IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2012-404-6353
[2013] NZHC 627

IN THE MATTER OF	an application under s 88B of the Judicature Act 1908
BETWEEN	ATTORNEY-GENERAL Applicant
AND	JOHN KENNETH SLAVICH Respondent

Hearing: 11, 12 and 13 March 2013

Court: Cooper J
Toogood J

Appearances: P J Gunn for Applicant
Respondent in Person
B D Gray QC as Amicus Curiae

Judgment: 27 March 2013

JUDGMENT OF THE COURT

This judgment was delivered by Justice Cooper on
27 March 2013 at 2.00 p.m., pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors:
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Introduction

[1] This is an application under s 88B of the Judicature Act 1908. The Attorney-General seeks an order against Mr Slavich on the basis that, in terms of the section, he has persistently and without any reasonable ground instituted vexatious legal proceedings.

[2] Mr Slavich was tried in the High Court at Hamilton between 18 and 22 September 2006. Mr Slavich had sought that the trial be before a Judge alone. That application was not opposed and Heath J granted it prior to the trial. There were originally ten counts in the indictment, but Mr Slavich was discharged under s 347 of the Crimes Act 1961 on two of them. At the close of the Crown case, the prosecutor, Mr Douch, indicated that he did not intend to pursue another of the counts and Mr Slavich was discharged on that count before being put to an election as to whether to call evidence.

[3] On 12 October 2006, Heath J convicted Mr Slavich on six of the remaining seven counts. Since two of the charges originally laid were expressed as alternatives, the conviction on one of the counts meant that no verdict was required on the alternative count. In the end, Mr Slavich was convicted on counts alleging that he used a document for the purpose of obtaining a benefit, with intent to defraud, contrary to s 229A of the Crimes Act (counts 1 and 5); forgery contrary to s 264 of the Act (counts 2 and 8); uttering a forged document contrary to s 266 of the Act (count 7) and drawing a document without authority contrary to s 272 of the Act (count 10). Heath J gave detailed reasons for his verdicts in his judgment of 12 October 2006.

[4] On 21 November 2006 Heath J sentenced Mr Slavich to an effective term of two years three months' imprisonment. He ordered that reparation be paid in the total sum of $60,000.

[5] Mr Slavich served the sentence of imprisonment, but subsequently decided he wished to appeal against his convictions. The Court of Appeal granted an application to extend the time for appealing and the appeal was heard on 15 May 2009. The appeal was dismissed.

[6] Mr Slavich sought leave to appeal to the Supreme Court, but his application was dismissed on 10 August 2009. He has never accepted that he was properly convicted. He maintains also that the Court of Appeal did not properly consider his appeal and that the Supreme Court did not properly consider his application for leave to appeal. Since those decisions were made he has engaged in a variety of legal proceedings, including applications to recall the judgments of the Courts; applications for review under the Judicature Amendment Act 1972 of decisions made by the Judicial Conduct Commissioner rejecting complaints made against numerous Judges; and prosecutions commenced in the District Court alleging criminal conduct by the Crown Solicitor at Hamilton and members of his firm, as well as by the Solicitor-General, Deputy Solicitors-General and other Crown counsel.

Result

[7] Having listened to extensive argument from Mr Slavich in opposition to the present application, we are in no doubt that he has a firm belief in the impropriety of his original convictions, and a very real sense of grievance and frustration that his efforts to right the wrong that he considers he has suffered have been to no avail.

[8] However, as this judgment will demonstrate, Mr Slavich has unsuccessfully raised issues concerning his convictions time and again. Having surveyed the various proceedings that he has instituted for that purpose we have reached the view that this is a very clear case for the making of an order under s 88B of the Judicature Act. Indeed, we are of the opinion that the Attorney-General would have been justified in making an application under the section at a much earlier time than has occurred.

Preliminary

[9] Before dealing with the substance of the application, we record that at the outset of the hearing Mr Slavich raised some preliminary matters which were dealt with by brief oral rulings on the basis that we would record the applications and give our reasons in this judgment.

Subpoena to Mr Douch

[10] At the request of Mr Slavich, the Registrar issued a subpoena to Mr Douch, Crown Solicitor at Hamilton, who had prosecuted Mr Slavich at the trial before Heath J. Counsel for the Attorney-General, Mr Gunn, applied to have the subpoena set aside.

[11] The evidence adduced by the parties in a proceeding under s 88B of the Judicature Act is generally confined to putting before the Court copies of judgments, pleadings, and affidavits filed in the proceedings instituted by the respondent which are said to form the basis for the Attorney-General's application. The question of whether a litigant has persistently and without reasonable grounds instituted

vexatious legal proceedings can be determined objectively having regard to such material.[1]

[12] Mr Slavich applied for discovery of documents prior to the hearing. In a Minute dated 4 February 2013, Lang J directed that the provision of documents sought by Mr Slavich, and other documents which the Attorney-General wished to refer to in support of the application, should be provided by way of an affidavit on behalf of both the Attorney-General and the Crown Solicitor at Hamilton. In response to the Court's order, the Attorney-General filed an affidavit of Linda Susan Lee, a legal executive in the Crown Law Office at Wellington, attaching relevant judgments and Court documents in two bound volumes, and an affidavit of Mr Douch referring to the whereabouts of documents said to have been adduced in evidence during the criminal trial.

