:

Well, it would be, because you're actually bringing the window of the sentence forward in time, so you're actually changing both. Deeming that to be so. Why is that not a change to start?

MS HAMILL:

As my learned friend Mr Ewen pointed out, while key dates include start dates, they are fixed in law. They are created by section 76 and so on.

WILLIAMS J:

Yes, but this is a deeming provision.

MS HAMILL:

Yes.

WILLIAMS J:

So we already know that Parliament is creating a fiction in this particular circumstance. So it's not necessarily inconsistent with section 76, because this is, for this circumstance, a deeming provision when you calculate the key dates. Now, one way of doing that is simply say, well, we therefore in the abstract just shrink the expiry date but don't change the start date. That's one way of doing it. But another way of thinking about it is you've shifted the window.

WINKELMANN CJ:

Well, isn't their answer to that proposition that the method of calculation actually doesn't depend upon moving the start date? It's explicit that it takes off the top end. That's the answer, isn't it?

MS HAMILL:

Yes.

WINKELMANN CJ:

So what section 90 does is in the calculation when you come to the – what's the provision that's the calculation provision?

WILLIAMS J:

It's deemed, yes, "is deemed to have been serving the sentence" –

WINKELMANN CJ:

The key dates.

WILLIAMS J:

– ie to have been serving.

WINKELMANN CJ:

And when you come to the calculation provision, it says that you take it off the end.

KÓS J:

And I think my brother's suggestion would be stronger if section 76(1) added section 90 to the list of exceptions which is section 77 to 81.

WILLIAMS J:

That would be good, but the section 77 to 81, they are all explicit exceptions for the reasons that you've identified where you have to shift where the start date simply can't apply, right, because it actually isn't the start date. This is cumulative or concurrent and extended or whatever. But you've got a deeming provision here that says you are deemed to be a serving prisoner from the date on which you are incarcerated. Why is it such a stretch to say that's effectively deeming the start date to be shifted back?

1240

MS HAMILL:

It is capable of being seen in multiple different ways. That's not something that is the key point from this analysis, in my submission. The key point is that the sentence itself, the length of the sentence doesn't change, so whether or not it brings that date forward, that release date, or –

WILLIAMS J:

It sure affects your argument. Because if the effect of this deeming provision is, in substance, to change the start date, then you don't have a problem?

MS HAMILL:

Yes, and I take your Honour's point about that.

WINKELMANN CJ:

But the other way of looking at that is if your argument depends upon that then you have got a problem because you're actually having to read section 90 in a way which is not naturally then to be read, and then put that into section 64.

MS HAMILL:

Yes, and your Honour has perhaps articulated what I was attempting to say better than I have, which is that the –

WILLIAMS J:

Well maybe I'm more impressed by my argument than anyone else. It's not the first time.

WINKELMANN CJ:

I was just going to say that.

MS HAMILL:

Well that is, I would accept, one way of seeing it, but the way, what matters either way that it is approached is that the sentence, the length of sentence itself is not changed by section 90. It just determines how much of it is left to serve by deeming some of it –

WILLIAMS J:

Yes, we all understand that.

MS HAMILL:

Yes, but that means that –

WILLIAMS J:

The question is how do we map it across to the PVCA?

MS HAMILL:

It does, well, how we map it across –

WILLIAMS J:

Where status does matter.

MS HAMILL:

– is because the sentence was already starting to be served at the point that section 90 deems it to be, for that legal fiction purpose, not necessarily a point in time but we've got amount of sentence that has been served at the time that the Chief Executive does his or her dates, and that is why an offender is released at the point in time that they are because of section 90, where they have of course been on pre-sentence detention. It won't apply if there hasn't been any. The provision doesn't change the length of the sentence itself, it just determines how much of it is left to serve in prison before a person is either released on a short-term sentence, or eligible to parole on a long-term sentence. So the amount of time to serve in prison remains subject to those key dates. It remains a third if it's a parole eligibility question. It remains a half if it's a release question as a short-term sentence. That doesn't change. It's just a question of taking some of that other pre-sentence detention and putting it towards the bit that would have been served in prison as an ordinary matter of course under the sentence. That same calculation, in my submission, can apply to section 64 because it is what's setting those dates. Pre-sentence detention is inherent in setting those dates in that capacity.

Perhaps one final point to make before I hand over again to Mr Perkins, and that is to just briefly address the question of retrospectivity. Now Mr Ewen has pointed out that this will involve a retrospective exercise potentially, but the concept of retrospectivity is perhaps to a large extent inherent in the calculation of limitation periods, and it's also not something that is particularly offensive to the PVCA when looked at in its broader context, and to go to sections 63 and

64 of the PVCA, and I should qualify this by saying neither directly answer the point, but they do provide helpful context.

