IN THE SUPREME COURT OF NEW ZEALAND

SC 50/2005

IN THE MATTER	an Appeal	
BETWEEN	**ALAIN MICHAEL YVES MAFART AND DOMINIQUE ANGELA FRANCOISE PRIEUR**	
	Appellants	
AND	**TELEVISION NEW ZEALAND LIMITED**	
	Respondent	

Hearing 22 November 2005

Coram Elias CJ
Blanchard J
Tipping J
McGrath J
Eichelbaum J

Counsel G P Curry and S L Cogan for Appellants
W Akel for Respondent

APPEAL

10.03 am

Elias CJ Yes thank you.

Curry May it please the Court, Curry, I appear for the appellants together with my learned junior Mr Cogan.

Elias CJ Thank you Mr Curry, Mr Cogan.

Akel Yes, may it please the Court, Akel for the respondent.

Elias CJ Thank you Mr Akel. Can I just say at the outset we were horrified to hear of the mix up in the arrangements that were made for the hearing of this matter and we've taken some steps to hopefully ensure that that sort of happen again. But I'm very sorry that you were inconvenienced to that extent, all of you. Yes Mr Curry.

Curry May it please the Court, what I have prepared is some counsel's notes which is intended to simply assist the oral presentation. And they have been prepared, one lot on jurisdiction, one on the s.14 application for an appeal and the other on the judgment of Simon France dealing with matters in that judgment.

Elias CJ We've had a preliminary chat about this and we think that it may be necessary to deal with them separately and that we should hear from you first on the jurisdiction matter and then from Mr Akel and consider that point before we proceed.

Curry Well think you for that indication Your Honour. In that case perhaps if I could just present counsel's notes relating to jurisdiction.

Elias CJ Yes.

(Notes handed up)

Curry May it please the Court these notes are refined. They proceed as very much an abbreviated summation of what's been filed with some refinement. And the first area of refinement has been to hone the issues a little further and so they are set out in the first paragraph of this document. And it's not my intention to read those. But what I've sought to do is hone the particular issues to the aspects that depending on the Court's decision of course on jurisdiction, that may well arise in this appeal.

Now turning to the tapes. The tapes at issue and indeed it is the video tapes that are central to this appeal, these were recorded at a trial held in the High Court building in Auckland but in the District Court. And they were recorded without the consent of the appellants. The purpose for the recording and this is taken from the Presiding Judge's evidence which is recorded in the judgment of the High Court, were to facilitate media access. There were two important features of that. One was to accommodate the extraordinary number of journalists who wished to be attending at the hearing and some 160 had registered from within New Zealand and overseas. So there was an accommodation of numbers aspect and there was also an aspect relating to it which was associated with the numbers and that was to minimise the interruption during the hearing of journalists coming and going, perhaps rushing off to meet deadlines to report and moving in and out of the courtroom.

The second one was security. Security was certainly an issue at the time and there was concerns both as to whether there might be some

attempt to free the appellants. There were concerns as to whether there might be some attempts directed against the appellants. But the essential part of the security that was certainly agreed to was a security which was accommodating both purposes. Projecting by closed circuit television into a second Courtroom in the High Court building in Auckland. But also projecting into a police van, police headquarters so that there could be a security overview and also the security system would survey the exterior of the building the previous day.

And then there was the third purpose that was as His Honour saw it, his personal notes.

Now on the 4th of November of 1985 this is at the preliminary hearing, His Honour did provided assurances concerning the video tape which is the permanent recording that he had ordered. And his assurances were that there would be only one tape from each camera. They would remain his property and they would be kept in his safekeeping.

Elias CJ You are not suggesting are you that your clients had any right to control whether the proceedings would be video taped.

Curry Well in this respect, that central to the case for the appellants when it cam to dealing with the videos was that they had a rightful expectation as being treated in a similar manner to others who had come before the Courts in New Zealand. And certainly the Presiding Judge went to great lengths to consult. But the consultation concerned closed circuit TV, not video recording. And in the course of the consultation that was the focus. Consent was sought and given relating to closed circuit TV. But it was not sought and consequently not given, and would not have been given, to a permanent video record being taken. The instructions from the appellant which was apparent in the material before the Court extended to issues such as their concern about even permission being given to sketch in the Court. That was firmly dealt with by His Honour.

Tipping J I was just wondering Mr Curry what this had to do with jurisdiction. Are you just sort of giving us a warm up on the full facts before you address the question of jurisdiction.

Curry Well I'm going through this Sir simply to indicate what was the underlying factual basis which led to the application to review the judge's decision.

Tipping J I understand that. I understand that, but, alright, well sorry, perhaps I should leave it to you.

Curry Well I can come directly to your question.

Tipping J No I don't want my intervention to distract you from your.

Elias CJ Well I think really what Justice Tipping is quite rightly saying is that if we're dealing with jurisdiction you can probably cut to the chase on that and you can warm us up in this way if we get further.

Curry Yes indeed, yes indeed.

Elias CJ And I was inviting you to go even further in the warm up. So I repent me of that and perhaps we could just deal with jurisdiction.

Curry Well I can cut to jurisdiction very very simply and quickly.

Elias CJ Yes.

Curry The essence of the case on jurisdiction is that because there are no criminal consequences flowing from the application TVNZ made to view the tapes, that the matter was in fact a civil application giving rise to civil consequences and civil rights of appeal and in the absence of any restriction on the right of appeal, s.66 of the Judicature Act provides the appropriate right of appeal. And that the Court of Appeal was wrong in determining that essentially it was a criminal appeal. It's analysis with respect did not take account of the substantial body of jurisprudence which points to the principle that I have mentioned, that the sena qua non of a civil case is one that has, of a criminal case is one that has criminal consequences, particularly by way of punishment in some form or another. And I've put before the Court cases such as Amand (**Amand v Home Secretary and Minister of Defence of Royal Netherlands Government** [1943] AC 147 (HL)) and Montgomery (**Government of the USA v Montgomery** [2001] 1 WLR 196) and New Zealand cases dealing with that point as well.

So in short that is the essence of the issue on jurisdiction.

Blanchard J Section 66 actually says nothing about civil or criminal.

Curry No it doesn't. On its face.

Blanchard J Should we be making that kind of rather bald distinction.

Curry Well on its face s.66 does appear to apply to all appeals. There are two perhaps constraints on that. The first one is the substantial body of jurisprudence in New Zealand going back to at least 1900 which has interpreted it as not extending to criminal matters. And that was particularly reviewed by the Court of Appeal in Victim X (**Re Victim X** [2003] 3 NZLR 220 (HC, CA)) and the history of that difference was very fully explored in that judgment. The second one is that if you're looking at the Act as a whole, it does come under a section which is dealing with civil. And so subject to those two points, on its face, s.66 applies a right of appeal generally across the board.

Tipping J I wondered Mr Curry whether the criminal civil dichotomy was not rather the product of the way s.66 should be looked at rather than the test. Can I explain for a moment. You have to find a principle basis to read down s.66 from its clear unrestricted terms. And you can say that there's a clear implication that s.66 doesn't apply to any case where there is another statutory right of appeal like the Crimes Act. And it equally doesn't apply by necessary implication where Parliament has clearly signalled in another statute that there should be no right of appeal in certain circumstances But in this case there is neither. Therefore it applies.

Curry Indeed.

Tipping J And the criminal civil dichotomy is actually the result of that jurisprudence rather than the driver of it.

Blanchard J In other words you look at the Crimes Act to see whether it contains expressly or by implication a restriction on appeal. If there is none s.66 applies.

Curry Certainly interpreting the section on its plain meaning that is available. I'm not sure that it sits comfortably with the analysis in Victim X but if this were being approached from first principles, I would respectfully accept that that was correct. In fact one of the points made in this outline is that at page 4 in F, since the consequences are not criminal the proceedings must be civil. But also taking that to the broad interpretative approach, unless there's a particular restriction, s.66 should be given it's full plate.

Elias CJ Well do you want to take us to the reasoning in Victim X.

Curry Well I can.

Elias CJ To indicate, well if you are going to develop this argument.

Tipping J I don't think it's Mr Curry's argument so much as a point that's been put to you from the bench as to how there might be a higher level concept which results in the criminal civil.

Curry Yes indeed sir.

Tipping J Your case is essentially that this is civil.

Curry Yes it is.

Tipping J Which will get you home if it's correct on that premise. But I'm looking and I think Justice Blanchard too was looking for something which on a more jurisprudential basis allows you to read down s.66 rather than some sort of broad rather amorphous distinction between criminal and civil. I think I have my brother's approach fairly. It's all

very well to come along and say oh well we can read this down because it's not a criminal case. Sorry, it shouldn't be read down because it's not a criminal case.

Curry Yes.

Tipping J But there's a higher conceptual basis for doing it in my view that leads to the same consequence. But at least prima facie to me is more satisfying.

Curry Sir.

Elias CJ And it's obvious. Well it's an obvious argument is what I mean.

Blanchard J I'm only allowed to articulate the obvious points Mr Curry.

McGrath J Mr Curry.

Curry Yes.

McGrath J Your point is there's no criminal consequences. Now that might mean that there can be no criminal consequences in relation to a search application because it's concerned with obtaining information. But it could also mean that the criminal consequences stage is well past. Indeed in this case it's 20 years past.

Curry Yes sir.

McGrath J And do you present your argument on one of those two bases or on both of them.

Curry On both. In the sense that this is 20 years ago but also if you look.

McGrath J It was applying just as much if it was one year ago wouldn't it, provided all appeals had been disposed of.

Curry Yes indeed.

McGrath J That's why I say one year ago.

Curry The point had been reached where the criminal proceeding had been finished.

McGrath J Yes.

Curry All appeal rights at the time had been expired. There was none of those. And so what then kicks in and it's my respectful submission that the proper manner to consider the application is an originating application under the Rules. And it's essentially an application to say,

can we look at or in this case, copy and broadcast, those tapes. And that is a stand alone originating application.

Blanchard J But you might also say, assuming that an application of some kind, not necessarily this application, but a news media application was being made during the course of the trial or before the trial, surely you would still stand back and say, when looking at this question of whether s.66 is to apply, does this conflict with the express or implicit requirements of the Crimes Act.

Curry Well certainly you would be saying that. And given the point of time, that if I heard the question correctly, it was focusing on, if it poses a problem which would relate to the undue interference with the business of the criminal court by pretrial or intrial appeals, clearly there are strong policy reasons against that.

Blanchard J And there are policy reasons apparent from the Crimes Act itself.

Curry Yes sir.

Blanchard J With its careful delineation of what can be the subject of a pretrial appeal.

Curry Yes sir.

Blanchard J And indeed its silence and therefore negativity on appeals during the trial or arising from matters that occur during the trial until the trial is over and then you have the full scale appeal if there's been a conviction.

Curry Yes sir, indeed. And in that full scale appeal you can effectively appeal the intrial or pretrial rulings that are not subject to specified rights of appeal.

McGrath J Mr Curry can I just come back, am I right in saying that the really distinguishing feature of this case from Victim X is not that it's a stand alone application because the victim's application was just that in Victim X, but that it is made after the criminal process has been absolutely concluded without any possibility of being revived as the result of an appeal.

Curry Yes that Sir plus applying the well established jurisprudence that it doesn't flow into any criminal consequences.

McGrath J Well I can see that's an extra aspect.

Curry Yes sir.

McGrath J But you are emphasising this is a stand alone application.

Curry Yes sir.

