IN THE COURT OF APPEAL OF NEW ZEALAND

CA818/2012
[2013] NZCA 483

BETWEEN	THE QUEEN Appellant
AND	TAYLOR IVAN ANTONIEVIC Respondent

CA819/2012

AND BETWEEN	THE QUEEN Appellant
AND	THOMAS JOSEPH BASHFORD Respondent

CA820/2012

AND BETWEEN	THE QUEEN Appellant
AND	NATALIE JEAN BUSCH Respondent

CA821/2012

AND BETWEEN	THE QUEEN Appellant
AND	COLIN CHINNOCK Respondent

CA822/2012

AND BETWEEN	THE QUEEN Appellant
AND	JORDAN JOHN DALY Respondent

CA823/2012

AND BETWEEN	THE QUEEN Appellant
AND	JASON PETER GEORGE FRIEND Respondent

CA824/2012

AND BETWEEN	THE QUEEN Appellant
AND	JASON PAUL GRIFFITHS Respondent

CA825/2012

AND BETWEEN	THE QUEEN Appellant
AND	GRANT ROY HAYWARD Respondent

CA826/2012

AND BETWEEN	THE QUEEN Appellant
AND	TERRY JONES Respondent

CA827/2012

AND BETWEEN	THE QUEEN Appellant
AND	HAYLEY JOANNE KIRKWOOD Respondent

CA828/2012

AND BETWEEN	THE QUEEN Appellant
AND	MARK JAMES LEE Respondent

CA829/2012

AND BETWEEN	THE QUEEN Appellant
AND	RUSSELL PHILLIP LLOYD Respondent

CA830/2012

AND BETWEEN	THE QUEEN Appellant
AND	JOSEPH MARK PAHL Respondent

CA831/2012

AND BETWEEN	THE QUEEN Appellant
AND	GREGORY JON PAGE Respondent

CA832/2012

AND BETWEEN	THE QUEEN Appellant
AND	ROGER PAUL PATRICK Respondent

CA833/2012

AND BETWEEN	THE QUEEN Appellant
AND	GLYN PATRICK RUTLEDGE Respondent

CA834/2012

AND BETWEEN	THE QUEEN Appellant
AND	CRAIG PETER SMITH Respondent

CA835/2012

AND BETWEEN	THE QUEEN Appellant
AND	DAMIAN JOHN STACEY Respondent

CA836/2012

AND BETWEEN	THE QUEEN Appellant
AND	ROBERT JOHN STEWART Respondent

CA837/2012

AND BETWEEN	THE QUEEN Appellant
AND	GLEN ROSS THOMPSON Respondent

Hearing: 14 August 2013

Court: O'Regan P, French and Asher JJ

Counsel: C L Mander, A Markham and P D Marshall for Appellant

No appearance for Respondent Antonievic
P H B Hall QC and S W Rollo for Respondents Bashford, Patrick and Stacey
R A Harrison for Respondents Busch
A N D Garrett for Respondent Chinnock
R M Lithgow QC and A J D Bamford for Respondents Daly, Jones, Lloyd, Page and Smith
S W Rollo for Respondents Friend and Pahl
K H Cook for Respondents Griffiths and Kirkwood
No appearance for Respondent Hayward
G J X McCoy and K J McCoy for Respondent Lee
No appearance for Respondent Rutledge
P L Borich for Respondent Stewart
No appearance for Respondent Thompson

Judgment: 15 October 2013 at 10 am

JUDGMENT OF THE COURT

A We answer the question referred for the opinion of this Court:

"Was I wrong to stay all prosecutions of twenty-one accused in relation to charges fairly said to flow from the Operation Explorer investigation?"

"Yes".

B The appeal is allowed.

C The stay granted by the High Court is set aside.

REASONS OF THE COURT

(Given by O'Regan P)

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Introduction

[1] This is an appeal against a decision of Simon France J in which he ordered that the prosecutions of 21 defendants for a total of 151 counts be stayed.[1] The reason for the stay was that certain police actions undertaken during an undercover investigation rendered the trial an abuse of process, and he determined that a stay was the appropriate response.

[2] In an application by the Crown under s 381A(1) of the Crimes Act 1961, the Judge referred for the opinion of this Court the following question:[2]

> Was I wrong to stay all prosecutions of twenty-one accused in relation to charges fairly said to flow from the Operation Explorer investigation?

Issues

[3] The first issue is whether the question referred to this Court by the Judge is, as required by s 381A(1), a question of law arising out of the Judge's direction that the prosecutions be stayed. The Judge addressed this question in his case stated judgment and determined that he was bound by the decision of this Court in *R v Vaihu*, in which this Court had found that a similarly worded question did raise a question of law.[3] The respondents argue that *R v Vaihu* was wrongly decided, and that the question referred to this Court is not a question of law. They argue that this means the Court does not have jurisdiction to deal with the question.

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[1] *R v Antonievic* [2012] NZHC 2686 [Substantive judgment]. There are twenty respondents: one of the original defendants pleaded guilty and was to be dealt with in a separate appeal had the present appeal failed.

[2] *R v Antonievic* [2012] NZHC 3340 [Case stated judgment].

[3] *R v Vaihu* [2010] NZCA 145.

[4] A consequential question that arises is whether this Court has the power to amend a question referred to it under s 381A. For the Crown, the Deputy Solicitor-General, Mr Mander, argued that this Court did have such a power and asked that we exercise it in the event that we found that the question as referred by the High Court was not a question of law. The respondents argued that this Court did not have any such power.

[5] The second issue, assuming the Court has jurisdiction, is the substantive issue raised by the question referred for the opinion of this Court, that is, whether the stay should have been granted. In order to address that question, we need to analyse the relevant New Zealand and overseas case law to establish the test to be applied by the Court. We then need to determine whether the correct test was applied by the Judge and, if it was not, whether on the application of the correct test the stay ought to have been granted.

[6] Before turning to these issues, we will outline the factual background.

Factual background

[7] The following summary of the factual background is adapted from that set out in the substantive High Court judgment. It was common ground that the Judge had correctly and fairly summarised the facts and that, in any event, there was no room for challenge to his factual findings in the context of the present appeal.

[8] In September 2009, the police commenced an investigation into the Red Devils Motorcycle Club in Nelson, which was known as "Operation Explorer". The investigation was commenced because police believed that the emerging prominence of the Red Devils was a forerunner to its becoming a chapter of the Hell's Angels. The operation involved a covert investigation, including interception of telephone conversations and text messages and the installation of listening devices. Warrants were obtained for these, as required.

[9] In December 2009 the police decided to deploy two undercover officers who infiltrated the Red Devils, posing as a couple.

[10] It seems that there was always a level of suspicion among the leaders of the Red Devils about the criminal credibility of the male undercover officer, whom the High Court Judge called "MW". The officers supervising MW became concerned that he could be exposed, and decided to implement a strategy to strengthen his credibility. Two steps taken by the police were the focus of the application for stay and are, accordingly, also the focus of the present appeal.

Fake search warrant

[11] From early in the investigation, a storage unit had been rented in MW's name. The owner of the storage facility was believed to be involved with the Red Devils, although it appears this was not, in fact, the case. The police placed in the storage unit some apparently stolen equipment and some equipment that was consistent with involvement in cannabis offending. This was done as part of the strategy to strengthen MW's credibility.

[12] The police then prepared a fake search warrant. The warrant appeared genuine: it was in the correct form and was completed in a way that was consistent with a legitimate search warrant. It stated that there existed reasonable grounds to believe that certain items would be located in the storage unit, and it authorised the search of the storage unit.