[13] Mr Slavich wished to cross-examine Mr Douch on this affidavit and, it seemed, on matters covered in two affidavits sworn by Mr Douch in 2008 and relied upon by the Crown in the appeal against Mr Slavich's conviction. The 2008 affidavits were included as part of the court records attached to Ms Lee's affidavits filed in this proceeding.

[14] The issue of what documents properly formed part of the evidence before Heath J at the criminal trial was a central issue in the appeal against the convictions entered. As Mr Gray QC (who appeared as amicus curiae) submitted, whether or not Mr Douch should be required to attend for cross-examination turned, in part at least, on whether the scope of the evidence before Heath J was a live issue for determination by us in this proceeding.

[15] We were of the opinion that the question of what evidence was before Heath J in the criminal trial, and whether that evidence supported the convictions entered, were matters thoroughly addressed by the Court of Appeal in its judgment of 15 May 2009. In the circumstances cross-examination of Mr Douch would have

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[1] *Attorney-General v Hill* (1993) 7 PRNZ 20 (HC) at 26-27; *Attorney-General v Brogden* [2001] NZAR 158 (HC) at [47]; *Attorney-General v Palmer* [2005] NZAR 46 (HC) at [31]-[36].

served no relevant purpose. The subpoena issued to Mr Douch was therefore set aside.

Respondent's application for summary judgment

[16] Mr Slavich also sought to have us deal with his application for summary judgment before hearing from counsel and from him on the Attorney-General's substantive application. As we explained to Mr Slavich, however, the merits of the Attorney-General's application would need to be considered in the context of a summary judgment application so the most convenient approach was to hear the substantive application and his application for summary judgment at the same time.

Application to disqualify counsel for the applicant

[17] Mr Slavich submitted that, as Crown counsel who had previously been involved in the proceedings which were the subject of consideration on this application, Mr Gunn was conflicted and ought to be disqualified from appearing as counsel under the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008. Although he did not refer specifically to it, it was plain that Mr Slavich was referring to r 13.5.3 which states (so far as is relevant):

> A lawyer must not act in a proceeding if the conduct or advice of the lawyer ... is in issue in the matter before the court.

[18] Mr Slavich also submitted that, because the conduct of the Solicitor-General, several Deputy Solicitors-General and other Crown counsel were in issue in the proceeding, Mr Gunn was not sufficiently independent and objective to appear on behalf of the Attorney-General in this proceeding.

[19] As it was not obvious to us that Mr Gunn's position as counsel was compromised by the issues to be determined in this proceeding, we ruled that his status as counsel could be reviewed if it became apparent in the course of the hearing either that the Conduct Rules were engaged or that, more generally, Mr Gunn ought not properly to remain as counsel in the proceeding. In the event, the matter was not

raised again in the course of the hearing, and we did not consider there was any proper basis on which Mr Gunn's participation in the hearing could be questioned.

Application for adjournment

[20] Mr Slavich then sought an adjournment of the hearing of this proceeding on the grounds that:

(a) there were live issues before the Court of Appeal and Supreme Court in proceedings not yet disposed of by those Courts and the decisions yet to be given were relevant to the question of whether the proceedings were reasonable; and

(b) we should recuse ourselves from hearing this case because, as no New Zealand Judge could hear it without apparent bias, Her Majesty the Queen would need to appoint a person from outside New Zealand to sit as a Judge of this Court in order to hear the matter fairly.

[21] As to the live issues in cases awaiting consideration or decision by the Supreme Court or the Court of Appeal, Mr Gunn submitted that the views of those higher courts on the merits of the matters before them were not likely to be compromised by the decision of this Court in this proceeding; that the Attorney-General did not seek an order in this proceeding which would have the effect of preventing Mr Slavich from pursuing any application of which the Supreme Court or the Court of Appeal were properly seized; and that the outcome of those matters awaiting decision of the higher courts would not affect the basis upon which the Attorney-General's case in this proceeding was put. We agreed with Mr Gunn's submissions on that point.

[22] We pointed out to Mr Slavich that his recusal point had been dealt with in a pre-trial ruling of Toogood J, reasons for which were recorded on 8 March 2013.[2] The ruling was that the test of apparent bias in *Saxmere Company Ltd v Wool Board*

[2] *Attorney-General v Slavich* HC Auckland CIV-2012-404-6353, Reasons for Ruling of Toogood J – Application that assigned Judges recuse themselves, 8 March 2013.

Disestablishment Company Ltd[3] was not met in the present circumstances. Cooper J was of the same opinion.

[23] For these reasons, we declined the application for adjournment.

The convictions

[24] A proceeding under s 88B should not be used as an occasion to re-litigate matters already determined against a respondent.[4] However, because of the evident importance for Mr Slavich of the circumstances of his convictions and their relevance to most of the proceedings he later initiated, we think it appropriate to deal in some detail with the reasons for his conviction and the subsequent rejection of his appeal.