Section 63(2) applies section 64 to causes of action that commence before the start date of the Act, and also applies to subsection (2)(b) to periods where a limitation defence would have – could have otherwise have been successfully pleaded before the Act was commenced.

Section 64 itself, of course, in a slightly more indirect way, contemplates retrospectivity because it applies itself to cumulative sentences, and also it takes into account time spent on recall in the conditions provided in subsection (2)(b).

Those are just some brief points to note, that retrospectivity conceptually is not in and of itself a complete answer to the interpretation put forward by the Secretary of Justice.

KÓS J:

May I ask what you say about Mr Ewen's argument about the effect of section 28(1)(b) which is the argument that the claim can't be made until the person becomes an offender, but on your argument as soon as they're made an offender it may well be that the effect is that time's up on the filing of the claim. So that seems to have a rather unfortunate consequence for the victim claimant when it turns out the time has run because of the PSD period.

MS HAMILL:

Yes. I attempt to just break that down into two parts, your Honour, if I may. To start with, section 28, that's part of the subpart that deals with the expedited claim process and as Mr Perkins noted, it's difficult to apply the subparts across one another to inform them. But the same point can be made I think, and was explored by Mr Ewen in respect of section 64 itself, which is that it refers to the word "offender", and I think I understood his submission to be that that means that it only comes into play for an offender. If I just may seek to clarify with your Honour, is that the point that your Honour is putting to me?

KÓS J:

Yes. In other words, at the point they are convicted, suddenly time served takes you back out of the limitation period.

MS HAMILL:

Yes, yes, and that's because when a person becomes an offender it's because the offending has been proven –

KÓS J:

Correct.

MS HAMILL:

– the conviction has happened and the sentence is what then brings into there the limitation period, the sentence of imprisonment that they serve. The way that is calculated is again to bring in section 90 of the Parole Act in the same way that I have been articulating. So, yes it refers to "offender", but it does so in a context that then brings into play how the Sentencing Act and the Parole Act apply to the administration of sentences, essentially in the same way as I've already attempted to articulate.

WINKELMANN CJ:

I think what Justice Kós is putting to you is that it could be in fact depriving victims of rights to interpret it, the way you're saying. Because on the date that the person is sentenced they may already – oh, I've lost the thread now. You can repeat it.

KÓS J:

No, I think I may have this the wrong way around actually.

WINKELMANN CJ:

I don't know. I actually think that might be right.

O'REGAN J:

Because if pre-sentence detention suspends the limitation period then it doesn't count.

ELLEN FRANCE J:

It will suspend the period, won't it?

KÓS J:

It will suspend it, exactly, that's right. So it, in fact, ends up enlarging the limitation period.

ELLEN FRANCE J:

Mmm.

WINKELMANN CJ:

Yes, yes.

KÓS J:

Yes. That's the short, that's the short answer to my point.

WINKELMANN CJ:

Well Mr Ewen have another go at convincing us that's wrong if we're wrong. But he's not convinced we're wrong. He's not convinced we're right. Yes, so right.

MS HAMILL:

Yes. So the period will cease to run during the time that the sentence is served.

KÓS J:

Yes, that's right.

MS HAMILL:

Thank you, your Honours. That is all I wish to say unless I can assist your Honours with anything further. Otherwise, I'll hand over again to Mr Perkins.

WINKELMANN CJ:

Thank you, Ms Hamill.

MS HAMILL:

As the Court pleases.

MR PERKINS:

Thank you, your Honours, I'll only be returning briefly and that's just to cover off the points that Justice Kós asked me to elaborate on in relation to how the Electoral Act provisions work. If we just bring up the Electoral Act, and I'll trace through how that works.

So, the starting proposition is section 74, which is the qualification of electors and subject to some slight nuances, the basic proposition that all citizens and permanent residents over the age of 18 are generally qualified to register at section 74. The next relevant provision is section 82. All persons who are qualified to register are under a legal obligation to do so. So, the starting proposition is that remand prisoners, for example, who are over the age of 18 and are citizens or permanent residents will be registered and then at the point at which they're sentenced to a term of three years or more imprisonment, they become disqualified, and that's section 80(1)(d).

1250

So the following persons are disqualified from registration. A person who was detained in prison under one of those three types of sentences. What happens as an administrative act is within seven days of receiving a person into prison to serve one of those sentences, the prison manager must write to the Electoral Commission, and that's at section 81. So the prison manager advises the Electoral Commission that someone has been received into prison to serve one of those sentences, and therefore are disqualified. Then section 98(1)(f) deals with their removal from the roll. The Electoral Commission shall remove, must remove from the roll the name of every person whose disqualification under section 80 has been notified to them.