[13] As the Judge correctly stated, a search warrant can be issued only by a judicial officer.[4] Such a warrant is a statement that the relevant judicial officer has considered the evidence available to the police and has independently assessed that evidence, and reached the conclusion that the evidence justifies an intrusion into the privacy of those associated with the premises to be searched. The Judge recorded that the fake warrant had been described to him by the police as "a prop". He said that he found that description "unappealing". So do we. The warrant purported to be signed by a judicial officer, and under the signature that appeared on it was a notation indicating that the signatory was a Deputy Registrar. In fact, the false signature had been made by a police officer.

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4 Substantive judgment at [10].

[14] When the police came to "execute" the fake warrant, they asked the owner of the storage facility to attend as part of the efforts to establish MW's criminal credentials. After the warrant was shown to the owner, he opened the facility and observed what was located. He also provided police with MW's details and the terms on which the storage unit was rented.

[15] The Judge recorded that the police supported this conduct by observing that it was not a real warrant, that it related to a storage unit of which the police were the lawful occupier, and to goods which were in the control of the police. So, other than duping the owner of the facility, no privacy interests were threatened.

False charges

[16] Having carried out the search, the police officers immediately supervising MW contacted their superiors to seek advice on what they should do. A meeting was held and the decision was made to carry through with the ruse. This meant that MW was to be arrested and charged with an offence under the Misuse of Drugs Act 1975.

[17] MW was arrested in public, "processed" at the police station and then appeared in the District Court. An information was sworn charging him with possession equipment capable of being used in the commission of an offence in breach of s 9 of the Misuse of Drugs Act. This involved a police officer swearing on oath that the officer had just cause to suspect and did suspect that the charged person had committed the offence.

[18] At the bottom of the information form is a space for the constable to sign it, having duly sworn on oath before a Registrar as to the truth of what has been recited. In this case the constable swore this oath, knowing it to be false, in that he knew that MW had not committed the offence and therefore he did not suspect that MW had done so. The constable's supervisors also knew the oath to be false.

[19] MW appeared in court and was remanded. The plan was that MW would be represented by the duty solicitor, would enter a guilty plea and would then be sentenced. However, members of the Red Devils referred MW to a defence lawyer, who advised MW to defend the matter. The defence lawyer believed MW was a real

defendant. In order to facilitate MW's staying in role, it was decided that MW would take the advice of the defence lawyer and so repeat appearances in the District Court were necessary. MW deliberately missed some of those scheduled appearances and warrants to arrest him were issued. On each occasion the warrants were cancelled when MW voluntarily appeared at a later date. A further charge of breaching bail was laid. Soon after the operation was terminated and the police sought to have the charges withdrawn.

Involvement of the Chief Judge

[20] On 31 May 2010, Detective Superintendent Drew and Detective Senior Sergeant Olsson visited the then Chief Judge of the District Court, Chief Judge Johnson. They presented the Judge with a letter that said it was a request for approval for a police undercover agent to appear in court under an assumed name. It referred to the investigation being undertaken by the police and the fact that one of the undercover police officers had been arrested during an orchestrated scenario. It explained the reasons for this. It then said that the police would like to facilitate that undercover officer appearing in the District Court under an assumed name. It said that the charge would be laid summarily under s 12A of the Misuse of Drugs Act, but was a charge for which the undercover officer, as a member of the police, had a complete defence under s 34A of that Act. It said that it was proposed that the officer would appear before a District Court Judge, be represented by a duty solicitor and obtain a remand without plea. It was then envisaged that the officer would plead guilty at a later hearing, obtain a conviction under his assumed name and pay any fine or undertake any other sentence as necessary.[5]

[21] The letter was accompanied by a sealed envelope that contained a document recording the real name of MW and details about the police operation and the proposed court appearance.

[22] Detective Superintendent Drew gave evidence in the High Court that the Chief Judge asked only a couple of questions about the group that was the target of

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5 The letter is set out in full at [31] of the substantive judgment.

the investigation and did not wish to see the document in the sealed envelope. He said that the detectives understood that the Chief Judge had approved the proposal.

[23] The High Court Judge accepted Detective Superintendent Drew's evidence that he would not have authorised the false charge scenario if he did not think he had judicial approval. Simon France J said that the visit by Detective Superintendent Drew and Detective Senior Sergeant Olsson to the Chief Judge was central to the police view of the legitimacy of what occurred.

[24] Detective Superintendent Drew gave evidence twice before the High Court. On the first occasion he said that the visit to the Chief Judge followed an established police protocol for "scenario situations". He referred to a relevant extract from the "Undercover Procedures Manual" that had said that the process that had been followed was in accord with that manual.

[25] The High Court Judge expressed surprise that such a protocol could exist and sought more information about the extent of this "established practice". Only one other example was given, and it seems that this did not involve the Chief Judge and, in the High Court Judge's view, it was open to debate as to whether the Judge to whom the approach was made had, in fact, approved the proposal.

[26] The fact that there was only one previous example led the Judge to conclude that the protocol was puzzling, because it purported to describe an established practice and even contained a statement that past experience had shown that the Chief Judge was supportive of requests and had not previously requested details of an officer or location to be disclosed. In fact, there had not been any previous occasion, other than the one in the present case.

[27] After the initial High Court hearing, the Crown advised the Court that new information about the protocol had come to light. It seems that the document to which Detective Superintendent Drew had referred in his evidence at the initial hearing had not been in existence at the time the Chief Judge was approached. It had been written afterwards to reflect the police perception of what had been established as a result of the visit to the Chief Judge in this case, which had been the first of its

kind. As a result of this Detective Superintendent Drew was required to testify a second time, and Detective Senior Sergeant Olsson also testified on the second occasion.

[28] At the second hearing, the manual as it had existed at the time of the approach to the Chief Judge was produced. It had no reference at all to the scenario situation that had featured in Detective Superintendent Drew's initial evidence. It did, however, discuss the possibility of an officer being arrested or charged with an offence, and then stated: "the Police must not allow an arrested agent to appear under a fictitious name without the permission of the court. Deceiving the court is not permitted." The Judge said he inferred that the focus of this was on an unplanned arrest situation, rather than a staged scenario as in the present case.

[29] Simon France J commented, correctly in our view, that the later version of the manual that had been featured in Detective Superintendent Drew's initial evidence reflected the dangers that can arise through untested assumptions being portrayed as practice. He said that there was no basis for the rewritten protocol to state, based on one visit, that past experience showed the Chief Judge to be supportive, and that he had not previously required the details contained in the sealed envelope. He said it was misleading and suggested an established practice when none existed.

Charges faced by respondents

[30] The respondents face a range of charges. Many are charged with participation in an organised criminal group. Others are charged with offences related to supply of methamphetamine or other drugs. Some are charged with both. There are also some charges of conspiracy to cause grievous bodily harm and threatening to kill, as well as other Crimes Act and Arms Act 1983 offences. In all, the 21 accused faced 151 charges. The stay granted in the High Court relates to all 151 charges.

Question of law

[31] The respondents argue that the question referred for the opinion of this Court is not a question of law, and that this Court therefore does not have jurisdiction to answer it. For convenience we set out the question again:

> Was I wrong to stay all prosecutions of twenty-one accused in relation to charges fairly said to flow from the Operation Explorer investigation.

[32] We heard submissions on two issues. First, whether the question referred was a question of law as required by s 381A of the Crimes Act 1961. Second, if it was not a question of law, whether this Court had the power to restate or amend the question. The first issue was squarely before Simon France J when he dealt with the Crown's request that a question be stated under s 381A(1). He determined that he was bound by the decision of this Court in *R v Vaihu*.[6] In that case, which concerned an application for stay based on delay, the question posed was:

> Given my finding there was undue delay, was I wrong to grant a stay?

[33] In *R v Vaihu*, this Court rejected an argument that the question invited the Court to review a factual decision based on the weight given to relevant evidence, and not, therefore, a question that involved an issue of law. The Court saw the real issue raised by the question as whether a stay was a reasonable and proportionate response, given the factual findings made in the judgment under appeal. The Court considered that the question of whether the remedy granted was appropriate was a question of law.