Findings of fact

[25] Mr Slavich was a chartered accountant practising in Hamilton as a partner in a firm called Drew Bullen. The offending alleged against Mr Slavich was that he had participated in two frauds, referred to by Heath J as the "Booth transaction" and the "Hannon transaction". Mr Slavich accepted that the frauds had been perpetrated on both Mr Booth and Mr Hannon, but he denied dishonest involvement in either of them.

[26] Heath J held that the prime mover in both transactions was a Mr Orchard. At the time of Mr Slavich's trial, Mr Orchard had already been convicted and sentenced on over 600 charges involving dishonesty. He was described by the Court of Appeal as "a serious recidivist offender" who "considers his fraudulent behaviour to be a profession".[5]

[27] Heath J found that on 28 October 2002, Mr Slavich personally delivered a funding proposal to a Mr Rolls of Basecorp Finance Ltd ("Basecorp"). Under the

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3 *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 72, [2010] 1 NZLR 35.

4 *Attorney-General v Jones* [1990] 1 WLR 859 (CA) at 863, per Lord Donaldson MR.

5 *R v Orchard* CA123/03, 24 October 2003 at [12].

proposal, Mr Booth was to borrow $75,000 for a period of four months on an interest only basis. Security was to be provided over a property at 66 Morrinsville Road, Hamilton. In the proposal, Mr Slavich stated that Mr Booth sought the loan so as to be able to assist a friend of Mr Booth, Paul Cameron, with a new project, and to repay some of Mr Cameron's short-term debt. Representations were made as to Mr Booth's employment and income.

[28] However, the real Mr Booth knew nothing of the intended transaction. Nor did he know Mr Slavich, or anyone named Paul Cameron.

[29] The proposal was accepted by Basecorp, and processed. A solicitor in Auckland, Mr Umarji Mohammed, was instructed to act on the transaction by facsimile on 29 October 2002. A loan document was sent to him at 1.46 p.m. on that day. Soon after he received the loan agreement, a man purporting to be Mr Booth arrived at Mr Mohammed's office. In fact, it was Mr Orchard. Mr Orchard, who gave evidence at Mr Slavich's trial, accepted that he impersonated Mr Booth without Mr Booth's authority. Mr Mohammed, however, remained unaware that he was not dealing with the real Mr Booth.

[30] Heath J found that shortly after 2.00 p.m. on that day, Mr Mohammed received a facsimile from the offices of Drew Bullen, which provided instructions for the disbursement of the loan funds. These included a payment of $30,000 to a company called Kona Wind Ltd. After discussing the authority with Mr Mohammed, Mr Orchard then amended the instructions by hand so as to reduce the amount to be paid to Kona Wind Ltd to $28,376. Heath J found that Kona Wind Ltd was a company with which Mr Slavich was associated, while another nominated recipient of the borrowed money, Mr Craig Dawick, was a person being used as a conduit to channel money to Mr Orchard in return for a modest fee.

[31] Mr Mohammed prepared a mortgage over the Morrinsville Road property. Mr Orchard signed the loan agreement and the mortgage in the name of Mr Booth. Mr Mohammed witnessed the execution of both documents. Mr Orchard was able to convince Mr Mohammed that he was the real Mr Booth by use of a false passport which was in Mr Booth's name but contained Mr Orchard's photograph. The Crown

case was that Mr Booth was defrauded of part of his equity in the Morrinsville Road property by the impersonation fraud in which Mr Slavich dishonestly participated. Counts 1 and 2 were based on the Booth transaction.

[32] We turn next to the Hannon transaction. Mr Hannon was an elderly and wealthy farmer residing near Cambridge who died before the trial but had made a written statement which was admitted in evidence by consent. One of the properties that he owned was used to secure an advance which was sought by a man purporting to be Mr Hannon, but who was in fact Mr Orchard. The sum sought was $400,000. On the morning of 6 November 2002 a man claiming to be Mr Hannon rang a Ms Gibbs, employed by Legend International Mortgage Brokers ("Legend"). This person told Ms Gibbs that he owned ten properties, all of which were unencumbered. A property situated at 191 Hannon Road, Cambridge was offered as security for the loan. Ms Gibbs was told that Mr Slavich was Mr Hannon's accountant. In fact, the real Mr Hannon had had nothing whatsoever to do with Mr Slavich or Drew Bullen. Following this initial contact, Ms Gibbs sent a request by facsimile for disclosure of Mr Hannon's relevant financial information to Mr Slavich. Heath J found that the request was accompanied by an authority for Legend to act on Mr Hannon's behalf, together with a waiver under the Privacy Act 1993 which was necessary to enable Legend to enquire into Mr Hannon's credit history before processing the loan application.

[33] Mr Slavich responded later on 6 November, forwarding by facsimile the documents requested by Legend. His facsimile was addressed for the attention of Ms Gibbs. Heath J held that Mr Slavich's facsimile was sent at 10.54 am and was accompanied by a Privacy Act waiver, purportedly signed by Mr Hannon; farm accounts for the year ended 31 March 2002 which, in context, were plainly intended to represent Mr Hannon's financial position to Legend; a handwritten document purportedly signed by Mr Hannon headed "Personal Details of Applicant/Guarantor", which was dated 4 November 2002 and documents confirming ownership of various titles to land in the name of Mr Hannon.