McGrath J I would have thought the Victim X application was a stand alone one and that you're therefore perhaps subject to what this Court might say about Victim X and covered by its discussion but that the distinguishing factor in this case really is that, unlike Victim X, the trial's over and any possibility of any appeal has well gone.

Curry Yes that's a very powerful distinguishing factor. In Victim X because it was an application by a witness relating to suppression, had the possible potential of holding up the whole criminal process.

McGrath J Yes.

Curry Whereas that potential just doesn't arise here.

McGrath J Thank you.

Tipping J Mr Curry, I think you've got a point in your submissions actually which does support the line of thought that Justice Blanchard and I have been putting to you and it's in your paragraph 1.13. Your counsel's notes I'm sorry.

Curry Yes sir.

Tipping J Where you refer to the Comalco case (**Comalco New Zealand Ltd v Television New Zealand Ltd** [1997] 1 NZAR 145 (CA)) where a five judge Court of Appeal said exactly what you've got noted here, the legislative practice is not to graft exceptions onto s.66.

Curry Yes.

Tipping J But to specify in legislation, actually they say to specify in the particular later legislation.

Curry Yes sir.

Tipping J Any limitation to a right of appeal.

Curry Yes sir.

Tipping J You've paraphrased it here quite accurately.

Curry Well I hope so sir.

Tipping J Well you have for present purposes. And that really means that s.66 is only cut down where there is a necessary implication to that effect emanating from particular other legislation. And your argument is if you were to adopt the conceptual thinking that there is no such

necessary implication here because nothing in the Crimes Act could possibly be regarded as cutting back s.66.

Curry Indeed sir.

Tipping J In present circumstances

Curry In the present circumstances, yes.

Tipping J And it's as simple as that.

Curry Yes sir. And that also does happen to sit with the jurisprudence relating to criminal consequences and the policy relating to not having continual interruptions with the criminal business of the Court.

Tipping J In Victim X the argument would be parche the correctness of Victim X, that there was a necessary implication from the Crimes Act that you couldn't appeal what was happening there under s.66 because of the intra trial or pretrial aspect. But that is debatable. I don't know that we have to go there.

Curry Well yes, with respect I consider it very debatable but I didn't think it was necessary to challenge Victim X in this proceeding.

Elias CJ Well I must say that sitting here, it's of some concern when points are, when arguments are put narrowly and they may carry an implication of approval of directions set in earlier cases. And I'm bothered by this civil criminal dichotomy and had thought that probably this Court should look at that issue. Because if the conceptual, you might be right that it's not necessary for you to go so far in your argument, but if the argument is based on an unsatisfactory conceptual framework then I'd be a bit troubled by not looking at it myself.

Curry Well I think the argument can be stated very simply in broad principle, that the law, excuse me, the law should provide a right of appeal. And that right of appeal should only be denied in carefully specified statutory circumstances

Tipping J Either expressly or by necessary implication.

Curry Well yes certainly.

Tipping J You would prefer expressly but I think we'd have to accept necessary.

Curry I would certainly prefer expressly.

Eichelbaum I suppose the opposite point of view is that a right of appeal is not a common law right, it's purely a statutory one. There is no right of appeal unless it's expressly given.

Curry Well perhaps Sir instead of stating it as a right, as a principle of law in civilised society, that there should be a right of appeal, or there should be an appeal relating to circumstances that come before the Court that affect the citizens of any country in a way that could be adverse to them. Clearly de minimis is obviously an exception. But broadly speaking, for a civilised society, I would submit that it's very appropriate that there be at least one level of appeal.

Tipping J Do you have to put it in those rather broad terms. Can you not simply say that s.66 gives it unless it is taken away by some other statutory provision or cut back by some other. You don't have to invoke sort of sociological type considerations do you.

Blanchard J I suppose Mr Curry could say that that underlies s.66.

Tipping J Fair enough. But it's the same result. You've got it by s.66 unless it can be shown that it's been curtailed for the purpose of the present circumstances

Curry Yes sir and that is the thrust of 1.13 as you point out.

Tipping J Yes.

Curry I was simply wanting to engaged His Honour on the larger sort of principle as it were. And I think standing back from that, and obviously going into natural law or any issues of that is not appropriate, but just standing back from it and saying generally in the civilised society, should there be a right of appeal or an appeal, in my submission the answer should be yes as a matter of principle.

McGrath J Well Mr Curry just for my part I can see that if fundamental rights are involved, a right of appeal might be part of that. Indeed the Bill of Rights says as much. But I think that once you've moved beyond rights that can be categorised as fundamental protected human rights, the general position has always been, as Sir Thomas Eichelbaum put it, that a right of appeal is conferred by statute or it doesn't exist. So I'm not sure that this principle really helps us interpret s.66, the more general principle you're articulating really helps interpret s.66.

Elias CJ The question then is the scope of s.66.

McGrath J Yes.

Elias CJ And I suppose what's being flagged with you that there are some concerns as to whether s.66 is wider than some of the earlier case law might suggest.

Curry Yes maam. I certainly understand that. I think it is possible to approach s.66 in the way that I have described initially, which is recognising a distinction going back to 1900 in relation to criminal

matters but that doesn't mean to say that that should exclude the broader application of the section. Because if you just read it in isolation it does state that there's a right of appeal.

Eichelbaum J But if you go back to the history of s.66, the result is that s.66 says as clearly as if the words were incorporated in s.66, this section relates to civil proceedings.

Curry Well there is, as I acknowledged a heading in the Act which certainly allows for that. It's my submission however that if you were just applying a plain meaning interpretation of the section, and I recognise the change between.

Eichelbaum J In isolation.

Curry Between the Acts Interpretation Act and the Acts, and the change that has occurred in relation to the place of headings in interpretation, but you would come to a conclusion that this is a general right of appeal across the board.

Eichelbaum J Well you certainly would if the section stood alone.

Curry Well certainly seeing it within the context of the statute, the significant thing does seem to be the subheading. But apart from that what appears to have been, has happened in New Zealand, is there's been a particular historical focus on the criminal law, the need to allow the Court to get on with its business, perhaps initially without articulating the broad policy reasons for that. And the criminal law has been treated in a different way historically.

Eichelbaum J Mm. I think to persuade me, and I'm not unsympathetic to your argument, but to persuade me I think you'd have to persuade me that this was a civil proceeding.

Curry Well in terms of the civil proceeding aspect, essentially what was set up was a settlement of injunction proceedings and the tapes were placed in the High Court under the argus of the search rules, the criminal search rules. And part of the order provided for any person who wished to access the tapes to apply to the High Court and the High Court would made it, the decision had to be made by a judge. Now in my submission that is clearly a stand alone civil application that is contemplated. There's no possible criminal consequences that flow from that and because the judicature act defines civil proceedings as anything other than criminal proceedings, essentially what flows is the conclusion that it's a stand alone civil application. Giving rise to nothing other than civil consequences but if you follow that divide that you've mentioned, certainly triggering a right of appeal.

Now in the course of the exchange, a number of the points that I have responded on have been covered and I'm anxious that I don't

unnecessarily take the Court's time. If we were to go to the top of page 3. What I'd set out there was the structure of what I was intending to present. And deal in part with the distinction between in and relating to criminal proceedings which is something we haven't particularly touched on.

But under the heading the originating application aspect. I've dealt with that in the course of debate except what's in here is particular reference to the rules. On the civil, not criminal heading it's the substance of the application again. And at page 4, spelling out some factors that in my submission leads to the civil conclusion. And the definition of at 1.7, from the Judicature Act which I have just mentioned to Your Honour in answer.

And in 1.8 I seek to summarise, that is the sena qua non of criminal proceedings. A charge and the threat of penal consequences are conspicuously absent. They were disposed of 20 years ago. The search rules are not intended to deter and punish but regulate access to Court's records by balancing the rights involved on such applications. The only connection to criminal proceedings in my submission in this case is that the video is a record and perhaps I should have record in quotes, but a record of the preliminary hearing.

And I then turn to the origin and the assurances that were given relating to the tape are briefly discussed there. Look at some of the decisions in Mahanga (**R v Mahanga** [2001] 1 NZLR 641 (CA)). Discretion to be exercised judicially. The distinction of in and relating to criminal proceedings. And I make the submission there that if arguendo, the underlying proceedings are criminal, just making that assumption, conviction and sentencing took place 20 years ago, at most Television New Zealand's applications relate to a criminal proceeding. But there is no criminal proceeding for it to be in. It's over and done with.

Eichelbaum J Is the origin of that distinction or supposed distinction the remarks of Justice Richardson in, was a R v B?

Curry He did refer to that.

Eichelbaum J Yes. Is that the origin of it.

Curry No sir.

Eichelbaum J No.

Curry No the origin goes back to English decisions. And it's mentioned I think it's mentioned in both Amand and Montgomery. And essentially the Courts at times seek to draw a distinction as to whether it's in or simply relating to criminal proceedings. But that distinction appears to really have been overtaken by the acceptance of the broader principle

which is that if there are no criminal consequences, then it's not a criminal proceeding

Eichelbaum J There must be other examples of applications in the course of a criminal proceeding though which in themselves do not have any criminal consequences.

Curry Those generally fall into the category of applications. For example it may be a suppression order or a name suppression of a witness that don't have criminal consequences.

Eichelbaum J Mm.

Curry But they fall foul of the policy that the criminal work of the Court should not be unduly interrupted and partly relate to the structure of the Crimes Act which on final appeal, if those issues affect the outcome, they can be argued on an appeal against conviction.

Blanchard J Something affecting the trial could be broadly said to be something with a criminal consequences. Because it impacts on the criminal system of justice.

Curry Yes it certainly could in the sense of creating shall we say a bar to the expeditious handling of the trial. But it's not criminal in the sense of relating to punishment which is the usual consequences that's looked at in terms of what distinguishes a criminal proceeding

Tipping J Take an application that the complainant should be other than screened or one of those rulings you have to make in a sexual case.

Curry Yes sir.

Tipping J Now that would clearly I would have thought be a criminal matter. Although of itself it doesn't lead to criminal consequences but it's so integrally bound up with the criminal process would you accept that that would be so.

Curry Well I would accept that it's a matter that's integrally bound up in terms of in the criminal trial. But if you're applying the test of criminal consequences as being the sena qua non in some ways, which is punishment, well that would be absent.

Tipping J Yes.

Curry And so it seems to me to fit into the policy categories.

Eichelbaum J So in those instances on your arguments, s66 would apply unless excluded in some other way.

Curry Well.

Eichelbaum J That doesn't seem to me to be very sensible.

Curry Well on my argument, on the first basis, it admits of a principle that needs to recognise the policy of expediting the work of criminal Courts. And because of that policy, it's an appropriate exception. And it's not necessarily expressed that way in the decisions of the Courts But if you're looking at it in terms of broad principle, that's the way in my submission it would fall under that analysis.

Eichelbaum J So for that policy reason one would read down s.66. Is that the structure.

Curry That is the structure. And it does also happen to coincide with the historical treatments of the criminal Courts in New Zealand. In England the approach has been rather than that sort of partial historical incremental approach, it appears to have been more forthright in recognising the broad policy that the criminal work should not be interrupted. You could just have endless appeals and criminals wanting to delay for ever and ever. And there must a sensible policy to deal with that. So for example as Lord Hoffman observes in the Montgomery decision, he recognises that as an appropriate policy of the law and a necessary policy.