[34] We agree with Simon France J that *R v Vaihu* is not distinguishable from the present case. However, in this Court, the focus shifted from an attempt to distinguish *R v Vaihu* to an invitation to this Court to overrule it.

[35] The respondents argued that the question required this Court to consider the exercise of a discretion, which does not give rise a question of law. They relied on the decision of the Supreme Court in *Bryson v Three Foot Six Ltd*,[7] which stated that an appeal is not an appeal on a question of law where the fact-finding Court has

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6 *R v Vaihu*, above n 3.

7 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721.

merely applied law that it has correctly understood to the facts of an individual case.[8] The decision in *Bryson v Three Foot Six Ltd* was confirmed in the more recent Supreme Court decision of *Vodafone New Zealand Ltd v Telecom New Zealand Ltd*.[9] In that case, Blanchard J said, in delivering the majority judgment:[10]

> ... if ... the Commission has correctly understood what net cost is for the purposes of s 92 [of the Telecommunications Act 2001] and has then proceeded to apply that understanding through the facts before it, its conclusion is a matter for the Commission weighing up the relevant facts. Provided that it has not overlooked any relevant matter or taken account of some matter which is irrelevant to the proper application of s 92, the Commission's conclusion cannot be disturbed on appeal unless it is insupportable even on a correct understanding of "net cost".

[36] For the appellant, Mr Mander argued that *Vaihu* was correct and that the question before us is a question of law. He argued that the present case is not a case where, as a matter of law, a decision either way is available. Rather, he argued, the grant of a stay was not a legally available option to the Judge, either because he did not have a discretion to grant a stay (that is, on the facts as found by him the discretion to stay was not triggered) or, if he did have such a discretion the manner in which he exercised it was insupportable or plainly wrong. He also argued that the Judge had erred in law by taking into account irrelevant matters.

[37] Mr Mander relied on the decision of the Supreme Court in *R v Gwaze*.[11] In that case the Supreme Court rejected the proposition that a question of admissibility of evidence was a question of fact because it involved the exercise of a discretion. The Court held that the question of admissibility involves the application of standards that must be observed before evidence is admitted, and if those standards are not met then the admission of the evidence is an error of law. While an admissibility issue involved an element of evaluation, this did not mean that the issue was a question of fact. Mr Mander argued by analogy that the present case involved a preliminary assessment of fact, but once the facts were determined, the question as to whether the stay was an appropriate remedy was a question of law.

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8 At [25].
9 *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153.
10 At [51].
11 *R v Gwaze* [2010] NZSC 52, [2010] 3 NZLR 734.

[38] We do not see this issue as being a black and white issue, as counsel suggested it was. We accept that it would not be appropriate for the Court to approach the present appeal on the basis that it can simply substitute its own view for that of the High Court Judge. If that is what the question meant, then it would be too broadly drafted. However, we think that the question must be seen in the context of s 381A, which is clearly limited to questions of law. As we see it, the question requires us to determine whether the Judge made an error of law in granting the stay, and if interpreted in that way we see it as falling within the ambit of s 381A(1). We note that this approach is consistent with that adopted by Baragwanath J in this Court in *R v Gwaze*, where he interpreted references to the word "wrong" as meaning "wrong in law".[12]

[39] Mr Mander also suggested to us that it was open to the Court to amend the question that was referred to us by the High Court and suggested that if we were concerned that the question fell outside the ambit of s 381A(1), then we should take that course. The respondent argued that this would be inconsistent with *R v Vaihu*, where this Court said:[13]

> We have no power to reframe the question in this Court on a case stated.

[40] It is not clear whether this Court in *Vaihu* was stating that as a finding of the Court or simply as a record of what counsel for one of the respondents had submitted to the Court. The latter seems to be more likely.

[41] Mr Mander suggested we follow the course adopted by this Court in *R v Aliimatafitafi*, where the Court reframed a question that was before it.[14] However, that case involved the Court considering a question of law that had been framed by this Court when granting special leave to appeal under s 144 of the Summary Proceedings Act 1957. We do not think that is analogous with the present case, where the question has been formulated by another Court.[15] Mr Mander also relied on *M (CA52/96) v Serious Fraud Office* in which this Court had amended a question

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[12] *R v Gwaze* [2009] NZCA 430, [2010] 1 NZLR 646 at [128].
[13] At [19].
[14] *R v Aliimatafitafi* CA233/05, 26 April 2006.
[15] Other examples, similar to *R v Aliimatafitafi* are *M (CA762/2012) v R* [2013] NZCA 113 and *R v Rowe* [2005] 2 NZLR 833 (CA).

of law referred to it by the High Court.[16] It is not entirely clear from that decision, however, whether the Court did in fact amend the question. It is, however, clear that the Court did do so in *Television New Zealand Ltd v Solicitor-General*[17] and *R v W (CA206/97)*.[18]

[42] Ultimately we see the issue as being resolved by interpreting the relevant statutory provisions. It is clear from s 381A that the decision as to the question to be referred to this Court is one for the relevant High Court Judge. Once the question has been referred to this Court, s 382(1) gives this Court the power to send the case back to the court from which it was stated to be amended or restated. There is, however, no express power given to this Court to amend the question itself. We believe that indicates a statutory intention that the question be formulated in the Court from which the appeal comes, and not reformulated by this Court.[19] While we see that as providing a clear answer in the s 381A context, we do not express a view as to whether the same limitations on this Court's powers exist in relation to other statutory provisions.

[43] We also note that the present difficulty will not arise under the Criminal Procedure Act 2011. Section 296 of that Act requires that any application to appeal on a question of law be filed with the appeal court, and that the appeal court determines whether leave should be granted and if so, approves the question of law. Section 299 gives the appeal court specific power to amend or restate the question of law.

[44] We conclude that a practical approach is required. While this Court cannot restate the question referred to it, it is also not in the interests of justice to take an overly technical approach.[20] As long as the Court is able to address the matter referred to it within the confines of the Court's jurisdiction, which is clearly limited to issues of law only, then it can proceed to determine the question. We record that Mr McCoy argued that the question of law should not be a question about the

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16 *M (CA52/96) v Serious Fraud Office* CA52/96, 8 July 1996.
17 *Television New Zealand Ltd v Solicitor-General* [2008] NZCA 519, (2008) 28 FRNZ 184.
18 *R v W (CA206/97)* [1998] 1 NZLR 35 (CA).
19 The issue of whether this Court could formulate its own question was left open by this Court in *R v Kim* [2009] NZCA 294.
20 *Ryde City Council v Pedras* [2009] NSWCCA 248 at [49].

ultimate decision, but rather a question involving a step in the legal reasoning leading to the ultimate conclusion. He said that a question which essentially asks whether the decision under appeal is correct is not what is envisaged by s 381A. We see some practical force in that submission, and believe that in future cases this Court would be assisted by a clearer identification of the issue on which this Court's opinion is sought than is apparent from the question that was asked in this case. We say that without criticism of the High Court Judge, because we accept that he was bound by this Court's decision in *R v Vaihu*.

[45] We decline the invitation of the appellants to determine that *R v Vaihu* was wrongly decided. While it is not good practice to word questions of law as broadly as was done in that case and this, when such questions are worded sufficiently broadly to include a question of law, however broad and unspecific that may be, the appellate Court is obliged to respond. We recognise that the respondent will need to be able to respond to the question, which may be difficult where the wording is as broad as it was in this case. However, given the close consideration given to the wording in assignment before us and the full argument we had on the merits of the appeal, we are satisfied that the difficulty did not arise in this case.