[34] Ms Gibbs then arranged for the loan to be obtained from Yidam LLC, an American company based in Colorado.

[35] Before final authority to advance the loan was given there were a number of telephone calls involving Ms Gibbs, Mr Bramell (a representative of Yidam), a solicitor acting for Yidam, Mr Orchard purporting to be Mr Hannon, and Mr Slavich.

[36] Heath J found that Ms Gibbs had asked Mr Slavich a number of questions about financial aspects of the transaction, which he was able to answer. Further, he had not mentioned any other person acting on behalf of Mr Hannon or suggested that any other intermediary was involved. Ms Gibbs made inquiries about Mr Hannon's creditworthiness, in the course of which she found that hers was the first inquiry ever made. Thinking that was unusual she spoke to Mr Slavich. Mr Slavich advised her that he had a number of clients who had limited inquiries about their credit, and assured Ms Gibbs that all was well.

[37] The loan was approved, and Ms Gibbs sent by facsimile to Mr Hannon a loan offer in the sum of $400,000. The third page of the document contained a declaration by the borrower instructing Legend to proceed with the advance. Heath J found that the declaration was signed in Hamilton on 6 November by someone purporting to be Mr Hannon. When it was signed the document was returned by facsimile to Legend. This occurred at 7.32 pm

[38] A firm of solicitors in Auckland, Bruce Dell Law, were instructed to act for Mr Hannon. A Ms Jenkin of that firm met with the man purporting to be Mr Hannon on 12 November 2002. In fact, her meeting was with Mr Orchard. He showed her a driver licence to establish that he was Mr Hannon. When she gave evidence, Ms Jenkin was asked to compare photographs shown on the licence and in Mr Orchard's passport. She identified Mr Orchard as the person who executed the mortgage. Mr Orchard accepted that he had done that.

[39] Ms Jenkin then arranged for Mr Orchard to execute mortgages over Mr Hannon's property. Later that day, the sum of $385,750 was placed into the law firm's trust account as the net proceeds of the loan.

[40] Ms Jenkin required a signed authority before the moneys were disbursed. She gave evidence that Mr Orchard asked her to contact his accountant. He provided

Mr Slavich's name, which she recorded together with his telephone number on her file. The telephone number so recorded matched the telephone number of Drew Bullen. She telephoned the number twice and spoke to a man who identified himself as Mr Slavich. In the first discussion, she sought clarification about the property over which the loan was to be secured. Mr Slavich advised her that one of the titles was in fact owned by Mr Hannon's brother. The second conversation was about the disbursement of funds.

[41] Next, Ms Jenkin received a document, purportedly signed by Mr Hannon, authorising the disbursement of funds from her firm's trust account. She could not recall whether that authority had been received by facsimile, or directly from Mr Orchard.

[42] Heath J noted that there was no primary evidence that Mr Slavich sent the disbursement authority to Ms Jenkin. However, a copy of the authority was located on the Drew Bullen computer system. There was evidence from a computer analyst confirming that the document had been created on 8 November 2002. The document authorised Ms Jenkin's firm to disburse the net proceeds of the loan. It was purportedly signed by Mr Hannon, and was in a form that had been amended by hand. Mr Orchard's evidence was that $49,000 of the money, which was to be paid to a Mr and Mrs Smith was in fact a payment to Mr Slavich. Another payment was to go to a Mr Muir, who was to launder the money for Mr Orchard's benefit.

[43] Heath J recorded that Mr Orchard was arrested and charged with offences of dishonesty on 14 November 2002. He also held that Mr Slavich had prepared a deed, which was dated 15 November 2002. That document purported to record an agreement between Mr Hannon, Mr Slavich, and Mr and Mrs Smith, the latter in their capacities as trustees of the Albacora Trust. Under the agreement, Mr Hannon agreed to lend $50,000 to enable the trustees of the Albacora Trust to operate two vessels. In consideration of the loan, it was said that Mr Hannon would have an option to purchase into or invest in a Fijian tourist resort being investigated by Mr Smith. It was recorded that Mr Slavich would arrange for repayment of the loan on its due date, 120 days after the advance was made. The Crown alleged at the trial that the agreement had been drawn up by Mr Slavich without lawful authority, in an

endeavour to provide evidence to substantiate claims he later made of involvement in an honest transaction.

[44] Mr Slavich was interviewed by Detective Browne on 3 December 2006. A record of the interview was kept in question and answer form. Mr Slavich signed the statement as being true and correct. In relation to the Booth transaction, Heath J recorded that Mr Slavich's position was that he had believed at all material times that the transaction was being undertaken on behalf of the real Mr Booth, a person whom he had met in the presence of Mr Adams (i.e. Mr Orchard). Similarly, in relation to the Hannon transaction, Mr Slavich adopted the position that he honestly believed that the real Mr Hannon was involved in the transaction.

