AN ORDER IS MADE PROHIBITING PUBLICATION OF THE JUDGMENT AND ANY PART OF THE PROCEEDINGS (INCLUDING THE RESULT) IN THE NEWS MEDIA OR ON THE INTERNET OR OTHER PUBLICLY AVAILABLE DATABASE UNTIL FINAL DISPOSITION OF THE TRIAL SAVE THAT PUBLICATION IN A LAW REPORT OR LAW DIGEST IS PERMITTED.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA312/2008
CA572/2008
CA672/2008
[2008] NZCA 585

THE QUEEN

v

DAVID CULLEN BAIN

Hearing:	17 and 18 November 2008
Court:	William Young P, Chambers and O'Regan JJ
Counsel:	M P Reed QC, H A Cull QC and P A Morten for Appellant K Raftery and C L Mander for Crown
Judgment:	24 December 2008 at 2.30 pm

JUDGMENT OF THE COURT

A **We dismiss the application for leave to appeal in CA312/2008 for want of jurisdiction.**

B **We grant leave to appeal in CA572/2008 and CA672/2008 to the extent that the matters raised in those applications are discussed in this judgment but dismiss the appeals as to those matters.**

C **We prohibit publication of the judgment and any part of the proceedings (including the result) in the news media or on the Internet or other publicly available database until final disposition of the trial save that publication in a law report or law digest is permitted.**

REASONS OF THE COURT

(Given by William Young P)

Introduction

[1] We are required to address, on a pre-trial basis, three issues associated with the proposed retrial of the appellant on five charges of murder:

(a) Does the Evidence Act 2006 apply to the proposed retrial? This question is raised in CA312/2008 but is an underlying aspect of other appeal grounds which we must address.

(b) Is a transcript of the evidence given by the appellant at the first trial admissible? This is one of the grounds identified in CA672/2008.

(c) Is a document containing a hand-written notation of the appellant as to him hearing gurgling from his sister Laniet admissible? This ground of appeal (which is formally addressed to the evidence of Professor Rex Ferris that relies on this hand-written notation) is raised by CA572/2008.

[2] A fourth issue, relating to the admissibility of the proposed evidence of a particular witness lies outside our jurisdiction under s 379A of the Crimes Act 1961

as the question has yet to be the subject of a final ruling by Panckhurst J. We note as well that the ruling of the Judge on the first of the issues identified is, in itself, not subject to appeal under s 379A. So the corresponding application for leave to appeal (CA312/2008) must be dismissed for want of jurisdiction. But given its materiality to the other two issues which we must address (as well as issues raised by other appeals), it is convenient to address it on a stand-alone basis.

[3] The background to the case and its history to date are well known. They are comprehensively discussed in the judgment of the Privy Council which resulted in the appellant's conviction appeal being allowed: see *Bain v R* (2007) 23 CRNZ 71. Given this and the need for a prompt judgment, we propose to assume reader familiarity with that judgment and proceed directly to a discussion of the issues.

Does the Evidence Act 2006 apply to the proposed retrial?

The issue

[4] The Evidence Act 2006 (to which we will refer as "the 2006 Act") came into force on 1 August 2007.

[5] The appellant maintains that the 2006 Act does not apply to the retrial. Panckhurst J has held to the contrary.

The relevant sections of the 2006 Act

[6] Section 5(3) provides:

> (3) This Act applies to all proceedings commenced before, on, or after the commencement of this section except—
>
> > (a) the continuation of a hearing that commenced before the commencement of this section; and
> >
> > (b) any appeal from, or review of, a determination made at a hearing of that kind.

[7] Section 4(2) provides:

> (2) A hearing commences for the purposes of this Act when at the substantive hearing of the issues that are the subject of proceedings the party having the right to begin commences to state that party's case or, having waived the right to make an opening address, calls that party's first witness.

We note that proceeding is separately defined in s 4(1) as meaning:

> (a) a proceeding conducted by a court; and
>
> (b) any interlocutory or other application to a court connected with that proceeding.

The approach of Panckhust J

[8] In his ruling of 19 May 2008, Panckhurst J reviewed the authorities that had been cited and the relevant statutory provisions. He expressed the view (at [31]) that "generally speaking the new provisions will have relatively little impact in the context of the trial". His reasons for concluding that the 2006 Act will apply to the retrial were:

> [36] I accept Mr Raftery's argument concerning retrospectivity. The English, Australian and New Zealand cases upon which he relied speak with a single voice. There is a settled divide between substantive and procedural provisions. The former are not accorded retrospective effect, including in particular definitional and penalty amendments. But procedural amendments are ordinarily applied at a trial, provided they have come into effect at that date. This, then, is the common law background.
>
> [37] But, of course, s 5 of the Evidence Act is an express transitional provision. Subsection (3) begins with emphatic confirmation that once the new Act was in force it applied to all proceedings regardless whether they were commenced before, on, or after the commencement date. Accordingly, unless one of the two exceptions comes into play, the new Act must apply to the retrial.
>
> [38] Is the retrial "the continuation of a hearing that commenced before …" the new Act came into force? Tucked away in the Act is s 4(2) which contains a highly relevant definition. It provides:
>
> > A hearing commences for the purposes of this Act when at the substantive hearing of the issues that are the subject of proceedings the party having the right to begin commences to state that party's case or, having waived the right to make an opening address, calls that party's first witness.
>
> [39] Clearly this definition of when a hearing commences is designed to distinguish between pre-trial (or interlocutory) hearings on the one hand, and the substantive hearing of a case on the other. In terms of s 5(3)(a), it is only

> where the substantive hearing has actually commenced, marked by the opening of the case or the calling of evidence, that the new Act is excluded from operation in relation to a proceeding. This provides a clear demarcation. Pre-trial hearings which occurred before the relevant commencement date do not influence the application of the Act at the substantive hearing. It is when the trial proper commences through an opening address, or the calling of a witness, which is determinative.
>
> [40] Here, the retrial is yet to commence. Therefore, the new Act applies, unless it can be said that the first trial of David Bain was a hearing as defined in s 4(2)?
>
> [41] I am in no doubt that the fact of a previous trial does not mean that the forthcoming retrial is a continuation of a hearing commenced long before the emergence of the new Act. The retrial is a new entity. Following the retrial decision, a new substantive hearing of the charges which are the subject of the proceeding, was required. It is the commencement of that hearing, evidenced by the Crown's opening address, which marks the commencement of a hearing in terms of s 5(3)(a). Given the clear purpose and intent of s 5, namely that it is only substantive proceedings actually part-heard at the Act's commencement date which are not caught, I consider it would be artificial to view the Crown opening at the first trial in 1995 as the determinative event.