[46] The approach we intend to take is to answer the question as posed to us, interpreting it in the context of the provision under which it was referred to us which clearly limits the area of dispute to questions of law. Applying the formulation of the Supreme Court in *Vodafone New Zealand Ltd v Telecom Ltd*, we will confine our consideration of the question to whether the Judge made an error of law. That involves considering whether he incorrectly concluded that the discretion to grant the stay was open to him and, if the discretion was open to him, whether he applied the wrong legal test in exercising that discretion, or reached a conclusion that was not supportable in the *Edwards v Bairstow* sense.[21]

The substantive question

[47] We now turn to the substantive question referred to the Court for its opinion, which requires us to address whether any error of law was made by the Judge in

[21] *Edwards v Bairstow* [1956] AC 14 (HL) at 36.

deciding to stay the prosecutions. We will begin by setting out the legal principles to be applied.

The law

[48] It was common ground that the Court has power to stay criminal proceedings in the following circumstances:[22]

(a) where it is impossible for the accused to receive a fair trial;

(b) where allowing the trial to take place would undermine public confidence in the integrity of the criminal justice system.

[49] There is no suggestion in the present case that the trial of the respondents would be rendered unfair because of the police conduct in issue. We therefore say nothing more about that ground for granting a stay.

[50] The second ground has been expressed in a number of different ways, but the essence of it is that the Court will act to prevent its own processes from being abused in order to prevent the administration of justice from being brought into disrepute. The fact that the trial will or will not be fair to the defendant is not a relevant factor in relation to the second ground.[23]

[51] The starting point is the statement of the law articulated by Richardson J in *Moevao v Department of Labour*,[24] which was also cited by the High Court Judge in the substantive judgment:[25]

> The justification for staying a prosecution is that the Court is obliged to take that extreme step in order to protect its own processes from abuse. It does so in order to prevent the criminal processes from being used for purposes alien to the administration of criminal justice under law. It may intervene in this way if it concludes from the conduct of the prosecutor in relation to the prosecution that the court processes are being employed for ulterior purposes or in such a way (for example, through multiple or successive proceedings)

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22 These two categories of stay are apparent from *R v Maxwell* [2010] UKSC 48, [2011] 1 WLR 1837 at [13]; *Warren v Attorney-General for Jersey* [2011] UKPC 10, [2012] 1 AC 22 at [22]; and *Beckham v R* [2012] NZCA 603, [2013] 1 NZLR 613 at [43].

23 *Warren*, above n 22, at [35] and [84].

24 *Moevao v Department of Labour* [1980] 1 NZLR 464 (CA) at 482.

25 Substantive judgment, above n 1, at [3].

> as to cause improper vexation and oppression. The yardstick is not simply fairness to the particular accused. It is not whether the initiation and continuation of the particular process seems in the circumstances to be unfair to him. That may be an important consideration. But the focus is on the misuse of the court's process by those responsible for law enforcement. It is whether the continuation of the prosecution is inconsistent with the recognised purposes of the administration of criminal justice and so constitutes an abuse of the process of the court.

[52] Richardson J added this qualification:

> While the Court must be the master and have the last word, it is only where to countenance the continuation of the prosecution would be contrary to the recognised purposes of the administration of justice that a Court would ever be justified in intervening.

[53] That passage has been cited with approval on a number of occasions by this Court, most recently in *Beckham v R*.[26] The articulation of the law set out in the judgment of Richardson J in *Moevao* has been adopted by the High Court of Australia.[27]

[54] Although the precise words used to express the test for the grant of a stay vary from case to case and from jurisdiction to jurisdiction, we consider the formulation used by Richardson J is appropriate.[28] The overarching question for the Court will be whether a stay is necessary to maintain public confidence in the integrity of the criminal justice system.

[55] This Court made it clear in *Fox v Attorney-General* that the power of stay is "not available for disciplinary purposes".[29] It was argued before us by the Crown that the principal purpose of the stay made by the Judge was, in fact, disciplinary.

[56] Beyond these broad propositions the courts have left the matter at a general level, requiring a determination to be made in the circumstances of the particular case. In assessing whether the Court needs to act to avoid an abuse of process, the

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26 *Beckham*, above n 22, at [46]. See also *Fox v Attorney-General* [2002] 3 NZLR 62 (CA) at [32]–[35].

27 *Jago v District Court of New South Wales* (1989) 168 CLR 23 at 29–30 per Mason CJ and *Williams v Spautz* (1992) 174 CLR 509 at 520. Similar comments were endorsed in *Moti v R* [2011] HCA 50, (2011) 245 CLR 456 at [57].

28 On the different language used in United Kingdom judgments see the comments of Lord Kerr in *Warren*, above n 22, at [83] where he sets out a number of examples.

29 *Fox*, above n 26, at [37].

Court must always weigh in the balance the important public interest in ensuring that those accused of serious offending are tried and, if convicted, sentenced.[30] As this Court noted in *Fox*, the traditional restraint of the courts in interfering with the executive's role of deciding whether or not to prosecute applies.[31] For this reason, a stay should not be granted unless it is a proportionate response to the impugned conduct. As noted by this Court in *Moevao* and *Fox*, a stay will be an "exceptional" or "extreme" step.[32]

[57] Rigid categorisation of the factors to balance when considering whether to grant a stay is undesirable. As this Court said in *Beckham* a fact-sensitive balancing exercise is to be taken.[33] The factors identified by the Privy Council in *Warren v Attorney-General for Jersey*,[34] and used by the High Court Judge, will often be relevant, but are not exhaustive or necessarily determinative.

[58] As noted, each case will turn on the balance of its own circumstances. Two issues that are critical to the analysis in this case are:

(a) Whether it is necessary, in order for a stay to be given, that there be a strong causal link between the misconduct by State authorities and the intended trial to which the stay application relates. This is referred to in a number of cases as "but for" linkage (essentially, the impugned conduct is so closely linked to the trial that, but for the impugned conduct, the trial would not be occurring). Examples of where this type of linkage has previously arisen are where an accused person has unlawfully been brought into the jurisdiction and but for that unlawful conduct would not be exposed to the risk of trial,[35] or where the evidence obtained from the impugned conduct is so significant that, without it, no prosecution could succeed.[36]

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[30] *Warren* at [26] and [83].

[31] *Fox* at [39].

[32] *Moevao* at 470 and 482; *Fox* at [37].

[33] *Beckham* at [60]–[71].

[34] At [24], citing Andrew L-T Choo *Abuse of Process and Judicial Stays of Criminal Proceedings* (2nd ed, Oxford, Oxford University Press, 2008) at 132.

[35] For example, *R v Horseferry Road Magistrates' Court, ex parte Bennett* [1994] 1 AC 42 (HL).

[36] For example, *Warren*, above n 22.

(b) Whether the focus of the decision to grant a stay is on preventing a future abuse of process from occurring, or whether the fact that the impugned conduct is, itself, an abuse of process is sufficient to justify the stay of a trial which would not otherwise be, itself, an abuse of process.

[59] We will deal with each of these in turn.

Importance of the "but for" test

[60] In the High Court, Simon France J considered that the lack of causative connection between the impugned conduct and the proposed trial was significant but not in any way decisive.[37] The Judge relied on comments made by Lord Kerr in *Warren* as authority for that proposition. What Lord Kerr actually said was:[38]

> The "but for" factor (ie where it can be shown that the defendant would not have stood trial but for the executive abuse of power) is merely one of various matters that will influence the outcome of the inquiry as to whether a stay should be granted. It is not necessarily determinative of that issue.

[61] Mr Mander said that this comment needed to be seen in context. In *Warren*, there was no doubt that there was a "but for" link between the executive misconduct and the intended trial. In saying that the presence of the "but for" factor was not decisive, Lord Kerr was saying that the presence of a "but for" connection was not decisive, and that a stay could still be refused. This did not necessarily mean that the absence of this factor would not be decisive. Mr Mander argued that it was.