[45] He acknowledged that, at Mr Adams' (i.e. Mr Orchard's) request he had held himself out as being Mr Hannon's accountant. He had spoken over the telephone to somebody calling himself Richard Hannon, but had only dealt with Mr Adams in relation to it. Although he had no instructions in writing from Mr Hannon, "there was an inference" that he would be carrying out work in the future for him. This suggestion had been made to him by Mr Adams. The authority to disburse the funds had been drawn up by him from information given to him by Mr Adams and he also accepted that the $49,000 was to be paid for the benefit of Mr and Mrs Smith in their capacities as trustees of the Albacora Trust.

Heath J's decision

[46] Counts 1 and 2 were based on the Booth transaction. Count 1, alleging an offence against s 229A of the Crimes Act, required Heath J to consider Mr Slavich's defence that he dealt with a person whom he honestly believed to be Mr Booth. On that issue, Mr Orchard gave evidence that he had recruited Mr Slavich to deal directly with Mr Rolls in procuring the loan, and that he, Mr Orchard, was the sole impersonator of Mr Booth. Mr Orchard said he had met Mr Slavich at a meeting in Hamilton, at which an associate, Mr McKelvy, was also present. According to Mr Orchard, the proposed transaction involving Mr Booth was discussed at that meeting. Mr Slavich accepted that he had met Mr Orchard (then using the name of Adams) on a previous occasion. Mr Orchard said that at the time of the meeting at which Mr

McKelvy was present, Mr McKelvy had introduced Mr Slavich and told him that Mr Orchard's name was in fact "Justin Booth". Heath J noted that if Mr Orchard's evidence on that issue were accepted, Mr Slavich must have known that Mr Orchard was impersonating Mr Booth. He would have known that Mr Orchard was not Mr Booth, because the person to whom he was being introduced was known to him as Paul Adams.

[47] Heath J held that the statement given by Mr Slavich to Detective Browne was the only evidence of any meeting that Mr Slavich may have attended at which both Mr Orchard and someone pretending to be Mr Booth were present. However, at [108] he said:

> I am satisfied, beyond reasonable doubt, that Mr Slavich knew that Mr Orchard was impersonating the real Mr Booth and that Mr Slavich used the funding proposal document in order to gain a benefit for himself or the interests associated with the Smiths by obtaining almost $30,000 for the fishing venture.

[48] He rejected Mr Slavich's explanation as implausible, giving seven reasons as follows:[6]

> a) Mr Slavich became involved in the transaction through a person whom he knew as Mr Adams (Orchard).
>
> b) Mr Slavich's object was to obtain money for the fishing enterprise with which he was in some way associated. In his statement to the Police, Mr Slavich acknowledged that he was a director and shareholder of Kona Wind.
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> c) There is no credible evidence to explain why any Mr Booth would mortgage an unencumbered property to provide money to an entity associated with Mr Slavich and to Mr Dawick.
>
> d) Mr Slavich delivered the proposal for funding to Mr Rolls with intent that it be acted upon. Mr Slavich had signed that proposal.
>
> e) Mr Smith, who gave evidence on behalf of Mr Slavich, confirmed that he never authorised Mr Slavich to seek money from anyone on the basis that it was "to assist his friend Paul Cameron with a new project and to repay some of Paul's short-term debt". Indeed, Mr Smith said that he did not know anyone by the name of Paul Cameron.
>
> f) Mr Slavich was involved in authorising disbursement of the funds from the lender. Were this a genuine commercial transaction

[6] At [110].

> undertaken on behalf of Mr Booth, there would have been no reason to arrange for cheques to be issued directly from Basecorp; the money would have been disbursed in the usual way through the trust account of the solicitor acting for the borrower.
>
> g) Mr Slavich knew that the money was not being sought for the registered proprietor of the property. He was aware that the net proceeds of the loan were being paid to Kona Wind and to Mr Dawick. Mr Slavich did not explain why moneys were being paid to Mr Dawick.

[49] Heath J then said:[7]

> The evidence of Mr Orchard on this issue is, for the most part, consistent with contemporaneous documentary evidence. It is generally consistent with the evidence of Mr Mohammed who dealt directly with Mr Orchard, thinking him to be Mr Booth. In the absence of any sworn evidence to support the proposition that another person was also pretending to be Mr Booth, I accept Mr Orchard's evidence on this topic.

[50] Consequently, he found that all the elements of the offence charged in count 1 had been proved beyond reasonable doubt.

[51] Count 2 alleged forgery of the authority to disperse funds purportedly signed by Mr Booth. Heath J noted that in his statement to the police Mr Slavich had acknowledged preparing the document. He concluded that he must have known the document was being prepared for dishonest purposes. He had nevertheless sent the facsimile from his office on 29 October 2002 to Mr Mohammed whom he must have known was intended to act on behalf of the man pretending to be Mr Booth.

[52] Following *R v Walsh*[8] Heath J considered that no distinction should be drawn between a document entering the facsimile machine of the sender and a document emerging from the facsimile machine of the recipient. Alternatively, if the unsigned document that entered the facsimile machine, made by Mr Slavich, was not in law a false document made by Mr Slavich, he had helped Mr Orchard to "make" the document when Mr Orchard signed it in Mr Mohammed's presence. Consequently, he found Mr Slavich guilty on count 2.