Would the application of the 2006 Act be unfair and unacceptably retrospective?

[9] Ms Cull QC, who presented this aspect of the case for the appellant, sought to contextualise her core argument by invoking considerations of fairness and challenging what she contended was the unacceptable retrospectivity implicit in the Crown approach.

[10] The appellant's case is one of a number which were first tried before 1 August 2007 and where there is to be (or has been) a post-1 August 2007 retrial as a result of an appellate court having allowed a conviction appeal and directing pursuant to s 385(2) of the Crimes Act that "a new trial" take place. In a number of cases it has been assumed, without being decided, that the 2006 Act would apply to such retrials, see *R v Rajamani* [2008] 1 NZLR 723 at [21] (SC), *R v Ngan* [2008] 2 NZLR 48 at [67] (SC) and *R v E (CA 308/06)* [2008] 3 NZLR 145 at [45] (CA). We think it clear that the true position must be that the 2006 Act either applies to all such cases or none of them. Accordingly we do not think it relevant to consider whether the appellant is better or worse off under the 2006 Act than under the former law.

[11] We accept that there may sometimes be scope for doubt or argument as to whether a particular change to the law should be seen as substantive or procedural, cf *Newell v R* (1936) 55 CLR 707 and *Carmell v Texas* 529 US 513 (2000). But there can be no doubt that where a change is procedural, the usual rule is that it applies to trials which take place after the change irrespective of when the offence is alleged to have occurred. And this is the usual approach taken by the courts to changes in evidential rules, see for instance *R v Cann* [1989] 1 NZLR 210 (CA), *T (CA175/97) v Attorney-General* CA175/97 27 August 1997 and *Rodway v R* (1990) 169 CLR 515.

[12] So the transitional provisions in the 2006 Act are, in their broad effect, entirely conventional. The 2006 Act is forward looking: it applies only to hearings that commence after the date it came into effect. There is no question of criminalising conduct that was not criminal when it occurred or retroactively increasing penalties (cf s 10A of the Crimes Act and ss 25(g) and 26(1) of the New Zealand Bill of Rights Act 1990). Viewed in this light, the appellant's arguments on this aspect of the case must come down to the proposition that his earlier trial under the former law makes a retrial under the current law inappropriately retrospective. Put in this way, the proposition is not self-evidently correct.

The statutory language

[13] The appellant's argument, on the wording of the statute, involves the following steps:

(a) The proposed retrial is, for the purposes of s 5(3)(a) of the 2006 Act, the "continuation of a hearing".

(b) The "hearing" of which it is a "continuation" was the first trial before Williamson J which commenced on 8 May 1995 when the Crown prosecutor opened the case for the Crown.

[14] The appellant's argument is not congruent with the ordinary meaning of the words employed in the statute. The hearing which commenced before Williamson J

and a jury on 8 May 1995 concluded either when the jury returned its verdicts or, at the latest, when the appellant was sentenced. The contention that the proposed retrial will be a continuation of that hearing requires considerable wrenching of the words actually used by the legislature and this even before allowing for the contextual considerations that the retrial will be conducted nearly 14 years later by a different Judge, before another jury and in a different city. We prefer to treat the relevant language of the statute as meaning what it says.

Conclusion

[15] Relevant to all of this is the following passage from the opinion of the Privy Council in *Humphreys v The Attorney General of Antigua and Barbuda* [2008] UKPC 61:

> [4] … [A] court will generally not construe legislation as intended to operate retrospectively if doing so would have an unfair result. The leading authority on this doctrine is the speech of Lord Mustill in *L'Office Cherifien des Phosphates v. Yamashita-Shinnihon Steamship Co. Ltd* [1994] 1 AC 486 at pp. 523-529. From the authorities examined by Lord Mustill, it would appear that the presumption will rarely, if ever, apply to changes in court procedure. Prospective litigants (or defendants in criminal proceedings) do not have a vested right to any particular procedure and there will generally be nothing unfair in applying whatever procedure is in force when the case comes to court. It is however unnecessary to examine the scope of the doctrine because on any view it is a principle of construction which must yield to the express language of the statute. In this case the language of the statute could hardly be clearer. ….

The 2006 Act involved changes to court procedure. It could for that reason alone be expected to apply to cases heard after it comes into effect. And in any event, and adopting the language of the Privy Council, the transitional provisions of the 2006 Act are expressed in language which "could hardly be clearer".

[16] Accordingly, and in agreement with Panckhurst J, we conclude that the 2006 Act applies to the proposed retrial.

Is a transcript of the evidence given by the appellant at the first trial admissible?

The appellant's evidence at his first trial

[17] The appellant gave evidence at his first trial and denied killing his parents and siblings. In the course of this, he gave an account of his movements on the morning of 20 June 1994 and addressed elements of the Crown's circumstantial case.

[18] For present purposes, the salient features of his evidence (which the Crown wish to have before the jury at the second trial) are as follows:

(a) The appellant's evidence as to his familiarity with firearms associated with him going shooting with his father when he was 17.

(b) His acknowledgement that he purchased and used the pair of opera gloves which were later found in a blood stained condition in Stephen's room.

(c) His evidence as to his sight and use of glasses.

(d) His estimate (based on a reconstruction) as to when he got home from his paper round (suggesting that this was around 6.42 – 6.43 am).

(e) His evidence that there were two keys to the trigger lock of the rifle, one on a string which was usually around his neck and one hidden in a piece of pottery in his room.

(f) His chronology of what happened after he arrived home, relevantly that he went to his room where he took his shoes off, sorted out washing and put on the washing machine, returned to his room, noticed bullets and the trigger lock, discovered his mother's body, then entered Stephen's, Laniet's and Arawa's rooms (hearing Laniet

gurgle and seeing the bodies of Stephen and Arawa) and then went into the lounge where he saw the body of his father, Robin.

(g) His confirmation that the washing machine took three quarters of an hour to an hour to complete its cycle.

(h) An acknowledgement that he had not used the rifle since January or February 1994.

(i) His acceptance that he kept his opera gloves in a drawer in his room.

(j) His acceptance that he sometimes used his mother's glasses for watching television or going to lectures.

We note as well that the Crown may wish to rely on the appellant's evidence relating to the Gondoliers shirt which was found in the washing machine with some blood on it. This is referred to by Panckhurst J in his rulings and the relevant evidence was marked up on the copy of the transcript provided to us but it was not on the list of extracts given to us by Mr Raftery.