[62] The respondents submitted that the approach of the High Court Judge was correct. They said that while the connection between the executive misconduct and the trial is likely to be a highly relevant consideration, it should not be determinative as that would introduce overly-prescriptive rules into what is a fact-sensitive balancing exercise. The respondents argued that comments in *Warren* that the "but for" factor "is merely one of various matters that will influence the outcome of the inquiry" meant just that, regardless of whether there was a "but for" connection on the facts of a particular case.

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[37] Substantive judgment, above n 1, at [70], quoted at [99] below.
[38] *Warren* at [83].

[63] To analyse those submissions, we need to consider *Warren* and the decisions that preceded it.

[64] A useful starting point is the decision of the Court of Appeal of England and Wales in *R v Grant*, in which there was no "but for" connection on the facts.[39] In that case Mr Grant, who had been charged with conspiracy to murder, sought a stay of prosecution on the basis that the police had deliberately recorded privileged conversations that took place between him and his solicitor in a police station exercise yard. The police did not, in fact, obtain any relevant evidence from those interceptions that could be used at the trial. Mr Grant's application for a stay was dismissed and he was convicted at trial.

[65] On appeal, the Court of Appeal was asked to allow an appeal against conviction on the basis that a stay should have been granted. The Court of Appeal allowed the appeal on the basis that the misconduct of the police was so grave that the proceedings should have been stayed in order to protect public confidence in the criminal justice system. The essence of the decision is contained in the following paragraphs:

> [56] Where the court is faced with illegal conduct by police or State prosecutors which is so grave as to threaten or undermine the rule of law itself, the court may readily conclude that it will not tolerate, far less endorse, such a state of affairs and so hold that its duty is to stop the case. ...
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> [57] We are quite clear that the deliberate interference with a detained suspect's right to the confidence of privileged communications with his solicitor, such as we have found was done here, seriously undermines the rule of law and justifies a stay on grounds of abuse of process, notwithstanding the absence of prejudice consisting in evidence gathered by the Crown as the fruit of the police officers' unlawful conduct.

[66] The respondents urged us to approach the present case on a similar basis.

[67] In a subsequent case, *R v Maxwell*, the United Kingdom Supreme Court considered the relevance of a "but for" connection.[40] This was not a case involving a stay, but rather an appeal against conviction. Mr Maxwell's convictions for murder and robbery were quashed on appeal, after it emerged that the police had misled the

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39 *R v Grant* [2005] EWCA Crim 1089, [2006] QB 60.

40 *R v Maxwell*, above n 22.

trial court by concealing and lying about various benefits that the main prosecution witness had received in consideration for giving evidence. The question before the Supreme Court was whether a retrial should be ordered. This was of particular significance because, while in prison, Mr Maxwell had voluntarily admitted a number of times that he was guilty of the offences of which he had been convicted. The Supreme Court proceeded on the basis that the question of whether a retrial would be an abuse of process was analogous to the question of whether a stay should be granted. Ultimately the Supreme Court decided that there should be a retrial, but only by a 3–2 majority.

[68] The "but for" connection between the misconduct and the proposed retrial in *Maxwell* was that the confessions Mr Maxwell made in prison would not have occurred but for the fact that the police misconduct had led to his being convicted in the first place. Giving the lead judgment of the Court, Dyson JSC held that the Court of Appeal had been correct to treat the presence of "but for" linkage as "no more than one of a number of relevant factors" to be considered in the overall decision as to whether a retrial should be ordered. Several relevant factors needed to be weighed in the balance.[41] The other judges in the majority were Lord Rodger and Lord Mance. Both agreed with Dyson JSC that a retrial should be ordered and that the "but for" factor was just one of many factors to be taken into account.[42]

[69] In his dissenting opinion, Lord Brown saw the "but for" factor as tipping the balance against ordering a retrial. However, while he saw the "but for" factor as decisive in *Maxwell* itself, he accepted that there may be exceptional cases in which the Court may regard the system to be "morally compromised" by a trial even in the absence of a "but for" link between the relevant misconduct and the proposed trial.[43] The remaining judge, Lord Collins also dissented but did not comment on the relevance of the "but for" factor.

[70] The lead judgment in *Warren* was also given by Lord Dyson. In *Warren* there was a very strong "but for" link between the police misconduct and the proposed trial. The Jersey police had undertaken surveillance operations using tracking and

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41 At [26] and [35]–[36].
42 At [47] per Lord Rodger and at [56]–[57] per Lord Mance.
43 At [108].

audio monitoring devices attached to a rental car used by suspected drug smugglers. The car was hired in France and driven to Amsterdam, where the drug transaction took place. Neither the Dutch nor the French authorities had authorised the use of the audio device and the Jersey police knew that their actions were unlawful. It was because of the unlawful surveillance operation that the evidence required to charge Mr Warren and others with serious drug trafficking offences was obtained. Not only had the Jersey police officers acted without authority in France and the Netherlands, they had also misled the Attorney-General and Chief Officer of Police of Jersey. Their conduct had been approved by senior police officers. It was, therefore, extremely serious misconduct.

[71] Lord Dyson noted that the Supreme Court in *R v Maxwell* had not seen the presence of a "but for" factor as determinative, but as one of a number of relevant factors. He reiterated this point in *Warren* as follows:

> [30] The Board does not consider that the "but for" test will always or even in most cases necessarily determine whether a stay should be granted on the grounds of abuse of process.

[72] He also made it clear that the Privy Council considered that the Court of Appeal's decision in *R v Grant* was wrong.[44] He said that the Court of Appeal in *Grant* had placed too much weight on the gravity of the police misconduct and insufficient weight on the linkage between the misconduct and the trial. He noted that the "but for" factor had no part to play in *Grant* and the misconduct had not influenced the proceedings at all. He concluded:[45]

> The misconduct had no influence on the proceedings at all. In these circumstances, surely the trial judge was entitled to decide in the exercise of his discretion to refuse a stay and the Court of Appeal should not have held that his decision was wrong.

[73] Mr Mander argued that this analysis by Lord Dyson in *Warren* indicated that the absence of a "but for" connection between the misconduct in issue and the intended trial is fatal to a stay application. We do not accept that submission. Rather, Lord Dyson was simply saying that the Court of Appeal had erred in *R v*

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[44] The Board did however approve of the proposition set out in *Grant* that in cases of stay for abuse of process where the integrity of the criminal justice system is threatened there is no need to show unfairness to the particular accused for the stay to be granted: at [34]–[35].

[45] At [36].

Grant by giving too much weight to the seriousness of the misconduct and insufficient weight to the lack of "but for" linkage.

[74] It is true, however, that Lord Dyson saw the strong "but for" link in *Warren* as a factor in favour of a stay, as was the seriousness of the prosecutorial misconduct. While Lord Dyson found that the Judge, in the exercise of his discretion, was entitled not to grant a stay, he also considered that the grant of the stay would have been open to the Judge. Lord Hope, Deputy President, concurred in that result, finding that the decision not to grant a stay was not "plainly wrong", although he indicated that he would have granted a stay if he had been dealing with the case at first instance.[46] He did not comment on the "but for" factor. Lord Brown also agreed with Lord Dyson, but commented that he did not see *Warren* as a "but for" case in the sense that he had used that term in *R v Maxwell*.[47]

[75] Lord Kerr also saw the "but for" connection as no more than a relevant factor. He set out a number of factors that should be weighed in the balance, of which the "but for" factor was only one.[48]

[76] What can be clearly discerned from both *Maxwell* and *Warren* is that the presence of a "but for" factor will not be decisive, but will be an important factor in the balancing of factors that is required. As noted, Mr Mander submitted that this does not necessarily mean that a stay may be granted in the converse situation where the "but for" linkage is non-existent or weak. While we accept that there is a difference between saying that a "but for" connection is not decisive when present, and saying that it is not decisive when absent, we have come to the conclusion that the authorities do not support Mr Mander's submission. We say this because:

(a) It is clear from the judgments in both *Maxwell* and *Warren* that rigid classifications are not seen as helpful. Both Courts emphasised the importance of the careful consideration of the facts in each case and the weighing of all relevant factors in the balance, approving the

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46 At [63].
47 At [76].
48 At [83]–[86].

comments of Lord Steyn to that effect in *R v Latif*.[49]

(b) Lord Brown's opinion in *Maxwell* makes it clear that, even in cases where there is no "but for" linkage, there may in exceptional circumstances be justification for the granting of a stay.