Tipping J Isn't part of the difficulty if one's going to look at the heading to the part of the Act in which s.66 applies, that the definition of civil proceedings is as it were circular in a sense in that it drives off what are criminal proceedings. And you sort of, you've got an almost perpetual ability in difficult cases for the dog to keep chasing its tail. Because you can't start anywhere because there's no sort of clear delineation of which are which at the margins. I mean that's, I appreciate the force of the argument that s.66 must be interpreted in the context of the whole structure of the judicature act, but that structure in this respect isn't particularly precise.

Curry Well.

Tipping J By this sort of semi-circular way in which you decide what are civil proceedings by having to say, well if this is not a criminal proceeding, this is a civil proceeding, but what's a criminal proceeding for this purpose. I mean it's not easy.

Curry Well it's not spelt out in the Act.

Tipping J No. So isn't possibly an argument, that the best way of reconciling all this is to read s.66 according to its literal terms and only read it down if some other statute expressly or by necessary implication requires such reading down. I don't think that does your argument as to your destination any harm frankly. But.

Curry No it doesn't do my argument any harm. I'm just thinking of the necessity to make proper provision for the criminal law.

Tipping J Yes.

Curry And to avoid the continual interruptions.

Tipping J Well that would be where the necessary implication from the Crimes Act structures.

Curry Yes.

Tipping J Arguably would do the job.

Curry Yes indeed. It spells out, unlike the statutory approach that you've been analysing, the Crimes Act spells out when rights of appeal will be available.

Tipping J In criminal proceedings.

Curry In criminal proceedings. And I suppose you can draw an inference from that or you can apply the expressio unias rule of interpretation saying well, since it's expressed that way, it's setting itself apart, it's only those areas of appeal that are specified that are subject to a right of appeal and that creates an exception of this statute to the broad interpretative basis that would flow from s.66.

Tipping J But what it really does that helps your clients is to delineate by necessary implication what cannot be treated as criminal proceedings, i.e. proceedings that don't in any way come within the pretrial regime, nor are they proceedings for appeal purposes that are susceptible of conviction and sentence appeal. Ergo, for appellate purposes, if they're not thereby restrained, they are within the connotation of s.66. Because they're not necessarily cut, by necessary implication cut back.

Curry Yes sir.

Tipping J I'm sorry, I'm probably not expressing that very well. But I'm struggling to try and made some sort of principle sense of this awkward failure of the legislature to delineate with clarity which are which. And I'd give the benefit of the doubt frankly to s.66.

Curry Sir.

Tipping J As the overriding provision. At least that's my inclination at the moment.

Curry I think that's the right principle.

Elias CJ There's also the fact that under that heading civil proceedings or whatever that subheading is, there are clearly criminal appeals contemplated when the part goes on to consider appeals from inferior Courts. So s.68 makes that quite explicit.

Curry Yes it does.

Tipping J It's an unhappy.

Elias CJ I don't know what the legislative history is because it's been expanded, the terminology, but probably to make it clear the The Crown has a right of appeal under s.68. Or I would have thought arguably under s.67, that's also appeals in criminal as well as civil matters.

Blanchard J We'll have to be a bit quick if we're going to rely on that argument because they're about to repeal s.68.

Elias CJ Oh.

Blanchard J It doesn't diminish the argument though.

Elias CJ No. Yes.

Curry Well out of all of this the opportunity is clearly there for this Court to clarify what is the proper basis for a distinction.

Now I believe what are in these notes really I've already touched on. I make the observation there's no limiting words in the search rules themselves and in principle it's my submission that an appeal should be available.

Elias CJ Yes. Thank you Mr Curry.

10.51 am

Akel Yes may it please the Court.

Elias CJ Yes Mr Akel.

Akel Yes may it please the Court I don't want to shy away from a conceptual argument in any way whatsoever. Those are the arguments that I prefer. I remember once I said to counsel who will remain nameless that I never take any technical points on arguments and his response was, no because you don't know any.

Elias CJ Does that mean you do have all the concepts at your fingertips.

Akel No, no I don't but in my submission this issue of jurisdiction is not one of a conceptual argument and just because it would be I suppose nice if there was a right of appeal in a case such as this, in my submission

doesn't mean that the could should strain legislation beyond its plain and clear intent and interpretation to try and find a course to the Court of Appeal. And if I can go straight to the Judicature Act at tab 2 of my authorities and the heading that's there, civil jurisdiction, is as we know under s.5 of the Interpretation Act which was a change in the law from the acts Interpretation Act of 1924. As I said in my written submission, the Acts Interpretation Act 1924 says that headings are not to be used in any way as part of, as an interpretative indication which is the words now used in s. 5 of the Interpretation Act. And the Interpretation Act says that in looking and interpreting a particular section, we do look at headings.

Now civil jurisdiction in my submission means exactly what it says. It says civil jurisdiction. And that is confirmed by s.64 which then says, transfer of civil proceedings from the High Court to the Court of Appeal if in the circumstances of a civil proceeding pending before the High Court exception etc etc. So clearly if we look at s.64, the starting point is under civil jurisdiction. The legislature is referring to civil proceedings.

Then we go on to a decision of the Court of Appeal, final as regards tribunals of New Zealand. And in my submission the reference there to tribunals must of course be to civil tribunals or tribunals dealing in an administrative way but certainly not criminal.

Then we come to s.66. And then appeals from inferior Courts. And then Your Honour the Chief.

Tipping J It's rather odd isn't it that in a section immediately following the heading civil jurisdiction, they actually refer expressly to a civil proceeding Whereas in the sections two down, they didn't.

Akel Well in my submission that is just making clear that we are dealing with the civil jurisdiction as opposed to the criminal jurisdiction. Then if you look at.

Elias CJ But where's the general civil jurisdiction of the High Court found in the Judicature Act. Because it's not here.

Akel In what I provided?

Elias CJ Well it's not in this Part.

Akel No.

Elias CJ It's earlier isn't it.

Akel Yes it is. Yes.

Elias CJ Have all the powers.

Tipping J Yes, it's about 16 odd I think from memory.

Blanchard J Yes it is 16.

Tipping J 16.

Elias CJ Oh 16, right. Can you just, do you have that in front of you, can you just read it out, to remind me what it says.

Akel No I'm sorry, I don't Your Honour.

Elias CJ No. I'm just about to look it up.

Akel Section 16, jurisdiction of the Court.

Elias CJ The Court shall continue to have all the jurisdiction which it had on the coming into operation of this Act and all judicial jurisdiction which may be necessary to administer the laws of New Zealand.

Akel Yes, yes.

Elias CJ So that's criminal and civil.

Akel Yes. And if we come to 68, again the distinction is made between civil proceedings or criminal proceedings. Now in my submission it's elementary with great respect, that if the Court had wanted s.66, sorry the legislature, had wanted s.66 to refer to criminal appeals, it would have made it clear by the device that they've used in s.68, that is referring to both civil proceedings or criminal proceedings.

Elias CJ Well that's a 1985 amendment substituted for the words any cause according to the legislative history. And of course there's no such expanded meaning in s.67 which one would have thought refers both to civil and criminal proceedings as indeed any cause might have done.

Akel Well if you look then at the next heading under 68 before s.69 you've then got the heading criminal jurisdiction. Now in my submission it would be twisting s.66 too far to turn around and say, in the scheme of this Act, to say s.66 covers criminal jurisdiction when the very next heading or subheading is dealing with criminal jurisdiction. It.

Elias CJ You see, it's interesting subsection 2 of s.69 refers to the jurisdiction of the Court of Appeal in relation to trials at bar.

Akel Yes because that seems to be, the only issue of criminal jurisdiction there is to cover the trial at the bar. Whereas the criminal jurisdiction of the Court of Appeal is set out in other legislation, in the Crimes Act and the Rules that are made with regard to criminal appeals. And I'm sorry if the argument seems so simple and devoid of concepts, but it

just seems to me that, and in my submission, that to turn around and say in that statutory scheme, that s.66 must apply or we can find a way in s.66 to say it extends to criminal appeals, is going against the whole scheme of the.

Tipping J I wouldn't myself suggest it applies to criminal appeals across the board Mr Akel.

Elias CJ No.

Tipping J I don't think anyone's suggesting that. I think it is a question of what assistance you can derive conceptually as to how you delineate what is a criminal proceeding for the purposes of not being covered by s.66. That's more the point. It's not as crude, with respect, as you're suggesting.

Akel Well then you get in, with respect Sir, then you get into a debate of what is then a criminal case and what is a civil case.

Tipping J Well you're saying this is criminal and Mr Curry's saying it's civil. So that just shows how easy it is to get a debate about it.

Akel Well as my friend has acknowledged, all the authorities in New Zealand make the clear distinction between civil and criminal and one doesn't look at, as for example in this case, at the application to search the Court record, you look at the underlying proceeding from which it arose.

Tipping J Well do you? Do you not more sensibly look at the issues at stake?

Akel No, in my submission you look at the underlying proceedings and if we can look with respect at what the Court of Appeal said in Geiringer which is at tab 3 of the cases in my authorities. (**Geiringer** [1977] 1 NZLR 7). And most of the authorities since the Amand decision in the House of Lords make reference to that case. But Dr Geiringer after acquittal applied to the Court for costs. Costs were not granted so he appealed to the Court of Appeal. And the Court of Appeal, the learned President, Justice Richmond, Justices Woodhouse and Cooke, referred to Amand at page 9, line 26.

And at about line 34 the House of Lords accepted the view that in criminal cause or matters, one which involves the possible punishment of a person for an alleged offence by a Court claiming jurisdiction to do so. In the present case the appellant's trial was undoubtedly a criminal proceeding and the question is whether his subsequent application for costs was so closely linked with the trial that it should properly be regarded as a criminal cause or matter. On that question Amand's case gives no help. There are however, earlier English authorities where the meaning of criminal cause or matter has been considered. There is nothing in those cases which would result in a

matter being regarded as civil rather than criminal merely because, although incidental to criminal proceedings, it arises after the accused person is no longer in jeopardy.

And my friend's bullet point was that this case must be a civil case because there was no longer any punishment. But that is not the point with respect. If one looks at the judgments of Lord Wright and Viscount Simon in Amand, what they make clear in that case is one doesn't look at the application that was before the case which was habeas corpus, a write for habeas corpus, and determine whether or not that's criminal or civil. One goes back to the underlying proceedings that gave rise to that and that determines the nature of what the application that arises is about. And in particular reference was made to Lord Esher in Ex Parte Alice Woodhall which is I think the next case in my authorities (**Ex Parte Woodhall** (1888) 20 QBD 832. Supports the contra view, at page 836, Lord Esher expressed the opinion that the words any criminal cause or matter applied to a decision by way of judicial determination of any question.

Elias CJ Sorry where are you now.

Akel Still at page 9 in Geiringer.

Tipping J Isn't the real ratio of Geiringer to be found between lines 20 and 25 on page 9. They're going on to discuss this in deference to Mr Bungay's argument.

Akel Mm.

Tipping J The real is what they say between those lines. Looking at the actual … makes the costs in criminal cases act.

Akel Yes, yes.

Tipping J Well it's a lay down, it's clearly criminal.

Akel Yes.

Tipping J Because of the nature of the application, the criteria to be taken into account, the fact that it's got to be the trial judge prima facie and so on and so forth.

Akel Yes but the point that perhaps I'm struggling to make is that when one determines the nature of the civil criminal divide, one doesn't look at, on the authorities that we've got, one doesn't look at the actual application that is before the Court such as in our case the application to search the Court records. One looks at the underlying proceedings that gave rise to in our case the records that have been searched. And that, it goes without saying, is a criminal proceeding

Eichelbaum J Given that there is high authority to support that, nevertheless I ask you what is actually the basis for holding that. Why should one look at the underlying proceedings and not at the application itself. Particularly where the application is so far removed from the proceedings as in the present case.