Mr Ewen very helpfully points out that section 86B is also potentially relevant here, and I think that applies to a situation in which someone is re-sentenced. Subsection (5), if the sentence of imprisonment length changes in a way that results in a prisoner becoming disqualified, the prison manager must advise the Electoral Commission. So that works together with section 81, but deals with the situation where a sentence is extended.

KÓS J:

And then the question we have, which seems to be a constant refrain in this area, is does that have retrospective effect? In other words, he was qualified, Mr Jones was qualified to vote, he registered, and then you say he can be removed because his registration effectively retrospectively is…

MR PERKINS:

No, so our submission is that in relation to remand prisoners, it's a point in time detained in prison. So if at the time that the writ is issued, and the rolls effectively are frozen, and I say "effectively" because there are some provisions that are not relevant for present purposes, but when the writ is issued and the rolls are effectively frozen, if the prisoner is a remand prisoner at that point, then they are entitled to vote.

WINKELMANN CJ:

Yes, I think Justice Kós is asking you whether it – are you saying that it retrospectively disqualifies the prisoner even though they're on the register?

MR PERKINS:

We say there's no retrospective disqualification. A prisoner can only become disqualified at the point in time in which they are sentenced to a –

WINKELMANN CJ:

No, no, but once – because they're on the register, this is about registration, so there's the act of registration and then there's the fact of registration. So would it have the effect of removing them? They may have registered when they were

on remand but if they're then convicted are they thereby – is the Electoral Commission permitted to remove them from the register?

MR PERKINS:

They become disqualified and they must be removed by reason of their disqualification, and the administrative way in which that happens is the prison manager advises the Electoral Commission they've been received into prison. But their disqualification is not retrospective. It does not go back to the time –

WINKELMANN CJ:

No, no, yes.

MR PERKINS:

– at which they were – begun their pre-sentence detention. It is moment in time.

WINKELMANN CJ:

Justice Kós has just spotted an argument that would reduce the impact of section 86B, but I don't know if that's been argued. Right. We're going down yet another rabbit hole.

MR PERKINS:

I think that's enough rabbit holes today from me so if there's no further questions from the Bench, I'll leave it to Mr Ewen to reply.

WINKELMANN CJ:

Thank you, Mr Perkins.

MR EWEN:

Yes, I think we'll finish before one. It's important when one looks at section 76 of the Parole Act, which is sentence commencement date, at the same time – sorry. To look at the statutory definition, section 4, of "start date". "Start date, in relation to a sentence of imprisonment, means the date on and from which an offender who is subject to the sentence begins to be subject to it."

When that's read together with section 76 it can have, in my respectful submission, no other meaning that under the Parole Act you start serving a sentence on the date that it's imposed or one of the other dates in sections 76 to 81. But whilst you are a remand prisoner, you are not serving the sentence and that in some respects could be the end of the matter in and of itself.

WINKELMANN CJ:
Mmm.

MR EWEN:
That is subject to an exception, I think it's section 77, in respect of cumulative sentences. But that provides that the start date for a cumulative series of sentences is the start date of the first in the train.

Now, of course, that's got two questions arising for the PVCA. First of all, even though the start date is normally the first sentence imposed, that cannot possibly take the limitation period back further in time than the date of the accrual of the cause of action to start with, which may postdate that first sentence.

But the second point is, and this is why I endeavoured in the Court of Appeal and to the High Court, if context, if the Parole Act provides such important and critical context, why is there discrete provision in the Prisoners' and Victims' Claims Act for the effect of cumulative prison terms, and why is there a discrete provision in the PVCA for the fact of the recall procedure? Because, if the Parole Act provided the essential context, then the notional single sentence approach from section 77 of the Parole Act would automatically carry over into the Prisoners' and Victims' Claims Act. It is essential context and so in fact, in some respect, it is more fundamental than the pre-sentence detention point. But it doesn't. The Prisoners' and Victims' Claims Act makes its own discrete provision both for cumulative sentences and the effect of recall, which don't exactly mirror the Parole Act. They're close, but –

KÓS J:

This is section 64(2) you're talking about?

MR EWEN:

Yes, section 64(2).

KÓS J:

Yes.

MR EWEN:

Because that extends it to anything, an earlier term in which it's imposed cumulatively. If the Parole Act provided the necessary contacts, all that, the provisions of subsection (2)(a)(ii) or (iii) are entirely surplusage. The same could be said for (b). So, it strengthens my submission, the argument that where the Parole Act, the specific aspects of the Parole Act, are incorporated in the PVCA, the PVCA does so quite expressly, and that's sort of, of course, with the exception with the start date et cetera which, as her Honour the Chief Justice points out, is just essential in determining when a prison sentence starts.