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7 At [111].

8 *R v Walsh* [2007] 1 NZLR 738 (CA).

[53] Counts 5, 7, 8 and 10 all related to the Hannon transaction. Count 5 (alleging use of a document, with intent to defraud, which was capable of being used to obtain a benefit), was based on the facsimile transmission coversheet addressed to Legend from Mr Slavich. Heath J held there was no doubt that the facsimile transmission coversheet that Mr Slavich signed (and the associated documents) were documents capable of being used to obtain a benefit, nor that Mr Slavich's purpose in sending the information was to obtain a benefit for some person. Referring to the finding that he had already made that Mr Slavich knew that the person known to him as Mr Adams was impersonating Mr Booth, Heath J considered it would be implausible to suggest that Mr Slavich did not realise that Mr Adams (in reality Mr Orchard) was also impersonating Mr Hannon.

[54] Accordingly, there was no reason for the Judge to doubt Mr Orchard's evidence that Mr Slavich knew that he was impersonating Mr Hannon. Contrary to what Mr Slavich had contended in his statement to the police, his role had gone well beyond that of a person asked to forward documents by facsimile with no role in representing the interests of the borrower. Consequently, Mr Slavich was guilty on count 5.

[55] Count 7 alleged that Mr Slavich had used a document that he knew to be forged as if it were genuine, namely the Privacy Act waiver in the name of Mr Hannon. Heath J was satisfied beyond reasonable doubt that Mr Slavich had received a request from Ms Gibbs for financial information accompanied by, amongst other things, a Privacy Act waiver in the form that Legend required. Mr Orchard's evidence was that he had signed the document, pretending to be Mr Hannon, and that that would have occurred in Mr Slavich's office. Heath J noted that in his police interview, Mr Slavich had acknowledged that documentation on file that was signed by Mr Hannon had been given to him by Mr Adams (that is, Mr Orchard) as part of the material he sent to Legend.

[56] Although noting that there was no evidence of the time at which the request for the financial information was sent by Ms Gibbs to Mr Slavich, Heath J held that the evidence established that Mr Slavich responded, with the requested information, at 10.54 am on the same day. He held that the speed with which Mr Slavich had

been able to assemble the material to respond to Ms Gibbs's request gave credence to Mr Orchard's evidence that the document was signed at Mr Slavich's office. He thought that the only alternative was that it must have been signed somewhere else in Hamilton, at a location proximate to the offices of Drew Bullen.

[57] He also considered that Mr Orchard's evidence was in substantial accord with the overall effect of the circumstantial evidence. He found as a fact that the document was signed in Hamilton by Mr Orchard, before 10.54 am on 6 November 2002, and that Mr Slavich knew that the real Mr Hannon had not signed the document. Consequently, he was satisfied beyond reasonable doubt that Mr Slavich knew that the Privacy Act waiver purportedly signed in the name of Mr Hannon and addressed to Legend was forged, but he had sent it to Legend as if it were genuine as part of the material required to support the loan. Consequently, he found Mr Slavich guilty on count 7.

[58] Count 8 alleged that Mr Slavich had made a false document, namely an authority to disburse funds, addressed to Ms Jenkin's firm knowing it to be false and with the intent that it should be acted on as genuine. This was another count of forgery. Heath J referred to evidence called by the Crown that the authority to disburse funds had been created within the Drew Bullen computer system on 8 November and noted that Mr Slavich accepted, in his statement to the police, that the authority had been prepared by him from information provided by the man he knew as Mr Adams. Further, Mr Slavich knew that the authority had not been prepared on the instructions of the real Mr Hannon. Mr Slavich had therefore made a false document which he knew was without proper authorisation, and he intended it to be acted on by the lender's solicitors as if it were a genuine document issued on behalf on the real Mr Hannon. Consequently, Mr Slavich was guilty on count 8.

[59] The final count was based on the deed of 15 November 2002 purportedly between Mr Hannon, Mr Slavich and Mr and Mrs Smith. The Crown alleged that this document had been made by Mr Slavich without colour of lawful authority, and had been created by Mr Slavich in an endeavour to distance himself from involvement with what he knew was a fraudulent transaction.

[60] The Crown called evidence designed to establish that the deed dated 15 November 2002 originated from the Drew Bullen computer system. An expert witness, Mr Bennett, expressed the opinion that the document was created on 25 November 2002.

[61] Mr Slavich had acknowledged that he was the author of the deed in his interview with the police. However, his stance was that it was a genuine agreement that had been made on 15 November 2002. Mr Slavich called evidence from a computer systems engineer, Mr Pook, who had designed the Drew Bullen computer system. Mr Pook agreed with Mr Bennett that the document had a "creation date" of 25 November 2002. However, Mr Pook's evidence was also that the document had had several file names over time, and that it appeared that it had been used as a "base template" which had been used on a number of occasions. The "creation date" was the date the document was last saved as a file name.