Akel Well one can understand the rationale generally for that is so that we can have, as in re Victim X, the smooth running of trials. And we don't have those appeals during the course of trials themselves. But the underlying rationale is perhaps best represented in the most recent English authority which is the House of Lords decision in McCann where they had to consider issues of whether or not evidence could be given at a trial that would be hearsay evidence. If it was a criminal proceeding the hearsay evidence would not be admissible. If it was a civil proceeding then under the exceptions in the civil proceedings it would be admissible. Now I've searched, made some extensive searches to try and look for the difference between the two and one gets back to that very basis of, the basic distinction between civil proceedings and criminal proceedings. Civil proceedings are between citizen and citizen. And a criminal proceeding is where the state's involved in it. It's hard to find any other rationale for that distinction. But when it comes to looking at the rationale for looking at the underlying proceedings it is determining whether or not the issue is one of substantive law or one of procedural law. And in the Amand case for example the issue was one of habeas corpus. That was a procedural writ, not arising from the substantive hearing. I accept I haven't perhaps covered that as clearly as I should have. But what the Court is looking at, it is looking at the differences between substantive law and procedural law that arises out of it. And in some ways as in the Geiringer case, making the distinction between the substantive trial involved, the criminal case involved, and the application for costs which is more in the nature of a procedural application. Admittedly under the appropriate legislation.

Elias CJ Well that's the point isn't it. All these cases that you've cited so far, Geiringer and Woodhall which follows, they turn on the legislation being applied. Geiringer is about the costs in criminal cases act so you can see why that classification has to be made between civil and criminal proceedings for those purposes. And Woodhall similarly was about because the, no I suppose Woodhall is more similar.

Akel Yes. And the point in the McCann decision which is one of the authorities in my friend's case book is, again although in that case the order that was being considered by the Court had all the hallmarks of a criminal order, and I refer to that in detail in the written submission, the House of Lords still said no, it is a criminal hearing. And we get the same dichotomy developing in the proceeds of Crimes Act. Certain parts of it are dealt with in a civil basis. Other parts become criminal.

McGrath J Mr Akel, isn't it really the case looking at Woodhall that the decision proceeded on the basis that the proceedings were still alive in the sense that there were matters after verdict that still had to be dealt with. I mean just looking at the passage on page 9 of Geiringer, the language used of Lord Esher speaks of whatever stage of the proceedings, the question arises. Now it seems to me there's a pretty substantial difference between the sort of situation that Geiringer was dealing with where there's an appeal sought against an application for costs relating to the proceedings. That might be said to be akin to an aspect of appeal rights.

Akel Yes.

McGrath J For which the proceedings continue in existence if you like.

Akel Yes.

McGrath J And a matter that relates solely to obtaining something that happens to be on the Court record. That's where, as a public record is stored, 20 years later or for that matter as I said earlier, even one year later, I mean the proceedings in this case surely are no longer in existence and you can't speak of the stage of the proceedings any more.

Akel Well in Geiringer the proceedings weren't really alive. They had finished, he'd been acquitted and in the Alice Woodhall case, like the Flickinger case, it all arises out of the habeas corpus applications and the proceedings are all alive. And in Flickinger the Court of Appeal referred to, without deciding, saying s.66 may come in aid but it didn't come in aid in that case. There was just a very brief reference to it.

Blanchard J I wonder whether the proper approach should be to look to the underlying procedure in order to get some guidance on what the policy considerations are in the particular application. I have in mind the line of cases which I don't think is referred to here on the classification of judicial review proceedings relating to deportation where there'd been several cases in the Court of Appeal which classify such a proceeding despite its being judicial review, as being a criminal matter because of the implications for appeal rights which the Court thought should be treated as coming within the criminal jurisdiction despite the fact that a civil form of procedure was being used.

Akel Well I think my submission Sir with respect would be that that gets back to my basic point that this is all about statutory interpretation. What does each statute say, as I said before. If one takes the proceeds of Crimes Act, in certain applications it's regarded as civil, other parts of it it's dealt with as criminal. But if we go to the underlying basis for these rules and where these rules are made, under s.409 of the Crimes Act which is at tab 3 of my authorities, that's the very basis for how the rules are made. And it says, they may be made under the judicature act. Rules of Court regulating the practice and procedure in

proceedings under this Act. Now the search rules are made regulating practice and proceedings under the Crimes Act. Now that must be as I say in my submission, that must be conclusive that the proceedings are criminal proceedings. They're proceedings under the Crimes Act.

Elias CJ They're made under the Judicature Act as well aren't they.

Akel Ah, yeah, well it's just for the Rules Committee, that's a reference to s.51C.

Elias CJ I see.

Akel And that's found in the, again I've put the full search rules at tab 1. And into the criminal proceedings amendment rules 2004 which extended the rules to this Court. The reference there is to s.51C. And as I say in my written submission, that's the mechanism. The rules committee is the mechanism for the making of these rules. And it gets back to my basic submission. If one stands back and looks at the statutory scheme of these search rules made under the Crimes Act, regulating procedure under the Crimes Act is a starting point. And then looking at how the Court of Appeal analysed what searches are about, most of them being informal searches and even appeals to High Court judges from decision of the Registrar being dealt with on an informal basis.

Tipping J Could you draw attention to what specific provision in the Crimes Act is invoked to justify the passing of these rules. Is there something.

Elias CJ It must be the regulation making.

Tipping J Regulation making and I wonder whether anything can helpfully come out of that.

Akel Well.

Tipping J There's s.400 and something or other.

Akel I think it's the next one, I think it's 410.

Tipping J 410 is it. How to make regulations for a variety of purposes. Because I mean it's easy enough to say the Crimes Act but the actual source of the power would be or might be, might be of some help.

Akel Well with respect Sir I would have thought that s.409 is the empower.

Tipping J And that's in here somewhere Mr Akel is it.

Akel Section 409?

Tipping J Yes.

Akel Yes sir, I've just been referring to that at tab 3. Sorry.

Tipping J I'm sorry, that's my being behind the play Mr Akel. 409.

Akel At tab 3 sir.

Tipping J Tab 3. The practice and procedure in proceedings.

Elias CJ In proceedings.

Tipping J In proceedings under this Act.

Elias CJ Mr Akel.

Akel The point I was making Sir is this, that it's clear that the search rules are made under s.409. And it's referring to practice and procedures in proceedings under the Crimes Act. Well as I say in the written submission, that must be conclusive that an application under the search rules is a criminal proceeding. Otherwise we, again with great respect, we're starting to try and expand both s.409 and s.66 of the judicature act beyond what is plain on the face of them.

Elias CJ Mr Akel I meant to check this before I came into Court but I now can't recall what rights of search there are in terms of civil proceedings.

Akel Rule 66 of the High Court rules.

Elias CJ Rt.

Akel And there is a similar, I refer to that in the written submission, there's a very similar right of search of Court records.

Elias CJ Under the control of the Judge.

Akel Under control of the Court. And journalists are always making applications.

Elias CJ Yes.

Akel Over the counter, simply to say, can I search a Court file or write a letter to a Judge. And there are a number of cases referred to in McGechan under rule 66. But by and large.

Elias CJ Are the rules exactly comparable.

Akel No not exactly comparable.

Elias CJ No.

Akel But similar. Generally under rule 66 there has been, in the past decisions have been that a party seeking to search a civil record must have a real interest.

Elias CJ Legitimate connection.

Akel A legitimate interest in the. I think the leading authority in that area is a decision of Justice Anderson involving the NBR seeking to search a civil case in the Hamilton Registry, from memory. And I think there've been various cases under these search records but His Honour Justice Eichelbaum's decision in the Philpott case dealing with searches was at the forefront of the move away from what had previously been regarded as the law prior, that is the need to look after or the primary aim to protect the privacy of the files. And His Honour in the Philpott case looked at a much more balanced approach, that is weighing up the competing interests of freedom of expression, administration of justice, privacy issues that was adopted eventually in Justice McGrath's decision on behalf of the Court of Appeal in the Mahanga case. But that's not on the point of jurisdiction.

Elias CJ No.

Akel And I could have also likewise warmed up the Court on some of these facts on consent. I take issue.

McGrath J If you're relying on Philpott you haven't given it to use have you.

Akel No, no I haven't because it's not.

McGrath J Because as I recall it was a ruling during the course of trial, was that.

Akel I can't recall, and I'm not relying on it.

McGrath J No.

Akel I was sort of almost on a tangent.

Eichelbaum J It's flatteringly described as a decision of the Court of Appeal but as Justice McGrath has said, it was in fact given either during or immediately after a trial.

Akel Yes, yes Sir.

Elias CJ Yes thank you.

Akel And again I don't want to laboriously go through my submissions on this issue of jurisdiction. But very much at the basis of the submission is that argument that s.409 must be the starting point, that is where the power is made. That's the reference to proceedings under the Crimes Act.

Blanchard J Mr Akel, are you able to help us with what other instance there are of rules being made in reliance on s.409.

Akel Yes I can Sir.

Blanchard J I think the Supreme Court rules may be an instance.

Akel It might be just helpful if I hand that up. There's very few made. One thing I did do yesterday was actually look at that point. And that's a printout from Adams. Very rules have been made under 409. I think the only rule that has been made from memory is the criminal appeal rules.

Blanchard J Um.

Akel Under 409.

Blanchard J That's the 1946 Rules?

Akel I just handed up the document that's got it there.

Elias CJ Oh sorry, I've got the only one have I? Yes thank you. Just while we're on some loose threads. Where does one find the obligation on the Registrar to maintain Court records. Are they separate for criminal proceedings and civil proceedings. You may not know the answer to that.

Akel No. No I don't know the answer to that and again I tried to look for that, I have to say, this morning. And I also tried to find the rationale for the notes of evidence. Where does that from.

Elias CJ Yes.

Akel And all I could find was the practice note, again, with respect I think delivered by Justice Eichelbaum with regard to how notes of evidence were to be dealt with following the introduction of word processing. I mean it's very hard to find for example the basis, what is the basis of the Crown Book that's referred to in the rules. Where does it all come from.

Elias CJ Mm, mm.

Akel And what seems to be the case on the commentary under rule 409 is that a lot of the practice and procedure's by and large, it's made by the Courts. And what the commentary appears to be saying is that it's developed incrementally from English practice and procedure.

Elias CJ Well that's why I was raising, although as Justice Tipping rightly pointed out I was getting off track. That's why I was raising whether

there was any right of accused in this position to give permission. Because it does seem to me that we've had incremental largely technologically driven changes which have to start somewhere.

Akel Mm.

Elias CJ And whether after all in the District Court now and in a lot of High Court proceedings the proceedings are taped, voice recorded.

Akel Yes, yes.

Elias CJ And whether the same argument could be advanced. And in the High Court of Australia for example, they video tape all their proceedings and I think increasingly in other Courts, whether people before the Courts can object that they really need to be given the opportunity to object to that or whether this is part of the Courts evolving with new technology and to meet changing circumstances

Akel My understanding Your Honour is that it's evolving as you've said to meet changing circumstances The in-court televising circumstances is perhaps the most obvious one and where obviously an accused has a full say in that area. With regard to search of Court records, in this case of course the compromise was reached in the civil proceedings. And that's, if I can just take Your Honours to the **Mafart v Gilbert** case (**Marfart v Gilbert** [1986] 12 NZLR 434 (HC, CA)).