[19] The appellant's evidence was recorded using the system known as TRS: in other words, by the associate of the Judge (or, for one day, a relieving associate) using a word-processor. As was common at the time, the evidence-in-chief was recorded in narrative form so that the text as typed recorded the associate's grasp of both questions and answers. Cross-examination and re-examination were recorded in question and answer form.

The relevant provisions of the 2006 Act

[20] Primarily relevant are ss 7, 8 and 27 of the 2006 Act:

> **7 Fundamental principle that relevant evidence admissible**
>
> (1) All relevant evidence is admissible in a proceeding except evidence that is—
>
> (a) inadmissible under this Act or any other Act; or

(b) excluded under this Act or any other Act.

(2) Evidence that is not relevant is not admissible in a proceeding.

(3) Evidence is relevant in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.

8 General exclusion

(1) In any proceeding, the Judge must exclude evidence if its probative value is outweighed by the risk that the evidence will—

(a) have an unfairly prejudicial effect on the proceeding; or

(b) needlessly prolong the proceeding.

(2) In determining whether the probative value of evidence is outweighed by the risk that the evidence will have an unfairly prejudicial effect on a criminal proceeding, the Judge must take into account the right of the defendant to offer an effective defence.

27 Defendants' statements offered by prosecution

(1) Evidence offered by the prosecution in a criminal proceeding of a statement made by a defendant is admissible against that defendant, but not against a co-defendant in the proceeding.

(2) However, evidence offered under subsection (1) is not admissible against that defendant if it is excluded under section 28, 29, or 30.

(3) Subpart 1 (hearsay evidence), subpart 2 (opinion evidence and expert evidence), and section 35 (previous consistent statements rule) do not apply to evidence offered under subsection (1).

…

[21] Also arguably relevant is s 30, which deals with the exclusion of improperly obtained evidence.

The approach taken by Panckhurst J

[22] The admissibility or otherwise of this evidence was dealt with by Panckhurst J in rulings of 8 September 2008 and 17 October 2008.

[23] In his ruling of 8 September 2008 Panckhurst J addressed in general terms the admissibility of the transcript of the appellant's evidence. He referred to a number of decisions, including *R v McGregor* [1968] 1 QB 371 (CA), *Turner v State of Nevada* 641 P 2d 1062 (1982) (Nev Sup Ct) and *Cornwell v R* (2007) 231 CLR 260. He took the view that these cases generally supported the admissibility of the transcript. He noted that s 13 of the Canadian Charter of Rights and Freedoms prohibits incriminating evidence given by a witness being used against that witness in other proceedings and on that basis distinguished the relevant Canadian cases. Finally, in his survey of the cases, he referred to the conflicting approaches taken in *R v Darwish* [2006] 1 NZLR 688 (HC) and *D v Police* HC AK CRI-2004-404-44 5 March 2004 as to whether evidence given in support of an application for bail might later be deployed against the deponent at his or her trial.

[24] More generally, the Judge took the view that the evidence was admissible. Of particular relevance in the present context are the following aspects of his reasons:

> [23] I am satisfied that in principle evidence given by an accused at a previous trial may be adduced by the Crown at a retrial. This is the position in other comparable countries, save for Canada, where s 13 of the Charter dictates otherwise. Although I have been unable to find a case in point, it is my personal recollection that on occasion evidence has been admitted in this country of admissions made by an accused at a first trial. This was achieved by calling a police officer who was present at the first trial – as in *McGregor*. I believe these instances were not controversial, because the accused did not seek to resile from what he had said on the first occasion and only a particular admission (not the evidence as a whole) was introduced at the retrial.
>
> …
>
> [37] It remains, however, to evaluate the arguments based on more discretionary considerations. Broadly, the defence contention is that reliance upon the accused's evidence at the first trial should not be countenanced on account of the extent to which elements of the Crown case have now been doubted in the Court of Appeal and/or the Privy Council. To my mind this question must be approached with ss 7 and 8 [of the 2006 Act] in mind. The former expresses the fundamental principle that relevant evidence is admissible, being any evidence which has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.
>
> [38] On the other hand, s 8 requires the exclusion of evidence if its probative value is outweighed by the risk that it will:
>
> (a) have an unfairly prejudicial effect on the proceeding; or

(b) needlessly prolong the proceeding.

In making that judgment, account must be taken of the right of an accused to offer an effective defence.

[39] To my mind the Crown's contentions invited a principal focus on s 7, while the defence arguments based on a poisoned fruit metaphor invoked s 8. I have considered Mr Reed's argument concerning particular aspects of the evidence which now need to be read in light of the emergence of further evidence, or the qualification of the previous evidence. But on reading the accused's evidence as a whole, I was not brought to the view that it represented the "fruit of a poisoned tree" and must, therefore, be excluded. At most, some answers required an element of qualification. ….

[25] The Judge, however, expressed some reservations as to the practicalities of producing the transcript of the evidence which the appellant gave at the first trial in a manner that would be intelligible to the jury. We will revert to this issue later in the judgment when we address the practicalities ourselves.

[26] Presumably as a response to this ruling, the Crown identified the particular passages in the appellant's first trial evidence on which it wished to rely and the Judge returned to both the admissibility and practicality issues in his ruling of 17 October 2008.

[27] In this ruling, the Judge reviewed the evidence in issue. He concluded that the account given by the appellant was admissible even though it did not amount to an admission of any of the elements of the offences alleged against the appellant. In support of this he referred particularly to *Turner v State of Nevada* and *Cornwell v R.* He explained the position in this way:

[30] Nor do I accept that a statement of a witness concerning an aspect of the circumstantial case advanced against him is insufficient to engage the admissibility principle discussed in my previous ruling. The present is necessarily a circumstantial case. Absent an admission to pulling the trigger, the Crown must establish to the required standard from a combination of circumstances the identity of the murderer. In this context admissions which establish factual matters of direct relevance to the circumstantial case are of significant importance. So is an accused's inability to account for physical evidence found in relation to items which were recently within his possession and control. Admissions made in a circumstantial context will usually not be as far-reaching, nor as clear-cut, as admissions of the other kind. For all that, they are admissions nonetheless, and it is their significance, in a cumulative sense, which may provide proof of the case.

He also noted that s 27(1) of the Act, which provides for the admissibility of any statement made by a defendant, does not require that the statement be against self-interest or inculpatory. He found that the transcript, despite not being word perfect, was sufficiently accurate for it to be of assistance. He rejected the contention that admitting the evidence would have the effect of needlessly prolonging the trial (see s 8(1)(b) of the 2006 Act).