(c) The Privy Council's criticism of *Grant* in *Warren* was directed at the erroneous weighing of the factors to be balanced, rather than the fact that there was no "but for" linkage.

[77] That is not to say that the strength of the causal connection between the executive misconduct and the proposed trial is not highly relevant. While a "but for" linkage is not necessary for a stay to be granted, the weaker the linkage the weaker the case will be for a stay. The importance of the causal connection is highlighted in our discussion below of the prospective nature of the stay jurisdiction. However, we agree with the United Kingdom authorities that rigid classifications in this area of the law are not helpful, and therefore we reject the view that a "but for" connection is a pre-condition for a stay.

[78] Counsel referred us also to a more recent decision of the High Court of England and Wales in which the judgments of the Supreme Court in *Maxwell* and of the Privy Council in *Warren* were considered.[50] In *Secretary of State for the Home Department v CC*, Lloyd Jones LJ said this about the relevance of a "but for" connection between the impugned conduct and the intended trial:

> [96] The connection between the abuse of executive power and the proceedings which are said to be an abuse of process is likely to be a highly relevant consideration. Thus it will often be the case that but for the wrongful conduct the defendant would not be before the Court at all. However the existence of such a causative link is neither a pre-condition nor a conclusive demonstration of abuse. It is simply a relevant consideration.

[79] We respectfully adopt that statement of the law and will apply it in the present case.

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49 *R v Latif* [1996] 1 WLR 104 (HL) at 112.

50 *Secretary of State for the Home Department v CC* [2012] EWHC 2837 (Admin), [2013] 1 WLR 2171.

Is the remedy prospective?

[80] Mr Mander argued that the Judge had erred by focusing on the past conduct of the police, and in particular the fact that that conduct had constituted an abuse of the Court's process, rather than focusing on the impact of that conduct on the trial in respect of which the stay was sought. He submitted that a stay can be granted only where the continuation of the prosecution would itself be an abuse of the Court's process. Mr Mander characterised this as a threshold question, and argued that unless the proposed trial would be an abuse of process, the discretion to order a stay was not triggered.

[81] The respondents argued that the focus of the stay inquiry is on whether the stay would promote the maintenance of public confidence in the criminal justice system. It is not a prerequisite for the grant of a stay that the trial would be an abuse. The focus should be on whether the integrity of the Court's process requires a stay. Whether the future trial will be an abuse is just one relevant factor.

[82] Again, the starting point is the judgment of Richardson J in *Moevao*. As noted above, Richardson J said that a stay would be justified "only where to countenance the continuation of the prosecution would be contrary to the recognised purposes of the administration of justice".[51] The reference to "continuation" supports the proposition that the focus of the Court should be on whether the trial itself would be an abuse of process if allowed to proceed, rather than on whether an abuse of process has already occurred.

[83] Mr Mander relied on the Canadian jurisprudence to support his argument. In particular, he referred us to the judgment of L'Heureux-Dubé J in *R v O'Connor*,[52] in which she accepted the following test postulated by Professor Paciocco, to the effect that a stay will be granted only where:

> (1) The prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and

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[51] At [52] above.

[52] *R v O'Connor* [1995] 4 SCR 411 at 465. The judgment of L'Heureux-Dubé was the majority judgment, in which La Forest, McLauchlin and Gonthier JJ concurred.

> (2) No other remedy is reasonably capable of removing that prejudice.

[84] Mr Mander emphasised in particular the reference to the prejudice caused by the misconduct being manifested, perpetuated or aggravated by the trial.

[85] An even clearer statement in this regard is contained in the Supreme Court of Canada's decision, *Canada v Tobiass*.[53] In that case, the Court again referred to Professor Paciocco's test and commented as follows:[54]

> The first criterion [in the Paciocco test] is critically important. It reflects the fact that a stay of proceedings is a prospective remedy. A stay of proceedings does not redress a wrong that has already been done. It aims to prevent the perpetuation of a wrong that, if left alone, will continue to trouble the parties and the community as a whole in the future ...

[86] However, the Court later acknowledged that there may be exceptional cases in which past misconduct is so egregious that the mere fact of going forward in the light of it will be offensive, and a stay will be appropriate. The Court saw such cases as, however, being "relatively very rare".

[87] The approach taken by the Supreme Court of Canada in those cases has been recently confirmed in *R v Nixon*.[55]

[88] The prospective nature of the jurisdiction is also emphasised in a decision of the Court of Appeal of Hong Kong, *Hong Kong v Ng Chun To Raymond*.[56]

[89] The decision arose out of appeals against conviction by two appellants who had been convicted of fraud and dishonesty offences involving the trading of derivative warrants. After their trial, it emerged that three officers of the Independent Commission Against Corruption had sought to pervert the course of justice in a series of meetings with one of the prosecution witnesses. Two of the officers were convicted of conspiracy to pervert the course of justice and all three were convicted of misconduct in a public office. The appeal was advanced on the

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53 *Canada v Tobiass* [1997] 3 SCR 391.
54 At 428.
55 *R v Nixon* 2011 SCC 34, [2011] 2 SCR 566 at [33]–[42].
56 *Hong Kong v Ng Chun To Raymond* [2013] HKCA 380.

basis that the conviction should be quashed because, if the improper conduct had been known before the trial, a stay of the prosecution would have been granted.

[90] The Hong Kong Court of Appeal reviewed an earlier decision, *Hong Kong v Wong Hung Ki*,[57] in which it relied on the decision of the England and Wales Court of Appeal in *R v Grant*.[58] The Hong Kong Court of Appeal concluded that, like *Grant*, *Wong Hung Ki* was wrongly decided.

[91] The Court criticised its earlier decision in *Wong Hung Ki* because it could be read as suggesting that a deliberate snub to the rule of law could give rise to such a sense of outrage as of itself to warrant a stay of proceedings. The Court stated that it is wrong to concentrate on the misconduct in question to the exclusion of other factors, as that detracts from the relevant question, namely whether the trial of the accused in the particular case is an affront to the conscience of the Court or would undermine public confidence in the administration of justice. The Court summarised the position as follows:

> [104] The result of all this is to remind the courts faced with a stay application based upon the second limb of the abuse test, that it is not appropriate to order a stay merely because of a sense of outrage at such particular misuse of executive power as may be demonstrated in the circumstances of the particular case; that the ultimate question under this limb of abuse is always whether all the circumstances specific to the particular case, including but not limited to the misconduct, lead to the conclusion that proceeding with the trial of the accused for the offence charged offends the court's sense of justice and propriety or that public confidence in the criminal justice system would be undermined by proceeding with it or whether, conversely, it is in the interests of justice that, notwithstanding the misconduct, the accused be tried for the offence with which he is charged.

[92] In the result, the Court dismissed the appeals and upheld the convictions. In essence, it concluded that, had the misconduct been apparent before the trial, a stay would not have been appropriate. This conclusion was reached even though the Court considered the misconduct was "particularly grave", involving law enforcement officers acting in bad faith, flouting procedure and encouraging a witness to lie in the trial court. There were no circumstances of urgency or unwise legal advice received by the officers that could be said to temper their bad faith.