Elias CJ No, sorry, I should say that why I asked about these obligations to record and register is that it does seem to me that that may drive the need to classify proceedings according to whether they're civil or criminal. But it need not mean that the application to view is coloured by or takes it colour from the underlying proceeding. In other words if there are different obligations to maintain the record according to whether they're civil or criminal, that is a reason why you need to understand the different classification but it doesn't of itself mean that any application to view should be regarded as coloured by the underlying proceeding

Akel I can see why Your Honour's coming from but surely the answer to that is that the proceeding is either, the underlying proceeding is either going to be a civil proceeding or a criminal proceeding. And if for example it's a civil proceeding an application is made under rule 66 to inspect the Court record. Whatever that record may be. Whether or not it's a videoed record or whatever. And if it's under the criminal, if it's a criminal case it's going to be under these rules. With respect I can't see why the fact that the record may be, there may be a video or recording of the proceeding should colour that underlying proceeding. And this case is a prime example.

Elias CJ No I'm talking about it colouring the application. Because it does seem to me that if there are comparable powers to search the civil record.

Akel Yes.

Elias CJ And there is not an availability of a restriction on s.66 in relation to a possible appeal against a denial of an opportunity to search the civil record or whatever.

Akel Mm.

Elias CJ I cant see the policy for a distinction in not having an appeal in one circumstance if you have it in another.

Akel Well I don't know if there is a right of appeal under rule 66 of the High Court rules.

Elias CJ Section 66.

Akel No, no that's a bit, it's just a coincidence.

Elias CJ Yes I know.

Akel It's rule 66 of the High Court rules deals with searches of civil proceedings.

Elias CJ Yes but if the outcome is a Court order.

Akel Yes.

Elias CJ Then it seems that s.66 would permit an appeal.

Akel Yes if it is regarded as an order. And of course our Court of Appeal in this case.

Elias CJ Well you say it's administrative

Akel Yes, it is.

Elias CJ And I want to question you about that.

Akel Well I don't with respect consider it administrative in the same sense as a right to visit the Court which I think is referred to in one of the judgments. But it's administrative in its practical application. And that is referred to by all three judges in the Court of Appeal. Invariably these applications are made to the Court by way of a simple letter by a reporter or an oral request. And Justices Chambers and O'Regan refer in their judgment from their experience of them that they are invariably

informal applications. Justice Anderson also refers to that, but perhaps not as forcefully in his judgment.

Tipping J But they're not administrative in the sense that no other party has a legitimate interest in the outcome.

Akel No I accept that sir. That an accused person has a right to be heard, the crown invariably would want to be heard as well. But it's part of that administrative process of control over those records. It doesn't turn the decision invariably into a decision where there should be a right of appeal. Like in my submission the distinction is made between administrative as used in the term of this is controlling the Court records, the functioning of the Courts. It is not controlling a particular procedure that's taken place in the Court case. For example a decision made on whether or not there should be screening or something like that, the screening of witnesses or something like that. It's quite a, as best I recall Justices Chambers and O'Regan refer to it as a low level decision.

Tipping J There's one point Mr Akel, just before we adjourn for morning tea, no one seems to have placed any particular weight on rule 57, sorry rule 2-7 which gives the right of appeal to a Judge from the Registrar if the Registrar deals with the application. It could be argued that that actually by necessary implication, by silence, suggests that there's no appeal from the Judge.

Akel Well I think I did with respect Sir refer to that in my written submission.

Tipping J Well that must be my. I think I didn't say you didn't refer to it. I said put any particular weight on it.

Akel Yes I didn't put any strong emphasis on it. In fact.

Tipping J Well that's the sort of thing one looks for to see whether Parliament is in effect.

Elias CJ It's the Rules Committee.

Tipping J Or the Rules Committee if you like. Alright not quite the level of Parliament. But whether there is an intent shall we say that it stops at the Judge.

Akel Yes.

Tipping J And it could be said, I'm not expressing a view here, it could be said that that rather suggests that if you give an appeal from Registrar to Judge you're not giving a Judge an appeal from Judge to Court of Appeal.

Akel Yes.

Elias CJ I think the Rules Committee might be overreaching itself to give a right of appeal to the Court of Appeal.

Akel Yes.

Elias CJ And the answer to that comes back to the meaning of s.66. But the point that you might like to ponder that I'd like you to think of over the adjournment is this characterisation of any decision that has to be made by a Judge as administrative. It may not be a hugely significant decision compared to some that judges are called upon to exercise. But I find it hard to accept the terminology that it's other than, that it's administrative. It's a judicial determination and if it's a judicial determination then the question is whether s.66 provides an appeal.

Akel Yes can I just before you go.

Elias CJ Yes.

Akel At paragraph 88 of my written submission I did say, as stated, s.409 of the Crimes Act provides for rules to be made regulating practice and procedures under the Crimes Act. It can be assumed the rules committee was conscious of the civil criminal divide and whether there should be appeals to the Court of Appeal under the criminal search rules. I then say, after all the rules committee distinguished in rule 7 between an appeal to a Judge from a Registrar's refusal but provided no such appeal right when consent was given. So.

Tipping J I think it sounds a bit like a lead balloon this idea Mr Akel.

Akel Well it was but I didn't want to go.

Blanchard J Lead balloons of silence.

Elias CJ Alright, we'll take the adjournment thank you, for 15 minutes.

Court adjourns 11.35 am
Court resumes 12.00 pm

Elias CJ Yes thank you.

Akel May it please the Court. The only basis I can see Your Honour with regard to it being an administrative decision must be in rule 2(6). That is an application may be made on an informal basis. And at paragraph 40 the learned president said in his reasons, if a Judge's decision under the search rules is in the nature of an order rather than a merely administrative decision, then it must be either an order in or relating to criminal proceedings or an order in or relating to civil proceedings. If the latter, what is a civil proceeding. I do not think it can be said that

an informal application for leave, say a letter addressed to the Court Registrar, can sensibly be regarded as equivalent to an originating application under part 4 or part 4A of the High Court rules. It certainly falls far short of the prescribed requirements for commencing proceedings under those High Court rules. Nor will there be the context of an existing civil proceeding which might colour the application as an interlocutory application in such a proceeding. And then he says at paragraph 43, because the order made by Simon France J cannot be considered a judgment, decree or order in civil proceedings it must either have the character of a judgment, decree or order in criminal proceedings or the character of a purely administrative decision. It is unnecessary to decide which of those alternatives is more appropriate because an appeal to this could will not lie in either case.

And in their joint reasons Justices Chambers and O'Regan again refer to the nature of the informal application at paragraph 50. On a normal application to search a criminal file neither the Registrar nor the High Court judge on appeal is required to consult either the defendant or the crown before making a decision as to whether to allow access. The fact that in this case Justice Greig imposed notice requirements on any subsequent search of the file does not alter the essential nature of the record keeping regime. Certainly Greig J's order cannot create a right of appeal to this Court if one does not genuinely exist.

And then at 52, in our view as well it is irrelevant how the application for search is made. Rule 2(6) of the rules makes it clear that an application for leave to search may be made on an informal basis. As we know from our High Court experience, appeals under subclause (7) are also almost invariably made on an informal basis. It does not matter what form of search application is used. Adopting a more formal process does not convert the nature of the process into something different. A decision made on a formal application is no different from a decision made on an informal one. We respectfully disagree with the president when he suggests that in some circumstances a disaffected applicant could bring an application under Part 4A. The High Court rules govern the practice and procedure of the High Court only in civil proceedings and this is not a civil proceeding.

So in my submission the basis for the reference to it being an administrative decision must only be on the basis that an informal application can be made. And if Justices Chambers and O'Regan are correct, and there's no reason to query what takes place in their experience in practice, even appeals are dealt with on an informal application.

Elias CJ From the Registrar.

Akel From the Registrar.

Elias CJ Yep.

Akel And sometimes in practice applications are actually made by journalists to search an exhibit or see an exhibit during the course of a trial itself. And that application must be implicitly under the search rules. I cant find any other rules or regulations governing procedure where it says an application can be made on an informal basis. And if one really sits back and considers it, the rules apply to both the Court of Appeal and to this Court. And one, it would be hard to imagine that if the Court of Appeal declined an application by simple letter then set to the Registrar or even after a hearing, that there would be a right of appeal to Court. And clearly there's no right of appeal if something's declined by this Court. The whole, it starts to stretch it if one looks at what these rules are about. They're not regulations. They're I suppose the next rung down. They're rules governing how does one get to have a look at Court files. And the rules committee has purposely laid it down that this is going to be a civil procedure. And it's in the nature of looking at that underlying proceeding that is being searched. That is the criminal proceeding.

Tipping J Can you help me with a point that I think the Chief Justice raised just before the adjournment? Could there be any logical or policy justification for an appeal existing in a civil case and not in a criminal, using those terms in the sense that there is that dichotomy. I mean I cant at the moment see how that could have been the outcome of any rational approach to the law.

Akel I with respect agree with Your Honour that it is hard to say why there should not be an appeal right but.

Tipping J No, no, not an appeal right per se.

Akel Per se.

Tipping J In one and not in the other.

Akel In one and not the other on policy basis. And one would turn around and say, well is there some force in my friend's submission that when you have issues raised in these cases that do affect people's privacy, reputation, other issues involved, should the concept, you know, it's hard to see conceptually why there shouldn't be an appeal. But that doesn't mean to say that because there should be an appeal, you have to search and twist certain sections or the scheme of certain Acts to give that right of appeal. The correct approach is what the legislature has done. It has said, alright, if there is an anomaly, it has given rights of appeal as referred to in re Victim X, they gave rights of appeal after Flickinger on habeas corpus applications. And there are various examples of s.389 being amended to give rights of appeal. And conceptually one can understand why there shouldn't be rights of

appeal during a trial on some point if there is a right of appeal after the trial is completed.

Tipping J You see the thought came back into my mind when you were understandably emphasising so strongly this informality point. It's a point that applies across the board. It's not just peculiar to civil searching is it, sorry criminal searching.

Akel To criminal searching?

Tipping J You're equally entitled to apply under the civil search, under rule 66.

Akel Yes, yes.

Tipping J Aren't you, in an informal manner.

Akel Yes, yes and it's often done on that basis.

Tipping J Yes.

Akel Often it's.

Tipping J It's very convenient. You don't have to have a formal application, don't have to pay a fee presumably.

Akel Yes.

Elias CJ I wouldn't be sure about that.

Tipping J What, the fee?

Elias CJ Pretty assiduous.

Tipping J Never mind the fee dig, on my part I mean.

Akel But again there may well be policy reasons and may be anomalies that are there. But if the, that cant, because of that anomaly, one can't then turn round and say that there is an appeal despite the clear wording of the statutes that create the search rules. That is, it's a criminal case, ah, searching under the Crimes Act. And then.

Tipping J Why does a search that's authorised by the Crimes Act necessarily have to be a criminal proceeding Why can't the authorisation by under the Crimes Act just for convenience but the underlying step that is authorised is a civil one. I don't quite take the immediate synthesis that you're making that because it's authorised under the Crimes Act it has to be criminal.

Akel Well. With respect Sir, the only response that I can give to that is that s.409(1) specifically refers to regulating the practice and procedure in

proceedings under the Crimes Act. And the Crimes Act, it's regulating practice and procedure under that Act. By it's very nature it must be a criminal practice and procedure.

Tipping J It's a fair response Mr Akel.

Akel Well I cant expand on it.

Tipping J You can't put it any stronger than that.

Akel I cant put it any stronger than that sir.

Tipping J No.