But again, and this also goes to Justice Williams' point I believe about the possibility of a moveable start date. My respectful submission, your Honour, section 76 and section 4 do not allow for a moveable start date. They are either, as provided in sections 76 to 81, and the deeming effect of section 90 cannot have an effect on that. That is the crystalising date from which everything else is calculated in my submission so that –

WILLIAMS J:

The start date?

MR EWEN:

The start, yes. Start date as defined by statute is not calculated by the Chief Executive. The reason start date has to be crystallised and can't move is because that's the date of certainty from which all other equations flow. You've got to add on the prison sentence and then deduct any pre-sentence detention.

But I say the purpose of section 90 is to show from the start date how long you will be serving the sentence.

WINKELMANN CJ:

Yes, well the point I was making very inelegantly before was even section 90 assumes that that's an immovable thing because it operates by reference to that date being fixed, and then you calculate and then you take off.

MR EWEN:

Absolutely, your Honour, so that the process is you add on the prison sentence to the start date and then subtract the pre-sentence detention, but only back until the earliest point in time, the sentence commencement date. You can't go past further than that. That's what I –

WILLIAMS J:

Yes, yes, I get all of that but of course all of these key dates effectively shift because – I mean, one way of – it's possible to take an accountant's approach and deduct and add and so forth. The question is really whether the deeming provision in subsection (1) is intended to be read only as a calculation device or whether it is something more substantive, given its substantive effect.

1300

MR EWEN:

Well, that, in my submission, would be the argument that I lost in *Prince*. The pre-sentence – the start date of a prison sentence should be the first day you go in.

WILLIAMS J:

So you're arguing the opposite proposition to the one you lost on in *Prince*.

WINKELMANN CJ:

He's got to be allowed to do that. Mr Ewen, can you just tell me, where's the provision –

O'REGAN J:

No, he's arguing what the law is because *Prince* decided it.

WINKELMANN CJ:

Where's the provision that tells you how you calculate it?

MR EWEN:

Well, it's the mechanical –

WINKELMANN CJ:

No, the mechanics, the mechanics that says you…

MR EWEN:

The mechanics of the thing is actually in section 92, I think…

WINKELMANN CJ:

Yes, the one that says you, the start date when you…

MR EWEN:

That is certainly the way that Corrections operationalises it. They take it from the start date, add on – well they then calculate the number of days the prison sentence is, add that on to the start date, and then deduct the pre-sentence detention, but that is in accordance with Justice Edwards' judgment. I said to Mr Perkins, yes, I was wrong in Edwards, I'm happy to admit it –

WINKELMANN CJ:

You were wrong in the other case, *Prince*, but not Edwards. Edwards was the Judge, she was not the Chief Executive, she was the Judge. It's all very…

MR EWEN:

Sometimes, in conclusion, sometimes legislation is actually as simple as what it says on the side of the tin, and this morning, this afternoon, has just demonstrated the knots that one can end up tying themselves in by trying to put something in that isn't there. It's the black cat in that dark room that isn't actually there to begin with.

WINKELMANN CJ:

Right, got that.

MR EWEN:

My final thing my friend Ms Hamill was at pains to point out. The sentence length doesn't change. But of course, yes, the sentence of imprisonment doesn't change. The sentence of imprisonment is as imposed. We're not concerned with the sentence of imprisonment. We are concerned how much of it the person is serving. That's why in serving a sentence of imprisonment, "serving" is the key modifying factor and from section 4 and section 76 together, than cannot be earlier than the sentence commencement date.

Unless I can assist further, those are my submissions.

WINKELMANN CJ:

Thank you, Mr Ewen. Mr Perkins, did you want to say anything about the legal aid point that Mr Ewen made, because I forgot to ask you that when you were on your feet, I'm sorry.

MR PERKINS:

No, Ma'am.

WINKELMANN CJ:

You would accept it might be just and equitable to…

MR PERKINS:

I don't have instructions as to what decisions might be made by the person administering legal aid provisions but –

WINKELMANN CJ:

No instructions, no, no, and it is their decision, it's not ours.

MR PERKINS:

Absolutely. But an indication from this Court along the lines that Mr Ewen indicted, no objection would be taken to that, and of course it is to be noted that he is taking an extremely responsible position in not wanting to disadvantage his client to argue the points he has argued, so I can certainly understand his rationale for asking for it.

WINKELMANN CJ:

Thank you. Thank you counsel for your excellent submissions. They were, as we previewed, very well-prepared and well-delivered today. So we will take some time to consider our decision.

COURT ADJOURNS: 1.03 PM