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[57] *Hong Kong v Wong Hung Ki* [2010] HKCA 135, [2010] 4 HKC 118.
[58] See [64]–[65] above.

However, the Court saw the seriousness of the misconduct as outweighed by the following factors: the offences with which the appellants had been charged were serious (although not the most serious of their kind), the manipulated evidence was not actually used at the trial, there was no evidence that the other prosecution witnesses were manipulated, and there was no "but for" link between the misconduct and the trial.

[93] We agree with the Hong Kong Court's discussion of *Grant* and the prospective nature of the stay jurisdiction. We accept Mr Mander's submission that the focus of the inquiry needs to be on the proposed trial in respect of which the stay is sought. To that extent we accept that the fact that the impugned conduct is, itself, an abuse of the Court's process will not be decisive: the Court must ask itself whether the proposed trial will be an abuse of process. This is the foundation of the stay jurisdiction. As Richardson J put it in *Moevao*, the justification for a stay is that the Court must protect its own processes from abuse.[59] When will the future trial be an abuse? When the trial would harm the integrity of the criminal justice system or would be contrary to the recognised purposes of the administration of justice. This future focus ensures that the jurisdiction is not used for improper disciplinary purposes.

[94] The causal link between the misconduct and the trial will often be highly relevant when considering whether the proposed trial would be an abuse. The stronger the causal link between the conduct and the proposed trial, the more it can be said that the proposed trial will be rendered an abuse of process because of the fact that the Court will be allowing its process to perpetuate the impugned conduct by the executive and allow the executive to derive benefit from that impugned conduct. On the other hand, as the Supreme Court of Canada said in *Tobiass*, there will be rare cases where the misconduct is so egregious that, despite the lack of a strong causal connection, allowing the trial to go ahead in light of it would harm the integrity of the Court's process and so would constitute an abuse.

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[59] *Moevao*, above n 24, at 482, quoted at [51] above.

The present case: the High Court judgment

[95] The High Court Judge began by directing himself on the relevant law. He adopted the statement of the law set out in the judgment of Richardson J in *Moevao*.[60] He also noted that the Privy Council in *Warren* had set out factors relevant to a decision on an application for a stay of a criminal trial.[61]

[96] Having recounted the facts in broadly similar terms to the summary that appears above, the Judge then made some observations on the evidence. In particular, he found that:

(a) The police had not acted in bad faith because they thought they had obtained a sign off for what they had done. However, there was a significant measure of recklessness in their holding that belief.[62]

(b) Detective Superintendent Drew did not intend to mislead the Court in the evidence he gave about the manual, but what transpired reflected the Judge's impression that the officers concerned had convinced themselves that what was happening was permissible, without having obtained external advice. He considered that was unwise.[63]

(c) The Chief Judge of the District Court and the police were not "on the same page". The letter provided to the Chief Judge was inadequate to alert him to the realities of what was involved.[64]

(d) It was a significant deficit that no legal advice had been sought.[65]

(e) There was a surprising lack of insight by the officers directly involved in the conduct about the lack of propriety involved in the fake warrant episode.[66]

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60 Substantive judgment, above n 1, at [3], citing *Moevao*, above n 24, at 482.
61 Substantive judgment at [4], citing *Warren*, above n 22, at [24].
62 At [32]–[33].
63 At [34].
64 At [35]–[36].
65 At [37].
66 At [38].

[97] In considering whether an abuse of process arose, the Judge applied the factors set out in *Warren*. His analysis was as follows:

(a) *Seriousness of the violation of the defendant's rights*: the Judge found that the rights of the respondents had not been violated, but that the police had engaged in improper conduct in relation to the owner of the storage unit by presenting a fake warrant and requiring him to act on it. In addition, the police actions amounted to an abuse of the Court's process both in using the fake warrant and in laying the false charge. The Judge described this as "a fraud ... being committed on the courts". He pointed out, and we agree, that it is not a function of the Court to facilitate a police investigation by lending the Court's processes to the false creation of street credibility. He described the abuse of process as "fundamental and serious".[67]

(b) *Bad faith*: there was no bad faith, although there was a significant measure of recklessness.[68]

(c) *Urgency, emergency, or necessity*: none existed. Although there was thought to be a risk of the officer being exposed, this was not a situation of urgency and there was no threat to the ongoing operation. The Judge highlighted the statutory provisions relating to the protection of undercover operations but noted that there was no hint that Parliament contemplated or authorised activities such as those that occurred in this case.[69]

(d) *Other direct sanctions*: the Judge considered there were no other appropriate sanctions for the police misconduct.[70]

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67 At [41]–[49].

68 At [50].

69 At [51]–[55]. The measures to which the Judge referred were s 65 of the Births, Deaths, Marriages, and Relationships Registration Act 1995; ss 108, 109 and 120 of the Evidence Act 2006; and s 34A of the Misuse of Drugs Act 1975. See also ss 84 and 91 of the Criminal Procedure Act 2011, which concern the ability of undercover officers to give evidence under an assumed name.

70 At [56].

(e) *Seriousness of the charges against the accused*: the Judge considered that the offending with which the respondents were charged was "moderate". With one exception, the drug allegations were at the lower end of the scale and there were no charges of violence. The charges of being part of an organised criminal group were serious, but there were grounds to dispute those charges.[71]

[98] The Judge then did an overall assessment. He discussed the United Kingdom cases we discussed above: *Grant*, *Maxwell* and *Warren*. Having done that, he took as his starting point the fact that the acts of misconduct were of a nature to justify a stay of proceedings: the Court's processes had been abused in a significant way. A firm response was appropriate.[72]

[99] Against this he balanced three factors: the fact that the police thought they had permission to bring the false charges, the fact that there was no strong causal link between the misconduct and the evidence underlying the charges ultimately laid, and the fact that the proceedings involved a large number of accused charged with serious offences.[73] He then commented as follows:

> [69] The lack of any strong casual connection is significant. I was not convinced by the efforts of the defendants' counsel to establish a connection. In theory it may be that the club members might have otherwise twigged to MW's real occupation. However, that is very speculative, and the reality is that club members continued to suspect him anyway, notwithstanding the courtroom role play. The most that can be said is that the misconduct may have helped MW to maintain his cover.
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> [70] In terms of how much significance should be placed on this lack of any real causative connection, it is proper to note that in *Maxwell* the majority judges saw it as important. However, when the rationale for recognising an abuse of process doctrine is considered, it does not appear to me to be in any way decisive. The concern is not unfairness to the accused, but the necessity to maintain the integrity of the court's processes. Although the immediate impact can be the unpalatable step of allowing persons accused of serious offences to avoid a trial, the longer term effect is the restoration of the public confidence in the integrity of the system.
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> [71] Accordingly, I conclude it is sufficient connection if a charge is the product of the investigation known as Operation Explorer. I understand that

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71 At [57]–[59].
72 At [66].
73 At [67].

> description to apply to the charges being faced by all twenty-one listed in the intitulment to this ruling.

[100] He then asked himself whether it was enough to just articulate his concerns, given that it was unlikely that the police would engage in similar conduct again. He concluded that, given the fact that the police conduct involved serious misuse of the Court and a troubling misunderstanding of the Court's functions, "anything other than a significant response runs the risk of being seen as rhetoric".[74] He concluded that a response was necessary, and that the only available response was a stay of the proceedings. He therefore made the order.

[101] In summary, the starting point taken by the High Court Judge was that the acts of misconduct were of a nature to justify a stay of proceedings, in particular because the processes of the Court had been abused in a significant way. The Judge considered that a firm response was appropriate. Against this, the Judge balanced the fact that the police thought they had permission for the false charge activities, the lack of a strong causal link between the misconduct and the evidence underlying the charges ultimately laid and the fact that the proceedings involved a large number of accused charged with offences that were serous, albeit only moderately so.