Akel And in response to Justice Blanchard I wasn't able to find too many other rules. In fact they are listed in the printout from Adams, dealing with that. But as I say in my written submission, that must be conclusive in my view that it's a criminal proceeding.

Tipping J Well what I think is niggling away at me, and I'd better put it on the table, is that I have difficulty seeing that the search rules are actually specifically within the compass of the enabling statutes.

Akel Well that was dealt with by Justice Gault in his Marfart and Prieur case which is in my friend's bundle. But Mr Amery representing himself in the three cases, submitted before Justice Gault I think that the submissions were, sorry, that the rules were ultra vires. And didn't fall within. Justice Gault found in his decision that they were intra vires. And if I can, tab 27, the head note simply reads, the criminal proceedings rules were clearly authorised by s.409 of the Crimes Act which provide for the making of rules in relation to proceedings under that Act. And such proceedings encompass preliminary hearings in the District Court. Now at page 757 line 36.

Tipping J 757?

Akel Line 36.

Tipping J Thank you.

Akel His Honour says, I record that I am satisfied that the rules clearly are authorised by s.409. That section refers to the making of rules in the same manner as under the Judicature Act. That Act provides for the making of rules for the High Court proceedings by the Rules Committee. It does not follow from that that rules made under s.409 of the Crimes Act must be confined, as the applicant submitted, to proceedings in the High Court.

Tipping J Well that's not the point.

Akel That's not quite the point. No not quite.

McGrath J Where are you at Mr Akel. Sorry, is it 757 was it.

Akel 757 sir.

McGrath J And line 26 did you say.

Akel 36 sir.

McGrath J Sorry, thank you.

Akel And s.409, so no, it might not cover that point.

Tipping J I like the submission recorded at 45. That seems to be a really penetrating observation by the applicant. Sorry Mr Akel. I'm just being distracted.

Akel Well one of the cases in my bundle in Vickery (**Vickery v Nova Scotia Supreme Court** (1991) 64 CCC (3rd) 65) which is dealing with a substantive issue, does cover the history of the different approaches between the US and English jurisdiction with regard to the common law right to search. And in the US they do.

Tipping J Don't distract yourself on that.

Akel I won't, yes.

Tipping J Yes thank you. Well, to be fair, and I think I have to say this, Justice Gault and he even recognises, didn't deal with the precise matter that I'm concerned about as to whether they're actually within the enabling words. As to whether it's. But.

Akel Well.

Tipping J I don't know where that leads us but frankly it is a point that's just niggling.

Akel I certainly don't want it to go anywhere because otherwise there's going to be a concern from the media's point of view.

Tipping J Yes I thought you might say that.

Akel Yeah, I won't say it any more. But that is the closest.

Tipping J But it would then be back to inherent jurisdiction if the worse came to the worst. I mean there's no real.

Akel Yes, yes.

Tipping J Problem.

Akel Yes. But the only other point that I can make that I perhaps haven't covered in the debate so far is my friend has raised in his submission that s.66 should receive a interpretation favourable to his cause on the basis of s.6 of the New Zealand Bill of Rights. And as I say in my written submission, that would in fact, you cant have a interpretation using section 6 that would be consistent with my friend's position because it would render the reference to civil jurisdiction, that subheading, totally meaningless. And the second point that I make is that, well what rights are actually engaged in this case. Because the only right that can be referred to is a right of appeal following conviction. That's in s.25. There's no other right that could possibly be engaged in this case. I've referred in the submission to perhaps s.27 of the Bill of Rights coming into play, that is the right to judicial review. But I've annexed to our authorities the white paper, Sir Geoffrey Palmer's white paper or Hon. Geoffrey Palmer's white paper on the Bill of Rights and certainly the suggestion there is that s.27 of the Bill of Rights is saying that judicial review of administrative tribunals and not from High Court decisions. But my basis point is that to try and force section 66 of the judicature act would mean that we're totally ignoring that subheading in the Act.

And the Act's been subject to, as her honour the Chief Justice said, the Act has been subject to review and amendment at all times. And one would have thought that the rules committee or the legislature would have conscious of the s.66 argument that has been raised now for over 100 years since **Re Bouvy** (**Bouvy (No.3) Ex Parte** (1900) 18 NZLR 608) would have been conscious of that and would have, if it wanted to say s.66 covers hybrid cases or criminal cases where there are no other rights of appeal, it would have said so. But it's deliberately not said so. And those cases, there's one a decade, important ones every decade on them. There's R v B, there's Flickinger, there's re Victim X. They're all listed in one of the footnotes in my written submission. And our Court of Appeal has consistently said and the learned President Justice Cooke in the Clark case, has given the history of what it's about.

So if this Court was to, with respect, say no, s.6 now does cover a case such as this, then it would certainly be a change from that legislative and judicial approach. Which of course the Court is with respect entirely entitled to do. My submission in my paper is that that change is best left to the Rules Committee if there should be a change.

There's one minor amendment in my written submission or one typo that I would ask Your Honour's to correct. It's at paragraph 48 at the top of page 15. I say the common law develops the substantive law. The Courts themselves, and it should be, and their appeal procedures, are created by legislation.

So I'm sorry if I haven't engaged the Court in a conceptual argument. As much as I would like to. But again, my submission is one that it's just unfortunately straight statutory interpretation. And that there is no jurisdiction. Unless I can help Your Honour's further I'll sit down at this point.

12.21 pm

Elias CJ Yes. Thank you. Thank you Mr Akel. Do you want to be heard in reply on this Mr Curry.

Curry Well briefly maam. Perhaps I could just broadly say, referring to Lord Hopman in the Montgomery case, this is in the bundle of the documents, of the appellants' bundle tab 16. And it's at paragraph 19 of his judgment. And these words do with respect seem to be very apt except for the change in the name of counsel. But I would not accept what I regard as the extreme proposition of Mr Arnhem Jones that the nature of the proceedings in which the original order was made will necessarily determine whether the machinery of enforcement through the Courts is a criminal cause or matter.

And in respect of my friend's submissions relating to various English authorities, there has been a tendency with respect to not apply them in the context of those authorities. For example he mentioned Amand and Woodhall. Certainly both there habeas corpus proceedings. But in Amand the underlying basis was in fact criminal. It was during, it was war time and there was absentee without leave under various provisions of an Army Act. And in Woodhall there was again a direct relationship to criminal proceedings. It was a fugitive, a criminal fugitive and the habeas corpus proceedings were taken against that background.

Now in order to prepare for the hearing we had actually prepared reply argument to my friend's submissions. And I don't wish to take the Court's time by going.

Elias CJ On jurisdiction.

Curry Substantially on jurisdiction. This document goes beyond jurisdiction.

Elias CJ Ah well, so it's I think always helpful if when submissions are exchanged in advance, if counsel would reply in the course of their oral presentation because then you don't have to have a separate round as it were in case something is contained in your submissions which your friend hasn't had an opportunity to comment on. But carry on. What are you trying to raise with us now.

Curry All I was intending to do was to say that essentially the reply on behalf of the appellants is contained in this document. And I could take the Court through it orally but it would seem to me.

Elias CJ Well I think you'd better do that.

Akel I might just add that I haven't seen this document before and I don't want to … right of reply.

Elias CJ Is there anything additional that we haven't covered Mr Curry.

Curry There is nothing of substance.

Elias CJ I'm sorry, I don't think we need to see the written submissions. I've asked Mr Curry to identify whether there's anything additional.

Curry There's nothing of what you might call additional substance. It's dealing with for example cases like Geiringer pointing out the true context of the Geiringer case. It's dealing with the four cases that my friend referred to in his written submission that were not referred to in the appellants' submissions and it seeks to put those in context. But essentially the reply reaches, so it all fits into the same basic sena qua non of what is a criminal proceeding and it makes the observation that what my friend has at times confused is form over substance. And it also deals with the thrust of my friend's submissions concerning rule 409 of the Act. That's the Crimes Act and what he submits as the consequences that flow from that.

Elias CJ Well is there anything that you haven't covered with us that you had proposed to respond to in reply.

Curry Well in substance, what I mentioned just now are the areas. There are particular matters, for example under rule 409 I draw attention to subsection 2 of that rule, of that provision and point out the broader consequences that flows from that.

Elias CJ Can you simply respond to the argument we've had. Ws there anything in the argument that you want to respond to. Or is this in response to the written argument.

Curry This was in response to the written argument which has partially been presented today in oral form as well.

Elias CJ Right well is there anything additional that you need to raise with us.

Curry Well I would refer, in dealing with my friend's submissions concerned s.409 of the Crimes Act. The conclusion that he seeks to draw with respect doesn't follow. And I particularly refer to subs 2 which provides, until such rules are made, and so far as they do not extend the existing practice and procedure of the High Court and the Court of Appeal, remain and are in force in those Courts as far as they are not altered by or inconsistent with the provisions of this Act. And

consequently submit that originating application provisions may apply alongside the rules made pursuant to s.409.

Tipping J You mean you can do it formally.

Curry Can do it formally. Can do it informally.

Tipping J Is that the simple way of making the point.

Curry It's a simple way of making that part of the point Sir, yes.

Tipping J And what's the other part of the point. Because at the moment I'm afraid I'm not getting it.

Curry Well the substantial part of the point is that merely because the rules are made under that section it does not mean that an application pursuant to those rules is characterised as a criminal application.

Tipping J That's Lord Hoffman in action.

Curry That's Lord Hoffman in action and in my submission it also flows from the provisions arising from that section.

So Your Honour in coming to grips with your very direct question, I do accept that essentially what it is in here has been covered in our submissions, it's not of a character that is substantively different. It simply takes my friend's submissions and provides a particular analysed approach to those submissions.

Elias CJ Well I think we can't take that in at this stage Mr Curry unless there's anything new in it. Because you'd have to have an opportunity to respond to it. So if there's nothing additional that you need to bring to our attention, which we would of course let Mr Akel comment on if it is new, then I think that's probably it.

Curry Thank you maam. On that basis I won't delay the Court any longer.

Elias CJ Thank you.

Curry Well perhaps you could just take this little explanation. I hadn't understood that that was the practice of the Court. I thought matters of reply needed to be kept for reply. And so that's why I prepared it on that basis.

Elias CJ Yes thank you. Alright. Well, yes, we think that without prejudice to the conclusion we'll reach because we think there are some quite significant points that have been raised, we had better proceed to hear the next part of the argument in the same way. Mr Curry, that is the leap frog suggestion.

Curry Yes indeed. Yes.

Elias CJ Whether we should entertain this by way of leap frog. So we'd like you both to address that at this stage before we decide whether we need to embark on hearing again without prejudice. Because it all hangs on the jurisdictional point, the merits.

Curry Yes indeed. I do again have some counsel's notes and I seek to tender those.

Elias CJ Yes thank you. And perhaps you would also in the course of your oral submission deal with any points that you had thought to make in reply this time round.

Curry Indeed maam.

Elias CJ Thank you.

Curry There are none. The background to this was the minute from the Court indicating that counsel should be ready to make an oral application.

Blanchard J Well there was a jurisdictional problem.

Curry Indeed Sir. And so this is the response to that minute. And hopefully to the jurisdictional problem. I do seek leave on behalf of the appellants to make a direct appeal from the High Court pursuant to s.14 of the SC Act. The Court's already determined that this appeal gives rise to issues of public or general importance. The exceptional circumstances which in my submission satisfy s.14 include that the appeal involves relations between France and New Zealand, relates to a significant episode in New Zealand history of which 2005 marks the 20th anniversary, poses an issue as to whether an assurance given by a New Zealand judge to two officers of the French army should be honoured or at least weighed by the Courts of New Zealand, give rise in an unprecedented way to the balance to be struck between privacy, freedom of expression and open justice, engages New Zealand's obligations under the International Convention on Civil and Political Rights and the way in which those obligations are given effect under the New Zealand Bill of Rights Act 1990, is the first time an appeal under the search rules has come before the Supreme Court..