[62] Having considered the evidence, Heath J was satisfied that the document was saved, for the first time, as a "Hannon" document on 25 November. Consequently, the "creation" date of the particular deed in issue was 25 November. Further, there was no evidence from which any inference could be draw that Mr Slavich had authority from the real Mr Hannon to prepare the document. In the circumstances Heath J was satisfied beyond reasonable doubt that Mr Slavich had created the document without lawful authority from Mr Hannon to do so, and that it was drawn in an endeavour to distance himself from the fraud practised upon the real Mr Hannon, to which Mr Slavich had been a party.

[63] Consequently, Mr Slavich was convicted under count 10.

The evidence of Ms Gibbs (Mrs Calder)

[64] It will be apparent from the foregoing discussion that the evidence of Ms Gibbs was important for Heath J's reasoning in convicting Mr Slavich. Mr Slavich spent a considerable amount of time at the hearing of the present applications endeavouring to convince us that Heath J had not properly considered the evidence that she actually gave. Although near the end of the hearing Mr Slavich

was to suggest that his argument as to the content of Ms Gibbs's evidence was only a subsidiary issue, the suggestion did not reflect the thrust of his argument.

[65] As we will emphasise later, the points raised by Mr Slavich were all available to be canvassed before the Court of Appeal where it appears that they were, at least to some extent, raised in argument. In the end that Court was satisfied that there was nothing in the issue. Nevertheless, we deal with the matter here for the purpose of explaining why Mr Slavich's continued reliance on the issue is without merit.

[66] Special arrangements were made at the trial in respect of the evidence of Ms Gibbs. She was pregnant at the time of the trial and there were complications. Her medical advice was that she could not safely travel from Auckland where she lived to Hamilton for the trial. Nor was she able to travel to a facility in Auckland where her evidence could be taken by a video link. Neither side wanted the trial adjourned to a time when she would be available after giving birth. Consequently, it was agreed that her evidence should be based on a brief, but that she should be questioned by counsel concerning aspects of the brief in a telephone call. The process intended to be followed was set out in Heath J's minute (no.7), dated 20 September 2006, which we now set out:

> [1] The Crown has completed its oral evidence in this trial, save for evidence to be called from Ms Gibbs. She is currently indisposed, for reasons into which it is unnecessary to go.
>
> [2] Counsel have endeavoured to find a suitable mechanism to deal with any issues arising out of her proposed evidence to enable the trial to proceed this week without the need for an adjournment.
>
> [3] Following discussions with counsel, I approve the following procedure:
>
> > [a] Following the adjournment of the Court today, the Registrar will obtain a telephone number from Detective van der Wetering for Ms Gibbs.
> >
> > [b] A conference call will be held and initiated by the Registrar, from Courtroom 3.
> >
> > [c] Mr Douch and Mr McIvor will participate in that conference so that they can question Ms Gibbs about matters set out in her deposition.

[d] Mr Slavich may be present while that conference call is held, though he cannot participate in the conference by speaking.

[e] I will make available, my Associate to record the conversation, so that there is an independent record of it. That record will not however, be evidence in the trial and will be made available only to counsel after it has been transcribed.

[f] That record will then be available for Mr Douch and Mr McIvor to confer, with a view to providing, tomorrow, an agreed brief of evidence that can be read to the Court, together with other remaining evidence to which there is no objection from Mr McIvor.

[4] I confirm that I will not view the transcript as it is not evidence in the trial.

[5] The trial is adjourned to 11am tomorrow. Counsel can inform me how they intend to proceed at that time.

[67] In its judgment of 12 May 2008[9] granting an extension of time for appealing, the Court of Appeal described the process followed as "most unusual",[10] and went on to raise the possibility that because Ms Gibbs's evidence was not sworn, it might have been inadmissible.

[68] While the circumstances were unusual, the arrangement was consensual and no doubt appeared to both the Judge and counsel to be a practical way of ensuring that Ms Gibbs's evidence could be placed before the Court, in accordance with the wishes of both the Crown and the defence.

[69] It appears from the wording of [3][f] of Heath J's minute that he envisaged that after Ms Gibbs had been questioned about her deposition, counsel would confer with a view to providing an agreed brief of evidence that could be read to the Court. In the event, that process was not followed. In fact what was provided was a brief of evidence that had been used for the purposes of the questioning of Ms Gibbs by counsel over the telephone and the transcript made by the Judge's Associate of the questions and answers.

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9 *R v Slavich* [2008] NZCA 116.

10 At [46].

[70] A further complication that needs to be noted is that Ms Gibbs had, by the time that she was questioned on 20 September 2006, married and become Mrs Calder. The transcript of her questions and answers shows that Mr Douch began by calling her Ms Gibbs, but when Mr McIvor, for Mr Slavich, elicited that her married name was Mrs Calder, her answers were recorded under her married name.

[71] Mr Slavich contends that having regard to Heath J's minute he must have considered that the brief of evidence that was subsequently treated as part of the evidence in the trial was the agreed brief contemplated by [3][f] of the minute. That is to say, an agreed brief reflecting the original brief appropriately modified to take into account the questions and answers that the witness had given when questioned over the telephone. He argued that Heath J, in dealing with the evidence, had referred only to the brief and not to the transcript. The consequence was that in important respects, matters to his advantage that had been elicited by Mr McIvor in the telephone questioning were never considered by the Judge.