[28] Finally, the Judge addressed practicalities as to the admission of the evidence. We will address these a little later in this judgment.

Is the evidence given by the appellant at his first trial relevant?

[29] In his rulings, the Judge referred not only to s 7 (see [39] of his ruling, set out in [24] above) but also to ss 19 and 27. We consider, however, that the first and primary issue is relevance.

[30] In each of the respects highlighted in [18] above, the appellant's evidence contains what on the Crown case are admissions as to circumstantial facts that are material to its case. In some instances, there is other evidence available to the Crown which covers all or some of the same ground, but that does not detract from the relevance of the evidence. Nor does it justify the invocation of s 8(1)(b) of the 2006 Act.

[31] In short, and largely for the same reasons as given by Panckhurst J, we conclude that the evidence is relevant.

Is there an implicit exclusion from s 27(1) in relation to evidence given on a prior occasion?

[32] A substantial part of the argument advanced on behalf of the appellant on this aspect of the case rested on the proposition that evidence given on an earlier occasion should form an exception to the otherwise broad terms of s 27.

[33] We disagree. We see no reason in principle why evidence given by a defendant on a prior occasion should not be within s 27(1). Again we adopt the approach taken by Panckhust J.

Is it unfair to the appellant to allow the Crown to rely on his evidence at the first trial?

[34] The "fruit of the poisoned tree" argument was advanced before us with what we suspect was rather more particularity than before Panckhurst J. It accordingly warrants rather more elaborate discussion by us.

[35] We have no difficulty accepting that in principle the "fruit of a poisoned tree" approach might justify exclusion from a retrial of the evidence of a defendant at the first trial. We can see this approach as arguably applicable where the defendant gave evidence at a first trial to explain away incriminating evidence that was uncovered because of the police's improper conduct, for example, an unlawful search or police interview, see *Harrison v United States* 392 US 219 (1968). An argument of this sort might be thought to bring into play s 30 of the 2006 Act, which deals with the exclusion of improperly obtained evidence.

[36] The appellant complains that his first trial was fundamentally unfair. To be more specific, his position is that in very significant respects the Crown evidence was wrong. According to Mr Reed QC, this had two consequences:

(a) The apparent strength of the Crown case created a situation in which the appellant was practically required to give evidence at his first trial and that he thereby was compelled to forego his right of silence; and

(b) False assumptions in his own mind created by incorrect assertions made by Crown witnesses led him to give evidence that may not have been correct on certain topics.

[37] Mr Reed pointed to aspects of the prosecutor's closing address and the refusal of the Judge, after closing addresses, to admit the evidence as to a possible

motive for Robin as being material to the fairness or otherwise of the trial. But because all of this happened after the appellant had finished giving evidence, these considerations have no logical causative link to the appellant's earlier decision to give evidence and the content of that evidence. And given the extracts which the Crown wishes to rely on mainly come from the appellant's evidence-in-chief, the complaints about the way the appellant was cross-examined are also of no relevance. So in assessing this argument, we think it necessary to focus on what happened prior to the appellant electing to give evidence.

[38] We recognise that even focussing just on what happened prior to the appellant electing to give evidence, there is scope for challenging the fairness of the trial. For instance:

(a) Material which was of potential assistance to the appellant was not disclosed. We have in mind a second statement given by Mrs Laney, additional material the police had as to the ownership of the glasses and the apparently dusty state of the lens found in Stephen's room, and information which was relevant to when the computer was switched on.

(b) Some evidence led was incorrect, for instance as to the position of the lens found in Stephen's room and as to ownership of the glasses.

(c) Aspects of the Crown case were presented as being incontrovertible when they were in fact open to challenge. The most obvious example of this is the evidence as to the bloody sock prints.

Many other aspects of the Crown case as presented at trial are challenged. We propose, however, to concentrate on the above points because we are trying to identify points on which it can be said fairly to have been demonstrated that the trial went wrong.

[39] We think it helpful to contextualise all of this by considering two particular aspects of the appellant's evidence which the Crown wishes to rely on at trial. The

first is the appellant's reconstructed time of return to the house (around 6.42 – 6.43 am) and the second is his acknowledgement that in walking from room to room he made the bloody sock prints found in the hall.

[40] At the first trial on the then assumptions and evidence as to when the computer was turned on, the later the appellant arrived back at the house, the better for him. He was thus better off on Mrs Laney's evidence that he returned home at 6.45 am (which, if correct, meant that he was not at the house when the computer was understood to have been turned on) as compared to his evidence which suggested that he returned home at around 6.42 – 6.43 am. We note that given new evidence as to when the computer was turned on, it seems unlikely that much will turn on the exact time of the appellant's return home. So, on this point, the debate might be thought to be of little moment. Nonetheless, it was carried on before us in a spirited way and we must address it.

[41] The non-disclosure of Mrs Laney's additional statement meant that the appellant and his counsel did not know the full story as to why she was confident in her timing. On the other hand, the appellant's reconstruction was based on material which was independent of Mrs Laney's evidence. There is thus no obvious link between this non-disclosure and the appellant's willingness at trial to put himself back at the house as early as 6.42 – 6.43 am.

[42] We turn now to the bloody sock prints.

[43] The Crown evidence at trial as to the bloody sock prints portrayed a picture that is different from what is now known. But there is no reason to suppose that this evidence led to the appellant engaging in a false reconstruction exercise when he told the Court at the first trial that he went into the rooms of his mother and siblings in stockinged feet. Indeed, it is possible that the appellant's awareness of having walked in the hall in socks which had blood on them led to there being no forensic challenge to the scientific evidence. If he had not walked down the hall in such socks, he would have known that he could not have left the sock prints. And if this was so, he would presumably have required his counsel to challenge the forensic evidence which, on this hypothesis, he would have known was incorrect.

[44] After anxious consideration we have concluded that the evidence should not be excluded. Our reasons for this conclusion are as follows:

(a) Section 30 of 2006 Act is addressed to the admission of improperly obtained evidence. It was plainly drafted with a primary focus on unfair police interviews and unreasonable search and seizure and is not easily applicable to evidence given voluntarily at a properly conducted criminal trial.

(b) Importantly, there has been no finding to date against the police, forensic witnesses or the prosecutor of misconduct which could fairly be regarded in the present context as material (in the sense of being likely to influence significantly the appellant's decision to give evidence at his first trial or the jury's verdicts). We emphasise that the Privy Council was concerned with the potential impact of fresh evidence rather than attempting to affix blame for what had happened at the first trial. So it is not the case that the appellant's evidence was given in response to established improprieties on the part of the police.