Blanchard J That last point might be a good reason for not granting a leap frog appeal.

Curry I may well be sir.

Blanchard J And having the matter go the distance through the Court of Appeal.

Curry It may well be Sir except I make the observation in the final paragraph that to date the highest appellate decisions on the search rules are

Mahanga and Jackson (**Jackson v CanWest TVWorks Limited** [2005] NZAR 499 (CA)). In both cases the Court of Appeal dealt with the merits of the case but left the issue of its jurisdiction undetermined.

Tipping J I'm sorry but I don't quite follow how that point helps.

Curry It just, all I'm seeking to do is to put it in context of essentially the decisions that have been made to date.

Blanchard J But that's a pretty good reason why the Court of Appeal should undertake the task of first appellate review and coming to a decision.

Curry Well Sir I accept the thrust of what you're saying. On the other hand, there's a pragmatic underlying basis that we are before the Supreme Court. The opportunity is there and given the circumstances both because of the prior history of the way the Court of Appeal has dealt with the jurisdiction and the opportunity that flows before the Supreme Court on these proceedings, all of the factors that I've sought to mention in 2.2, certainly from A through to E, would support in my submission exceptional circumstances

Tipping J The exceptional circumstances A through E, I have difficulty seeing why they are exceptional in the leapfrog context as opposed to perhaps generally exceptional. Do you understand what I mean.

Curry Yes I do, I do sir, yes.

Tipping J Are you able to assist.

Curry Well only in this regard sir, that given those matters, it would be one expeditious and very appropriate in my submission for the highest Court in New Zealand to deal with the appeal rather than have a referral back and who knows what consequences might flow from that.

Tipping J I would have thought with respect that perhaps the best point you've got, which is not really directly articulated here, is that the fact of the Court of Appeal having declined jurisdiction and the necessity for it to come to this Court in order to clarify that matter, and this is on the assumption that we clarify it in your favour, is sufficiently exceptional to justify us tagging on if you like the merits rather than putting the parties to the expense of going right round the circle again.

Curry Yes sir.

Tipping J I'm slightly surprised not to see that point. Because it's that, it seems to me, a starting toward getting towards an exceptional situation, the fact that the Court of Appeal has declined jurisdiction where ex hypothesis they should have accepted jurisdiction.

Curry Indeed sir. I sought to try and encapsulate that in the words pragmatic and given the expedition that is now available.

Tipping J Well I'm afraid it was just a little too coded for me Mr Curry. Being a Judge with a simple mind who likes to call a spade a spade.

Curry Indeed sir. And there should have been spades listed in 2.2.

Tipping J Right.

Curry And it's not.

Tipping J But you adopt that proposition to the extent.

Curry Yes, as an additional point sir.

Tipping J Yes, yes. I'm not saying whether it's a good point or a bad point. It just seems to me that it's a good one from your client's point of view.

Curry So unless I can assist the Court further.

Eichelbaum J Expedition to use your word, I can understand Mr Curry. Appropriate I have a bit more difficulty with. The profession among others was very much in favour of an additional right of appeal within New Zealand. I would have thought that to be quite good grounds for short circuiting one of the three steps.

Curry Yes indeed. And the language clearly that I have to satisfy is the language of, I'm just trying to, the exceptional circumstances

Eichelbaum J Exceptional, yeah.

Curry And if the factors that I've mentioned don't amount to exceptional circumstances including the pragmatic and expeditious position we're in, well I accept that I won't succeed on this application.

Blanchard J Is it going to become an exceptional circumstance every time a jurisdictional question intervenes in a case and has to be resolved in this Court.

Curry No not in every circumstance in my submission.

Blanchard J Well why is this any different from any other.

Curry Because of the other factors that I've listed in 2.2

Eichelbaum J Well it's a very important case but cases that come into this Court really by definition are going to be of that character.

Curry Indeed sir.

Eichelbaum J I think there's a danger that we could be seduced by the fact that you were here and ready to argue the point. But I just wonder for myself whether that's enough.

Curry Well I hope my arguments are not too seductive sir.

Tipping J I thought you'd hope that they were.

McGrath J I suppose Mr Curry your concern in relation to the jurisdictional point might be that it's not easy to conceive when a case under the search rules, which after all involve access to public records, otherwise would be getting here. Because nearly always such cases would simply be concerned at first instance with an appeal against the exercise of the discretion. And it's perhaps not very often that a second appeal would actually arise. So this may be the opportunity, an exceptional opportunity for this Court to consider matters which have never been the subject of a considered decision on jurisdiction at this level.

Curry Yes indeed Sir. The opportunity is there to provide precedent direction to the Courts and to administrators on rules that have become very important because of the advent of recording film in Courts and the added media access to Courts and there is a need in my submission for a well considered judgment of this Court.

Tipping J Just one other point Mr Curry that perhaps has to be considered. You say in your paragraph 2.2 that we've already determined that the appeal gives rise to issues of general or public, public or general importance. Well that I think relates to the jurisdiction of the Court of Appeal point. And you have to show that there is both exceptional circumstances to justify leap frog and that the leap frog issue is a matter of general or public importance. Now it wouldn't ordinarily be, would it, in the Supreme Court if the Court of Appeal had correctly applied the principles and so.

Curry The jurisdictional issue wouldn't arise? Is that what?

Tipping J I'm just saying that what got you into this Court in the first case was the jurisdictional point.

Curry Yes sir.

Tipping J But for a leap frog you need both a leap frog exceptional circumstances and a qualifying issue.

Curry Yes indeed sir.

Tipping J And the second of those could be arguable in this case. In that we are simply reviewing a discretion of a High Court Judge or if there was an interposed appeal, the discretion of the Court of Appeal or its review of

a discretion of the High Court Judge. And ordinarily that wouldn't be a Supreme Court point at all.

Curry Well you say ordinarily Sir. That may well be the case. But these aren't ordinary circumstances when one considers essentially what has led to this position. And significant amongst those is what occurred in the dc. A New Zealand Judge no doubt well intentioned and certainly endeavouring to conduct a hearing of international focus that was unprecedented for New Zealand.

Tipping J But what is the harm in us sending it back to the Court of Appeal, following what you might call the sort of conventional approach in a situation of this kind. Or can you point to any serious harm that might revolve out of that.

Curry I can't point to harm in the way that word is normally used. I can however stretch it by saying, if the opportunity were not taken to deal with this expeditiously as the Court now has, these issues would continue to fester. There wouldn't be the certainty that seems to me to be appropriate and it would take additional time before there could be that certainty.

Elias CJ Well we sent back the other day, oh no we haven't yet. Cases arise where the Court or the Court of Appeal because, of a view it's taken, hasn't reached a subsidiary argument or a secondary argument. And in those cases this Court would normally not itself countenance leap frog appeal because the issue may not raise a matter of general and public importance when dealt with by the Court of Appeal or on its face and it may not warrant a leap frog appeal. It's difficult to see from the factors that you have isolated here, if you are not attacking the approach adopted by the Court of Appeal previously in cases like Mahanga, it's difficult to see that there's a matter of such importance as would justify a leap frog appeal so that this Court doesn't have the benefit of the determination of the Court of Appeal.

Curry Well I certainly hear what you say maam. To that I can simply say it's difficult to conceive of what would satisfy all those requirements if this particular case doesn't.

Elias CJ Well there's no huge urgency here, is there. I mean it's 20 years on. That might be a circumstance that would justify this Court in saying, we must move on and put an end to this.

Curry Yes indeed. The only urgency is asserted by TVNZ because they want to market a documentary.

Elias CJ Well we'll hear from Mr Akel on that.

Curry I'm tempted to respond with various shall we say exaggerated expansion of what's here but they would not be credible.

Elias CJ Well what you're saying here is that this is a unique case. Well if that's so then does it raise a matter of general or public importance.

Curry Well some of the issues that need to be focused on as to whether, in an application of this nature, a judicial assurance which was given needs to be weighed and indeed even whether it needs to be honoured.

Blanchard J It came out of circumstances that are hardly likely ever to be repeated. It's a unique circumstance.

Curry The facts giving rise to the circumstance are unique. But the circumstances of a Judge giving such an assurance in my submission is a matter of public importance as to how it's dealt with.

Elias CJ But that was on one view overtaken by the solution which the parties agreed to, which was that this would become part of the Court record. So while it may be a consideration that would be taken into account in exercising the discretion, it cant be determinative. And you don't contend that it should be.

Curry I don't contend that it should be in terms of meaning there can never be any access to the file. But I would certainly press the point that it would be determinative in respect of an application by a television medium to broadcast the entry of the pleas world-wide.

Eichelbaum J Can you just help me on that same point because it's been concerning me too. At what precise point of the committal proceedings was that assurance given.

Curry It was on the 4th of November at about, I'm just trying to … the time in the morning. The committal proceedings were to start at 10. There was a conference with His Honour prior to those proceedings.

Eichelbaum J Yes.

Curry The matters that were dealt with at conference extended over a long period of time.

Eichelbaum J Mm.

Curry The Court sat at about half an hour late, about 10.30 and the assurance came about on my recollection, it would probably be somewhere a little before 10. I don't know that I can pinpoint it time wise better than that.

Eichelbaum J Yes. Well it wasn't the time but it was the, I'm sorry I used that word. But it was the stage really. But it was immediately before the committal.

Curry Yes sir. Yes.

Eichelbaum J And the occasion for that being given, did counsel learn at that meeting or conference, consultation, whatever it was, did counsel then learn that instead of the transmission being by closed circuit television

Curry Closed circuit.

Eichelbaum J It was going to be videoed.

Curry Yes sir. The previous agenda and what occurred at a meeting on 1 October.

Eichelbaum J Yes.

Curry And the agenda was focused on closed circuit tv.

Eichelbaum J Quite. Now you've said in your submissions, or in fact you said earlier today, that the appellants did not consent to the video process and would not have done so.

Curry Certainly consented to the closed circuit video.

Eichelbaum J Yes, yes, I understand that.

Curry But not to be taking on the permanent video film record of that.

Eichelbaum J Well I don't quite understand having now got the sequence of events because the committal then proceeded shortly after this meeting on the basis that it would be videoed and not, it would be taped and not merely transmitted.

Curry No, it proceeded on the basis as the Judge had arranged it. So he had arranged for closed circuit television.

Eichelbaum J Yes.

Curry To primarily accommodate journalists.

Eichelbaum J Yes.

Curry But also partly for security reasons.

Eichelbaum J Yes.

Curry And he had also arranged and he'd issued an order on 30 October which was never served.

Eichelbaum J No.

Curry On the appellants that there actually be a video recording of the proceedings.

Eichelbaum J Yes.

Curry And it was only on the morning.

Eichelbaum J That became apparent during this meeting that you've been telling us about.

Curry Yes and the context of it becoming apparent was because His Honour had given permission for sketches to be taken in Court. And my instructions were to raise that with him because of the concern.

Eichelbaum J Mm.

Curry And it was in that connection.

Eichelbaum J Mm.

Curry And if I can just be permitted to get my, I'm not sure whether it was because of my body language or whether it was that I said something.

Eichelbaum J Yes. Well anyway it came out. I don't want to draw you into byways.