Our analysis

[102] We accept Mr Mander's submission that the Judge misdirected himself on the test to be applied. The Judge's starting point of historical serious misconduct meant that his focus was on the fact that the impugned conduct itself involved an abuse of the process of the Court, rather than on the question of whether the trial would, if permitted to proceed, be an abuse of the process of the Court. The balancing exercise must be between the need to protect the Court's processes from abuse against the public interest in seeing criminal charges being determined on their merits. This is evaluated in relation to the future trial, and the question is whether allowing that trial to proceed in the light of the misconduct will affect public confidence in the criminal justice system. If there is no significant connection between the misconduct and the future trial, that is a factor that while not fatal must weigh against a stay of the trial.

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[74] At [74].

[103] The Judge did not approach the issue in this way. Instead of focussing on the possibility of the future trial being an abuse, he focussed on responding to the fact that the police had previously abused the Court process. We cannot escape the conclusion that he stayed the proceedings to express the Court's disapproval of the police misconduct and to discipline the police. This is what the English Court of Appeal did in the since disapproved decision of *R v Grant*.

[104] Therefore, while the Judge did have a discretion to grant a stay, we conclude that he approached it erroneously, applying the wrong legal test when exercising his discretion. In these circumstances we consider it appropriate that we make our own assessment based on the Judge's findings of fact.

[105] We adopt the Judge's assessment of the factors identified in *Warren*.[75] In particular, we emphasise the degree of recklessness in the police conduct. We accept the submission made by both Mr Lithgow QC and Mr Borich that the involvement of the Chief Judge does not lessen the seriousness of the police action and may even be seen as aggravating it, given that the Chief Judge does not seem to have been fully informed. Even if he was, he could not, and probably did not, authorise what occurred.

[106] We reject Mr Mander's suggestion that the Judge was wrong to find that there were no other direct sanctions. He mentioned the Independent Police Complaints Authority and internal disciplinary processes. There was no evidence that either had been engaged in this case.

[107] We take into account the fact that, as the Judge correctly noted, there is no strong causal link between the misconduct and the evidence underlying the charges that have been laid against the respondents. There is no "but for" element in this case. That differentiates this case from *Warren* and *Maxwell*, which both had strong but for linkages, albeit quite different in nature from each other.

[108] We see the present case as having many similarities to *Ng Chun To Raymond* in that the misconduct was of a very serious kind (even worse in *Ng Chun To*

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[75] At [97] above.

Raymond than in the present case). In *Ng Chun To Raymond* the tainted evidence was not in fact adduced at trial. In the present case the Judge found that the police misconduct did not cause the undercover operation of MW and his colleague to be prolonged, because he considered that the misconduct did no more than help MW to maintain his cover. He did not believe that, but for the police misconduct, the undercover operation would have been terminated. While MW will be giving evidence at trial, presumably some of it relating to events after the police misconduct, it cannot be said that but for the police misconduct, that evidence would not have been available.

[109] Like *Ng Chun To Raymond*, therefore, this is a case of very bad police misconduct but also a case where that misconduct has little bearing on the trial in respect of which the stay is sought. We accept the point made by Mr Lithgow that the indictment in the present case is the product of the overall police investigation and that the police misconduct is a component of that investigation. But in circumstances where the evidence obtained by the police would have been obtained even if the police had not engaged in the misconduct, we do not see that a trial would be seen as the Court condoning the police conduct.

[110] It is significant that the decision of the Court of Appeal in England and Wales in *Grant*, in which a stay was granted because of past misconduct by the police that had no real bearing on the trial, has now been said to be wrongly decided.[76] Ultimately, as Lord Dyson put it in *Warren*:[77]

> ... the balance must always be struck between the public interest in ensuring that those who are accused of serious crimes should be tried and the competing public interest in ensuring that executive misconduct does not undermine public confidence in a criminal justice system and bring it into disrepute.

[111] We are also mindful of this Court's observation in *Fox*: [78]

> Finally, to stay a prosecution, and thereby preclude the determination of the charge on its merits, is an extreme step which is to be taken only in the clearest of cases.

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76 *Warren*, above n 22, at [36] per Lord Dyson.
77 At [26].
78 *Fox*, above n 26, at [37].

[112] Although the Judge was aware that the stay jurisdiction is not a disciplinary one, we consider that there is some merit in the Crown's contention that the stay jurisdiction was exercised for a disciplinary purpose in this case. The Judge's comment that a failure to respond could be seen as rhetoric is, on one reading, indicative of a disciplinary purpose.

[113] Having said that, we acknowledge that, as Lord Dyson observed in *Warren*, it is not always easy to distinguish between impermissibly granting a stay for a disciplinary purpose and permissibly granting a stay because it offends the Court's sense of justice and propriety.[79] The Court in such circumstances would intervene not to discipline, but because the prior conduct has been so egregious that allowing the trial to proceed would be inimical to public confidence and the criminal justice system. It would be, in the terms expressed by Richardson J in *Moevao*, contrary to the recognised purposes of the administration of justice. For instance, the misconduct might be so extreme as to cast in doubt the integrity of the prosecution process and those who would give evidence in support of it. In our view, the police misconduct in this case, which was found to not involve bad faith, was not in that category.

[114] We think it is also significant that while Lord Dyson did accept that the distinction between a disciplinary purpose and a purpose of protecting the Court's integrity can be elusive, he also reached the conclusion that the Court of Appeal had, in *Grant*, been wrong to stay the prosecution in order to express the Court's disapproval of police misconduct and to discipline the police. We consider that the same criticism could be made about the High Court Judge's decision in the present case.

[115] We conclude that, although the police misconduct in the present case was grave and, itself, involved an abuse of the Court's process, the trial of the respondents would not involve the Court condoning that conduct and would not involve the Court accepting evidence obtained as a result of that misconduct.

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79 *Warren* at [37].

[116] While the granting of a stay would have the substantial benefit of providing a clear condemnation by the Court of the police conduct and a clear signal that the Court does not accept that the ends justify the means, we do not see those factors as sufficiently strong to outweigh the public interest in bringing the respondents to trial.

[117] We do not believe that by allowing the trial to proceed, the Court could fairly be seen to be condoning the police conduct. While we acknowledge that the case is finely balanced because of the seriousness of the police conduct, we see the balancing exercise as favouring the refusal of a stay in the present case so that the respondents face trial for the offences of which they stand accused.

Conclusion

[118] We are satisfied that the error made by the Judge was an error of law, and that we are therefore acting within our jurisdiction in reaching this conclusion. The Judge misdirected himself as to the legal test to be applied by focusing on the fact that the police misconduct constituted an abuse of process, rather than considering whether the trial itself would constitute an abuse of process. The Judge's starting point moved him away from the underlying rationale for the stay jurisdiction, and caused him to take an unduly reactive and disciplinary approach. Given that error, it was necessary for us to re-conduct the balancing exercise on the facts as found by the Judge. We have accordingly held that the balancing exercise favours the refusal of a stay. The police misconduct was extremely grave, and itself an abuse of process. However, when balanced against the weak causal link between the misconduct and the trial and the public interest in having serious criminal charges determined on their merits, we have concluded that it would not be an abuse of process for the trial to go ahead.

[119] While public confidence in the criminal justice system is undermined by the actions of the police in this case, we consider that it would be undermined to a greater extent if the respondents did not face trial on the charges against them.

[120] We therefore answer the question referred to the Court for its opinion: "Yes".

Result

[121] We allow the appeal and set aside the stay granted by the Judge. The High Court should now make arrangements for the trial to proceed.

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