(c) In the absence of evidence from the appellant as to what happened at trial and the factors which were material to his decision to give evidence, we find that relevant errors that were or may have been made by the police and witnesses did not cause him to give evidence when otherwise he would not have done so. The appellant was the sole survivor of the six people who were alive and well in the house on 19 June 1994. Had his counsel sought to explain away the circumstantial evidence relied on by the Crown without calling the appellant to give evidence, it is quite possible that the Judge would have adversely commented upon the appellant's absence from the witness box. Nor do we regard as plausible the suggestion that such errors may have led to him falsely reconstructing his core narrative of events.

Practicalities

[45] Much of what the Judge said in his two rulings was addressed to the practicalities of how the evidence might be led at the second trial in a way which would be intelligible to the jury. In the end, the approach favoured by the Judge was that the Crown could rely on the particular extracts already mentioned.

[46] The Judge noted some of the difficulties in his 17 October 2008 ruling:

> [35] A more difficult issue concerns the final scope of the evidence. Mr Raftery originally advanced the application on the basis that a full transcript of the accused's evidence should be adduced at the retrial. At my prompting the Crown focused its initiative upon the 11 extracts set out above. This prompted Mr Reed's argument that the Crown had "cherry picked" portions of the accused's evidence, at the expense of others. In addition he challenged the commencement and conclusion points in relation to at least some of the extracts. Mr Raftery responded that the Crown was content to expand the extracts where it was thought they were unduly truncated or lacked a full context.
>
> [36] Mr Reed also observed that the defence may wish to adduce additional extracts before the jury, if the Crown application ultimately succeeded. However, counsel was not prepared to engage in relation to this aspect. Seemingly the concern was that to do so would detract from the essential thrust of the defence argument that introduction of this further evidence would be unfairly prejudicial and would needlessly prolong the trial. Accordingly, I am effectively hamstrung and I cannot attempt to evaluate this issue. I merely observe that the statutory vehicle by which the Crown has secured access to the accused's previous evidence is s 27 of the Act. That section is only available to the prosecution. Whether there is some other way by which the defence can proceed down this path, I am unsure. But I do not resile from the observations made in the course of argument that defence counsel should feel free to identify other aspects of the transcript which they maintain are required to place the Crown's extracts in proper context and to ensure fairness.

[47] We do not see it as our role to offer advice to an experienced Judge as to how trial practicalities should be addressed, something which will have to be determined in the context of the trial as it unfolds. We think it right to record, however, that the extracts relied upon by the Crown must be read in the context of all the evidence which the appellant gave. It is for the trial Judge to determine what arrangements should be made to provide a fair opportunity for the appellant's counsel to contextualise those extracts.

Is a document containing a hand-written notation of the appellant as to him hearing gurgling from Laniet admissible?

The document in question

[48] When preparing for the first trial, the appellant's counsel, Mr Michael Guest, summarised the material made available to him by the police. He referred to these summaries as "the greens". The appellant had annotated some pages of the greens in handwriting and then returned them to Mr Guest.

[49] On page 101 was the following text:

> Notebook entry on 20 June 1994. Constable Stewart, general description of Laniet and Laniet's room. 3 entry rooms [sic] into the skull not positive which shot was fatal or the order that they occurred. Note that she has not died instantly. Similar effect to drowning with mucous and blood in lungs, though this is not the cause of death.

Beside this text the appellant wrote:

> When I went into her room, I heard groaning type sounds muffled by what sounded like water. Turned on light, they came from her. Went over to her, but could see there was nothing I could do. I didn't touch her.

Materiality of the comment

[50] In the course of his closing address at the first trial, Mr Wright, the Crown prosecutor said this (or words to this effect):

> I leave you with one piece of evidence. Why was Laniet shot three times? Why did she have blood on her hand? The result of an involuntary movement? Putting her hand to her cheek. She was still breathing after the first shot, making audible gurgling sounds. Again I refer you to what Dr Dempster said. He said that there would have been audible gurgling as the air passages filled with blood after the first non-fatal wound to the cheek. "I could see blood on her face" the accused told Mr Guest. "I went up beside her [he said] and I could hear her gurgling". He could see blood on her face. He could hear her gurgling. Members of the jury, it is a vital statement. Only one person could have heard Laniet gurgling. That person is the murderer.

The evidential basis for this submission was found, as the passage suggests, in the evidence of the pathologist, Dr Dempster, and the appellant's evidence at trial that he had heard Laniet gurgling.

[51] This passage from the closing address of Mr Wright was the subject of much consideration on the appellant's petition to the Governor-General and the subsequent hearings before the Court of Appeal and then the Privy Council.

[52] On the Crown case, Laniet probably would have groaned or gurgled in the manner described but would have died so quickly after the final shot that only her murderer would have heard these sounds. Material to all of this is whether a dead body can gurgle – something which may depend on whether it is moved. This is why the Crown is anxious to have before the jury at the retrial the appellant's assertion that he did not touch Laniet.

[53] The document may also have had some significance to what seems now to be a peripheral issue, namely whether the appellant's evidence of Laniet gurgling came as a surprise to Mr Guest.

How the document came into the possession of the Crown

[54] The Ministry of Justice ("the Ministry") officials who were assessing the appellant's petition to the Governor-General wished to speak to Mr Guest. To facilitate this, the appellant signed a waiver of privilege in these terms:

> I DAVID CULLEN BAIN confirm that I waive privilege only as it relates to the inquiry by the Ministry of Justice into the following issues raised by my petition to the Governor-General for the exercise of the Royal prerogative of mercy:
>
> - Errors by defence counsel in the preparation and conduct of my defence;
> - Non-disclosure of certain material by the Police before trial and appeal;
> - Unfounded prejudicial allegations by the Crown which were not seriously challenged by counsel; and
> - Trial by ambush on the part of the Crown.

> This waiver of privilege is only to the extent that you may discuss these matters with officials from the Ministry of Justice, and further that any discussions with officials concerning privileged information shall not be disclosed, in whole or in part, to any other person or the media without my authorisation.