Curry Yes.

Eichelbaum J It came out at this meeting.

Curry Yes.

Eichelbaum J And that's the basis on which shortly afterwards the committal proceeded. What I'm puzzled about is your contention earlier today that it proceeded without the appellants' consent.

Curry No, the appellants' consent was closed circuit television. When it became apparent that there was also a video photographic record of it.

Eichelbaum J Yes.

Curry I was very surprised.

Eichelbaum J Yes.

Curry I certainly did not consent. And what happened was, and as I say I'm not sure whether it was in response to my body language or whether I actually started to say something, His Honour gave the assurance.

Eichelbaum J Yes.

Curry And the assurance that I relied on is recorded in the judgment of Justice Sinclair.

Eichelbaum J Yes, yes.

Curry Which is essentially.

Eichelbaum J Yes I understand that. Yes.

Curry So that's the context of it.

Eichelbaum J Yeah. Yes thank you.

Elias CJ Yes thank you Mr Curry. Yes Mr Akel.

12.55 pm

Akel Yes.

Elias CJ You may not get very far, if you want to, it's nearly 1, but.

Akel I'll be pretty quick.

Elias CJ Yes thank you.

Akel Just on this issue of consent which Justice Eichelbaum with respect has raised and my friend said that consent was not given. Now in this particular application under the search rules, no evidence whatsoever has been given on behalf of the appellants in any way whatsoever. And with the greatest of respect to my friend, he of course gave evidence in the proceedings Marfart and Gilbert. That was the judicial review proceedings. And at page 441 at lines, of the Marfart and Gilbert proceedings, that's at tab 7, Justice Sinclair records this. In view of the conflict which exists at the moment between Mr Curry and the Judge as to the extent of the consent given for the filming of the proceedings, it is not competent at this stage to resolve that conflict. Now I was going to take issue with my friend's comments about consent. But of course the proceedings then were settled. And the settlement is Justice Greig's order. And so that's throughout the theme of my submissions I say, all the previous history is irrelevant and the appellants cant attempt to relitigate the judicial review proceedings in this one here. Because that would have been one of the conflicts that would have been no doubt resolved if the judicial review proceedings had run its course.

Blanchard J Well the more extraordinary it gets the less general importance there is.

Akel Yes. Well yes Sir. I can understand.

Blanchard J There's no precedent value.

Akel Well there is no precedent value. But I've taken, again I hate to say it, the incredibly pragmatic approach in this case that if this Court was to find that there was jurisdiction in the Court of Appeal, I'd be back before the Court of Appeal. Then there'd be no doubt I'd have to deal with an application for leave. And the Court may well say, yes, because of certain issues, we do want to hear it. So I'm right back here maybe six to 12 months down the track. Now the only argument I can put fwd on hardship is that at this stage the respondent has a High Court judgment in its favour which was delivered on 23 May 2005. Almost six months ago. There's been a stay in place since then and rightly so, considering. But the reality simply is this, is that with that stay in place the principled argument that one puts forward is that TVNZ's and the New Zealand public's freedom of expression rights under s.14 have been delayed to such an extent and may well be delayed for perhaps another 12 months.

Blanchard J Well if that is so, it will have been because you've taken a jurisdictional point. And ultimately been unsuccessful with it.

Akel Well.

Blanchard J Which was open to you. I'm not being critical.

Akel But the jurisdictional point has been flagged by the Court of Appeal in Mahanga and then in CanWest and also. And so I applied for a priority fixture in the Court of Appeal not just on the jurisdictional point, and I have, I can provide a copy of my application to the Court, … on the basis that this was just further delay going on. The Court of Appeal then said, the learned president then said, as jurisdiction is an issue, we will hear the jurisdictional point. But I was pressing, although I did say in my application clearly there is an issue of jurisdiction, but I was pressing to get the whole thing heard as quickly as I can because I appreciated that if the Court of Appeal turned around and said well there is jurisdiction, then I'm still going to have to wait another six months to get the substantive thing heard. Now so the hardship that I say is in fact on TVNZ whose judgment has been declined for six months and may well be, if this Court decides that the Court of Appeal did have jurisdiction, is it's going to be another 12 months before we get any resolution of it. So that would be the hardship point that I would put forward.

McGrath J Can I just get a bit more clarification. The Court of Appeal President intervened and said that the Court wanted the question of jurisdiction argued first.

Akel Yes.

Elias CJ It was in Miscellaneous Motions wasn't it. It was in, yes.

McGrath J Well I was wondering. That was my question. I didn't know it was a Miscellaneous Motion.

Akel It was heard as a miscellaneous, yes.

McGrath J How did that proceed, did they just put you into the monthly list.

Akel Ah yes, it was, I've got the papers. On 30 May this year I filed a memo for the Court seeking a priority fixture. I went through the background, the date.

Blanchard J Was that hinging on the fact that the 20th anniversary was coming up.

Akel That's exactly it. I was.

Blanchard J And that's now come and gone.

Akel That's now come and gone so TVNZ was very keen. I then said, I then said, the issues that are raised are whether or not His Honour exercised his discretion. I did then say at paragraph, I said whether or not the learned Judge gave insufficient weight or excessive weight to various factors is irrelevant. And then I said there was also real doubt as to whether or not there is jurisdiction to hear any appeal from a decision of a judge under the search rules. I quoted paragraphs 41, 42 and 43 of Jackson and CanWest. And then I went on to say that the bombing of the Rainbow Warrior took place in Auckland on 20 July. As stated, we are coming up to the 20th anniversary. And then I said, a priority fixture is sought for the hearing of this appeal on this basis: freedom of expression rights, in particular the public's right to see what took place at the committal proceedings now being denied as a result of the appeal. Put shortly this is a classic case of freedom of expression delayed being freedom of expression denied.

And then I said, although the case is somewhat out of the ordinary, the principles to be applied are not novel.

Elias CJ It doesn't sound like a point of general and public importance.

Akel Yes that's right, perhaps I should, well that was before the Court of Appeal.

Tipping J Novel for some purposes but not others.

Akel Yes, novel, not novel for others. Well I'm of course, I said in my written submission that in answer to question 2, I said look, this is an exercise of the discretion and this Court has said in Clark and Muir (**Muir v CIR** (2004) 17 PRNZ 376), the case involving the … scene, that the Court will not, except on rare occasions, hear judgments where there's been a third judgment where there's been an exercise of the discretion. But that's on the assumption that the Court of Appeal

doesn't change the High Court. But I did say that well look there's pragmatic reasons come into play here.

Then on 3 June 2005 a minute of the President, this proceeding raises the issue whether there is jurisdiction for this Court to entertain such an appeal. That preliminary issue needs to be determined and I am therefore directing that the argument in Miscellaneous Motions list for 13 June with a time estimate of 1 hour.

So that's how it all came about. It wasn't again, with respect.

McGrath J Yes, it was the Court's initiative.

Akel It was the Court's initiate. It wasn't that I pressed just for that one point. I was pressing for a priority fixture all around on the whole thing. So the only hardship point that in my submission could justify the leapfrogging would be, in fact the hardship that's been caused to the respondent on the assumption of course that it turns out to be successful at the end of the day.

Elias CJ On the other hand, the anniversary having passed Mr Akel, the general principles in play here are ones of continuing interest I would have thought to TVNZ for application in other cases. So if there, if it should be the case that there are general points of principle which need further ventilation, perhaps the Court of Appeal should be given an opportunity and this Court should have the benefit of a Court of Appeal determination and if there are general points of principle engaged, you will have the opportunity to make application to come back.

Akel Well two points. First of all the fact of the anniversary. It's, I mean it's trite that yes, you know, the longer this drags out the longer the anniversary of the Rainbow Warrior becomes almost irrelevant in the, not almost irrelevant, but less significant.

Tipping J It'll just be a different anniversary.

Akel It becomes a 21st anniversary. But there was certainly a lot of news and the Courts have recognised that editors make decisions based on events. There was a lot of news surrounding the 20th anniversary. The family of the deceased camera man came out. Or the daughter came out. There were other things like that. But the more it goes on, it's going to be overtaken by other events. And so the delay is important.

Blanchard J That's already happened.

Akel Well put it this way, if there was a quick decision on this case, then it's still certainly within the 20th anniversary year of the events. I'm struggling on this one. But there's got to be.

Blanchard J Do we have to send one of those late birthday cards.

Akel An apology for the lateness. But there's no doubt, on a serious note, that a stay is in place and that does affect, that's abrogating s.14 and we've not opposed that stay. We accept that that's got to be in place. But on the.

Tipping J I hear your point. That you don't like continuing delay for a variety of reasons. That's the essential point isn't it.

Akel Yes.

Tipping J For its various aspects.

Akel Yes. I was just thinking of the second reason, to Her Honour the Chief Justice, the second reason is that the Court of Appeal in Mahanga laid down, you know, in a quite extensive decision, the principles to be followed. And in my written submission I've taken a little bit of issue with that. To give hopefully some new ground to discuss. But then in CanWest the Court of Appeal just followed Mahanga and all the judgments of the High Court, what judgments there are in this area, have just followed Mahanga. And by and large, in practice, it works. Sometimes TVNZ is successful, other times they're not successful. But you win a few, you lose a few. You just move on.

The resources of TVNZ I can assure you are not finite, certainly at this point in time.

Elias CJ But that sounds as if there isn't a point of general and public importance in the merits assessment.

Akel Well I'm going to be in a difficult position because if Your Honour refer the case back to the Court, we are not allowed a leap frog, of course I'm going to be saying in my submissions in opposition that there's no point of importance.

Elias CJ Yes.

Akel But a bit of the way the questions were framed that were put when leave was granted, the question was, well if we still want you to answer the substantive issue. So all the hard work's gone into it. And the ruling actually said, and counsel have got to be expected to you know argue it at the hearing itself. So that's why I've adopted the pragmatic approach.

Tipping J Be prepared to. Yes, doesn't mean to say we were going to.

Akel Well I think.

Blanchard J You'll be well prepared for the Court of Appeal wouldn't you.

Tipping J Yes, which saves you money. Your stretched resources have been relieved.

Akel I don't think if I'd come to Court, either of us had come to Court and said, well you only said be prepared to, and we've.

Tipping J No.

Akel That is the arguments I have Your Honours.

Elias CJ Yes. Thank you Mr Akel. Is there anything arising out of that Mr Curry.

Curry Just a simple point maam that what the appellants rely on in terms of the assurance given is at page 437 of the case. This is under tab 7, line 25 and this is taken from the judge's own affidavit. The judge in paragraph 15 of his affidavit states that in the course of that meeting he made it clear there would be only one video tape from each of the cameras and that they would remain his property and they would be kept in his safekeeping. So I've been very careful to focus the case on something the Judge himself said.

Elias CJ Yes thank you. Alright. I think we would like to confer about this. So perhaps we could, counsel don't need to come back until 3 o'clock. Would that be convenient. Alright we'll take the adjournment now.

Court adjourns 1.09 pm
Court resumes 3.03 pm

Elias CJ Yes, thank you counsel. We've conferred about this matter and have decided that if there is jurisdiction in the Court of Appeal, there's no occasion under s.15 for this Court to entertain the appeal. So we will reserve our decision on the jurisdictional point. I don't know whether there's any other matter, we thought we had better come back into Court in case there was any other matter that counsel wanted to raise. But if there isn't then thank you very much for the argument we've heard and the efforts you've put in and we will reserve our decision.

Curry As the Court pleases.

Akel As the Court pleases.

Court adjourns 3.04 pm