[55] It appears that Mr Guest told the Ministry representatives of the existence of the greens and that they were in the possession of the appellant's then legal team. This resulted in a letter of 5 February 1999 from the Ministry to the appellant's solicitors in which they sought copies of the greens. This in turn led to Mr Withnall QC (who was then acting for the appellant) writing to the Ministry on 12 February 1999, enclosing the greens as requested. As far we can tell, the possible significance of the notation on page 101 was not recognised at the time. It was common ground before us, however, that page 101, when released to the Ministry, should be regarded as covered by the limited waiver of privilege signed by the appellant. On the other hand, given the apparent disconnect between the terms of the limited waiver and the making available of the document by Mr Withnall, it is understandable that the Ministry officials dealing with page 101 did not realise that it was subject to the limited waiver.

[56] In the course of the Ministry's assessment of the petition, the comments made by the appellant on page 101 of the greens came to be seen as material, or possibly material, to the appropriateness (perhaps viewed retrospectively) of what Mr Wright had told the jury and also to whether Mr Guest should have anticipated that the appellant would give evidence of having heard gurgling.

[57] For this reason, page 101 of the greens and the appellant's comment on it are referred to in Sir Thomas Thorp's report of 19 May 2000 to the Secretary for Justice and the report of officials to the Minister of Justice of 31 October 2000. As well, page 101 receives specific mention in the Order in Council of 18 December 2000 by which six points (in the form of questions) were referred to the Court of Appeal for its opinion pursuant to s 406(b) of the Crimes Act. The fourth question asked:

> Was the submission made by the Crown Solicitor in the Crown's closing address to the jury at the applicant's trial that "Only one person could have heard Laniet gurgling. That person is the murderer" wrong or misleading?
>
> The following documents are or may be relevant to this question:

> (a) page 101 of the summary of the briefs of evidence for the applicant's trial prepared by defence counsel, Michael Guest, containing the applicant's handwritten notations:
>
> …

Page 101, along with the other documents specifically referred to in respect of each question, was attached to the Order in Council, as presented to the Court of Appeal. It was not, however, annexed to the Order in Council as published in the *Gazette*.

The section 406(b) hearing in the Court of Appeal

[58] In the lead up to the s 406(b) hearing, there was considerable discussion about the questions in the Order in Council and the proper scope of the evidence to be presented to the Court. As far as we can tell no issue was raised directly with the Court as to the admissibility of page 101 and the appellant's comments.

[59] On the other hand, it appears that Mr Withnall informally raised concerns about the document. We say this because we have a copy of the affidavit of Ms Valery Sim sworn on 31 July 2003. She was one of the officials who had been responsible for the investigation of the appellant's petition. In her affidavit she said:

> 3 One of the grounds of the Petition questioned the competence of Mr Bain's counsel at trial, Mr Michael Guest and Ms Jonelle Williams. The Ministry sought from Mr Bain, through his counsel Mr Stephen J O'Driscoll, a waiver of the privilege between him and counsel at trial to facilitate the investigation of the Petition by the Ministry. The Ministry provided a draft waiver document for Mr Bain's consideration.
>
> 4 A copy of the waiver document signed by Mr Bain was sent to the Ministry by facsimile on 9 January 1999. …
>
> 5 The Ministry was provided with a copy of the summary of the briefs of evidence for Mr Bain's trial prepared by defence counsel Mr Michael Guest ("the Summary") by counsel for Mr Bain, Mr CS Withnall in February 1999.
>
> 6 The Governor-General, by Order in Council dated 18 December 2000, referred 6 questions arising from the Petition to the Court of Appeal for its opinion under section 406(b) of the Crimes Act 1961 and identified documents which were or might [be] relevant to those questions ….
>
> 7 Among the documents listed in the Order in Council in relation to question 4 was page 101 of the Summary. …

> 8 During the hearings before the Court of Appeal on the section 406(b) reference, Mr Bain's counsel advised me that Mr Bain maintained legal professional privilege in some of the material provided to the Ministry during the investigation of the Petition, and that this material should not be further disclosed to the Court of Appeal without Mr Bain's consent. I do not understand that this claim for privilege extends to page 101 of the Summary which was referred to in the Order in Council and provided to the Court of Appeal.

This affidavit, although produced for the purposes of the s 406(a) hearing, plainly referred to what had happened at the earlier s 406(b) hearing.

[60] For the purposes of the s 344A hearing before Panckhurst J, Mr Withnall swore an affidavit of 2 August 2008. In this affidavit he referred to having appeared before the Court of Appeal at both the s 406(b) and s 406(a) hearings and noted that amongst the affidavits submitted on behalf of the Crown at the s 406(a) hearing was Ms Sim's affidavit. He said that the greens were provided to the Ministry in terms of the limited waiver of privilege signed by the appellant. The affidavit then went on:

> 10. I was disturbed that this document had been referred to in the Order-in-Council because I considered that the use of this document was a clear breach of the terms of the waiver. No authority to disclose its contents had ever been sought by the Ministry. I am aware from my own personal knowledge that no authority to disclose its comments [sic] was ever given by David Bain.
>
> 11. Furthermore, the matter to which this document relates was not within any of the categories of issues which the Ministry wished to discuss with trial counsel, as listed in David Bain's waiver of privilege document, in respect of which the waiver was given.
>
> 12. I took this issue up with Ms Sim as soon as I became aware of it, and I made it clear that David Bain maintained his privilege in respect of <u>all</u> documents disclosed under the waiver.
>
> 13. There has never been a waiver of privilege by David Bain, or by me on his behalf, apart from the strict terms of the waiver referred to above.

[61] What is not clear is how any objection to the admissibility of page 101 was addressed and determined.

[62] We note that at the s 406(b) hearing the Court was provided with the affidavit of Professor Rex Ferris, a consultant forensic pathologist, who furnished an opinion for the Crown on the factual basis underlying question four. At [23] he made explicit reference to the material contained in page 101:

> It is my opinion that the statement of David Bain that he *"could hear her gurgling"* and the written comments attributed to David Bain *"when I went into her room, I heard groaning type sounds muffled by what sounded like water"*, so accurately reflect the expected observations of an individual inhaling blood, they give great credibility to these observations and their accuracy.

This affidavit was read out by consent at the hearing.

[63] At the hearing, Mr Withnall, in cross-examination, took Professor Ferris to the evidence given by the appellant at trial when he said that he could not recall whether he had touched Laniet. In response to that, and without any recorded objection, counsel for the Crown re-examined Professor Ferris on page 101:

> Q: Now you had referred to you the evidence of David Cullen Bain at trial in relation to the question of whether he had touched Laniet Bain when he entered her room. He's described going into her room. This is page 414. "I can't recall if I touched her. I … side of the bed". Now with reference to your appendix B.
>
> A: Yes.
>
> Q: You've listed at no. 7 a copy of the trial evidence of David Cullen Bain.
>
> A: Yes.
>
> Q: *Under 8(a) you record having also read page 101 summary of briefs which is otherwise described which is in page 91 of this volume 1 of the record.*
>
> A: Yes.
>
> Q: *And on the handwritten part of the margin on the right hand side of the page about half way down towards the end of that is recorded "went over to her but could see there was nothing I could do. I didn't touch her".*
>
> A: Yes.
>
> Q: *And you had access to that when you were looking at this question.*
>
> A: Yes.
>
> (Emphasis added)

[64] In the formal opinion delivered by the Court to the Governor-General under s 406(b), no particular reference was made to page 101: see *A Reference under s.406(b) Crimes Act 1961: David Cullen Bain* CA11/01 17 December 2002.

The section 406(a) hearing in the Court of Appeal

[65] Although Ms Sim's affidavit seems to refer to the s 406(b) hearing, it was in fact produced for the s 406(a) hearing. This might be thought to suggest that admissibility issues were still on the table.

[66] What is not clear to us is whether there was any specific objection taken to the evidence of Professor Ferris at the s 406(a) hearing.

[67] We note that the passage from Professor Ferris' affidavit that we have set out above is itself set out in the Court's judgment, *R v Bain* CA98/03 15 December 2003 (partially reported at [2004] 1 NZLR 638), at [127]. This Court regarded the appellant's statement on page 101 as "significant".

The hearing in the Privy Council

[68] The judgment of the Privy Council refers to the significance of the evidence of Laniet gurgling on two occasions, at [97] – [102] and [113] – [114]. It is clear that the Privy Council was critical of the willingness of this Court to regard this particular issue as concluded in favour of the Crown by reason of the evidence of Professor Ferris. There is no suggestion, however, in the judgment of the Privy Council that there was any challenge to the admissibility of Professor Ferris' evidence.

The 2006 Act

[69] Under the 2006 Act, the notation on page 101 is prima facie subject to legal professional privilege under s 54. As to waiver of privilege, the 2006 Act provides:

> **65 Waiver**
>
> (1) A person who has a privilege conferred by any of sections 54 to 60 and 64 may waive that privilege either expressly or impliedly.
>
> (2) *A person who has a privilege waives the privilege if* that person, or *anyone with the authority of that person*, voluntarily produces or discloses,

> or *consents to the production or disclosure of, any significant part of the privileged communication,* information, opinion, or document *in circumstances that are inconsistent with a claim of confidentiality*.
>
> (3) A person who has a privilege waives the privilege if the person—
>
> (a) acts so as to put the privileged communication, information, opinion, or document in issue in a proceeding; or
>
> …
>
> (4) A person who has a privilege in respect of a communication, information, opinion, or document that has been disclosed to another person does not waive the privilege if the disclosure occurred involuntarily or mistakenly or otherwise without the consent of the person who has the privilege.
>
> ...
>
> (Emphasis added)

[70] It is open to question whether s 65 applies where the alleged waiver of privilege occurred prior to 1 August 2007. Privilege might be thought to involve substantive rights and the associated rules are therefore not merely procedural, see for instance the comments of Gummow J in *Goldberg v Ng* (1995) 185 CLR 83 at 121, although cf the discussion in Auburn *Legal Professional Privilege: Law & Theory* (2000) at 31 – 32. So there is scope for the view that the question whether privilege in relation to page 101 was waived should be determined under the former law rather than under the 2006 Act. This, however, is a dry debate as there is no indication that s 65 was intended to change the existing law in any material respect.

The decision of Panckhurst J

[71] In a ruling delivered on 8 September 2008 Panckhurst J dealt with the admissibility of page 101 (in the broader context of the admissibility of the evidence of Professor Ferris). In the course of his judgment he referred to Ms Sim's affidavit and then to Mr Withnall's and the course of events in relation to the s 406(b) and (a) hearings:

> [72] A further difficulty concerns what occurred in the aftermath of the filing of Ms Sim's affidavit. I have already referred to my appreciation that Mr Withnall's affidavit speaks of raising the issue of privilege with Ms Sim when page 101 first surfaced as a document referred to in the Order in

Council. His affidavit is silent in relation to the filing of Ms Sim's affidavit in July 2003 and, moreover, concerning what occurred at the reference hearing in October and December 2002. Importantly, the opinion of the Court furnished on 17 December 2002 contains no suggestion of legal professional privilege being raised.

[73] Equally, there is nothing to suggest that privilege was raised before the Court of Appeal at the September 2003 hearing of the second appeal, or for that matter before the Privy Council in 2007. In the result the applicant's handwritten notation on page 101 is now a matter of public record at [127] of the Court of Appeal decision.

[74] Mr Morten's submissions were to the effect that the appellant could do nothing when page 101 was referred to in the Order in Council. The defence was confronted with "a fait accompli". It followed that in briefing Dr Ferris to give evidence based on David Bain's handwritten notation the Crown was seeking to rely on its own "deliberate and wrongful conduct". To allow it to do so would create a very dangerous precedent.

[75] What these submissions fail to grapple with is why objection was not taken to page 101, firstly at the reference hearing and more particularly at the second appeal hearing when Ms Sim's affidavit invited a response. It is evident from the opinion of the Court following the reference hearing that question 4 referred to five documents of suggested relevance to the question. Surely objection could have been taken to one of those documents, in which case the answer to question 4 would no doubt have recorded that page 101 had been excluded from consideration.

[76] Turning to s 65, I am of the view that waiver only occurred in this instance if counsel, with the authority of David Bain, voluntarily consented to the production or disclosure of page 101 in circumstances that are inconsistent with a claim of confidentiality: subs (2). Subsection (3) is not in point, since the accused did not act so as to put page 101 in issue during the s 406 proceedings, or subsequently. And, subs (4) deals with involuntary, mistaken or non-consensual disclosure of a privileged document, in which case there is no waiver.

[77] Was there consent to the production and disclosure of page 101 especially at the second appeal hearing, given that Dr Ferris' evidence contained express reference to David Bain's notation? A second question arises with reference to the circumstance that the privileged communication is now a matter of public record. Can the cat be put back in the bag at this stage?

…

[83] The striking feature of the present case is that Ms Sim's affidavit squarely raised the issue of privilege before the second appeal hearing. Mr Raftery termed it "a model of caution". I do not accept the contention that the defence was confronted with a fait accompli at the earlier reference hearing, given the terms of the Order in Council. I have already addressed that point. But, there is nothing to indicate that Dr Ferris adopted and used the privileged material at that stage. But he undoubtedly did so in the context of the second appeal when objection was not raised and para [127] of the judgment resulted. To my mind, the cat is out of the bag and it cannot now

> be returned. The conduct of counsel at the appeal hearing can only be construed as a consent to the production and disclosure of page 101. In all the circumstances that conduct was inconsistent with a claim of confidentiality.

Discussion

[72] As noted, we accept that the original release of page 101 by Mr Withnall to the Ministry was covered by the limited waiver. That release is therefore not inconsistent in itself with the appellant maintaining privilege in the document at the retrial. Whether the appellant can maintain that privilege turns on what happened downstream of that release.

[73] We think it clear that privilege in page 101 was waived for the purposes of both the s 406(b) and (a) hearings. Quite when Mr Withnall raised the objection that led to Ms Sim's affidavit is unclear. But what is perfectly clear is that Professor Ferris was permitted to give evidence which incorporated the comments made by the appellant on page 101. It is also self-evident that this comment is now, in a real sense, in the public domain as it is specifically referred to in this Court's s 406(a) judgment. We see this as sufficient to engage s 65(2) (and the previous common law).

[74] The more difficult question is whether the waiver of privilege is confined to the s 406(b) and (a) proceedings and does not extend to the retrial.

[75] There are a number of cases in which the courts have been required to consider whether privilege which has been waived in a particular context can be re-asserted in another context. Three of the cases involve the taxation of costs and the particular problems which arise where a claimant seeking to justify a bill of costs or its components is challenged or required to disclose privileged information, see for instance *Goldman v Hesper* [1988] 1 WLR 1238 (CA), *Bourns Inc v Raychem Corp* [1999] 3 All ER 154 (CA) and *Giannerellli v Wraith (No 2*) (1991) 171 CLR 592. Rather closer to the point in this case are two cases which arose outside the taxation context, *British Coal Corporation v Dennis Rye Ltd (No 2)* [1988] 1 WLR 1113 and *Goldberg v Ng* (1995) 185 CLR 83.

[76] In the *British Coal Corporation* case privileged documents belonging to the plaintiff had been disclosed to the defendants facing criminal charges. The Court held that the plaintiff was entitled to assert privilege in relation to those documents in civil proceedings which were closely connected with the allegations under consideration in the criminal trial. In *Goldberg v Ng*, Mr Goldberg, a solicitor, in responding to a professional complaint which covered the same ground as civil proceedings between him and the complainants, had made available privileged material to the Law Society investigator. A divided High Court of Australia held that he could no longer claim privilege in respect of those documents in the civil proceedings. The *British Coal Corporation* case thus provides some support for the appellant while *Goldberg v Ng* is of more assistance to the Crown.

[77] Two other cases warrant brief mention: *Manly Municipal Council v Ward* [1997] NSWCA 194 and *Le Grand v Criminal Justice Commission (No 2)* [2001] QCA 432.

[78] *Manly Municipal Council v Ward* concerned proceedings brought against the appellant Council for an accident that occurred on its premises. At issue was a privileged report commissioned by the Council into the causes of the accident. This report had been disclosed to the solicitors of another person (Ms Hill) who had sued in respect of the same incident. During the course of that trial, Ms Hill's counsel introduced the report into evidence without objection from the Council. In the later proceedings brought by Ms Ward, she sought disclosure of the report. A District Court Judge ordered disclosure. The Court of Appeal upheld, at 4, this ruling on the basis that the waiver of privilege could not be limited to the earlier proceedings:

> [O]nce a document, which would otherwise have been the subject of legal professional privilege, has been made available, otherwise than under compulsion of law, to the other party to the relevant proceedings and that document has been tendered in open court, as it was in this case, and becomes evidence in the proceedings, any privilege which might otherwise have attached to the document is to be regarded as having been wholly waived.

[79] On the other side of the line is *Le Grand*, where the documents provided to the Court had been placed in a sealed envelope and marked "not to be opened without the order of the court"; the proceedings had been held in closed court; and

both parties had agreed that the documents should continue to be protected. In these proceedings, it was held that confidentiality had been maintained in the documents and should not be disclosed to the third party seeking them.

[80] We can conceive of situations where privileged material might be referred to in Court and produced in evidence without a general loss of privilege. But a party who wishes to make only a limited waiver of privilege should act accordingly (for instance by making it clear that the waiver is limited and taking steps to ensure that the loss of confidentiality in the material is confined to what is necessary for the purposes of the limited waiver).

[81] In this context we see an analogy with the limited use undertaking in relation to discovered documents. The usual rule is that the limited use undertaking is lost once documents are used in open court. This Court noted in *Wilson v White* [2005] 3 NZLR 619 at [50] that on the approach which it preferred:

> … a party who has discovered documents can be confident that the limited use undertaking will apply until they feature in proceedings in open Court. At this point, that party has the option of seeking confidentiality orders if he or she seeks further protection. Otherwise the undertaking lapses.

We see this analogy as material because confidentiality is material to the principles which govern both waiver of privilege and limited use undertakings.

[82] In the present case we see the following points as being, in their totality, of controlling significance:

(a) The privileged material was adduced in evidence in open Court with the appellant's consent;

(b) This occurred in a context where there were no suppression orders or other external indicia that either confidentiality and privilege was being generally maintained or that the waiver of privilege was for the purposes only of the s 406(b) and (a) hearings.

(c) As page 101 is exhibited to the affidavit of Professor Ferris which itself is part of the records of this Court, it is now subject to the relevant search rules.

(d) The relevant passage is recited in the judgment of this Court following the s 406(a) hearing and is thus a matter of public record.

[83] Against that background, we think it clear that confidentiality in the comments on page 101 has been lost as a result of Professor Ferris (with the consent of the appellant's then counsel) referring to those comments in open court. Accordingly we see the case as falling fairly and squarely within s 64(2) and the pre-existing common law as involving a consent to the production of the once privileged material and an associated loss of confidentiality.

Disposition

[84] Accordingly:

(a) We dismiss the application for leave to appeal in CA312/2008 for want of jurisdiction.

(b) We grant leave to appeal in CA572/2008 and CA672/2008 to the extent that the matters raised in those applications are discussed in this judgment but dismiss the appeals as to those matters.

(c) We prohibit publication of the judgment and any part of the proceedings (including the result) in the news media or on the Internet or other publicly available database until final disposition of the trial save that publication in a law report or law digest is permitted.

Solicitors:
Duncan Cotterill, Auckland for Appellant
Crown Law Office, Wellington