[72] In advancing that submission, Mr Slavich placed weight on an affidavit by Mr McIvor sworn on 5 February 2009. In that affidavit, Mr McIvor, in his own words, "attempted to reconstruct exactly what happened in relation to the presentation of the Calder evidence" to the best of his knowledge. He attached to his affidavit a flow chart that had been prepared by Mr Slavich in which a process was set out which reflected the terms of Heath J's minute. Effectively, Mr McIvor was raising the possibility that Heath J may have relied only on the unsigned copy of the brief on which Ms Gibbs had been questioned without reference to the transcript of questions and answers. If that had occurred, it was not what the defence intended to happen.

[73] Mr Slavich complains that when the Court of Appeal dealt with his substantive conviction appeal, it had not referred to Mr McIvor's affidavit of 5 February. However, having ourselves considered the affidavit, we can well understand why that might be the case. We say that because of the very substantial extent to which the affidavit consists of argument, opinion and conjecture. We note also that Mr McIvor had filed two previous affidavits. In the first, sworn on 2 July 2008, having noted that Mrs Calder would be unavailable to attend at Court to give

viva voce evidence or present herself at another location for the purpose of evidence by way of video link, Mr McIvor said:

> 5. I subsequently agreed that an earlier provided brief of evidence for Mrs Calder could be introduced into the record on the basis that it represented admitted facts, together with a transcript of questions and answers taken by way of teleconference with her during the course of trial. I have reviewed the contents of the transcript and can confirm that it is an accurate record of the questions posed by both myself and the Crown Solicitor and the answers provided by Mrs Calder.
>
> 6. It followed that after the teleconference the contents of Mrs Calder's brief and the transcript were admitted by the defence as facts for the purpose of the trial. Heath J was advised that the material was to be admitted with the consent of the parties and it was submitted on this basis.
>
> 7. The intention was that this constitute an admission of facts pursuant to section 369 of the Crimes Act 1961.
>
> 8. I accept that Heath J has accurately summarised the procedure adopted in respect of the material obtained by Mrs Calder in paragraphs 13 to 17 of his Reasons for Verdict.

[74] Mr McIvor swore a second affidavit on 19 August 2008. In that affidavit, he said that his earlier affidavit had been drafted by the Crown Solicitor as he had been heavily involved in Court work at the time and had not had time to prepare the affidavit himself. He said that he should have reflected further on paragraph 7 of the affidavit. He then repeated that the evidence had been presented "in the form that it was", but, on reflection, he did not believe it was accurate to say that it was presented as an admission of facts under s 369 of the Crimes Act. The evidence had been "presented in the way it was solely because of the witness's pregnancy difficulties". Consequently, he wished to "formally retract" paragraph 7 of the affidavit and he apologised to the Court for his error. It can be noted that he did not at that stage have any second thoughts about the substance of his first affidavit which was that both the brief and the transcript were introduced into the evidence by agreement.

[75] We have to say that we prefer the evidence that Mr McIvor gave in his first affidavit to that which he gave in the third. Much of the third affidavit was inadmissible in any event. But the real reason for our preference is because the first

affidavit fits with other evidence as to what occurred, including that of Mr Douch. In his affidavit of 1 April 2008, having referred to the circumstances in which Heath J issued his minute of 20 September 2006, Mr Douch explained that Ms Gibbs's original depositions statement which had been presented at the preliminary hearing was expanded to cover issues that he wanted addressed in her evidence at the trial. That expanded statement was the one which formed the basis of the questions to and answers of Ms Gibbs in the telephone discussion. Mr Douch recalled that it was intended that the brief be produced as part of the Crown case together with the further information contained in the transcript.

[76] In a subsequent affidavit, sworn on 13 October 2008, Mr Douch stated that both the brief and the transcript of the telephone conversation were admitted by consent and both effectively formed part of the brief of evidence of Ms Gibbs. This process had not been challenged because the transcript contained matters that Mr Slavich wished to be included in addition to the material in the original brief.

[77] For the purposes of this hearing, at Mr Slavich's request, and pursuant to the minute of Lang J dated 14 February 2013, the Registrar of the High Court at Hamilton has provided the "Log of Proceedings Electronically Recorded" from the Court records. The following item appears at 12:39:13 on 21 September 2006:

> Evidence read by consent of Ronald Stuart Watt, Kevin Francis Carroll, Richard Capewell Hannon, *Caroline Anne Calder (nee Gibbs) and evidence taken yesterday*, Jarna Joy McLachlan, Caroline Jane Cody … [emphasis added]

[78] We consider that the passage we have emphasised must be referring both to Mrs Calder's brief and the transcript of the questions and answers. There was no suggestion of any objection by the defence to this process being followed. The fact that what was done did not accord precisely with the terms of Heath J's minute is not significant. Possibly, the length of the transcript of questions and answers (occupying some 15 pages) meant that there was not time for a composite brief to be prepared to be put before the Court. But there is no suggestion of any objection to the procedure which was in fact followed.

[79] Mr Slavich endeavoured to bolster his argument by reference to the fact that nowhere did Heath J refer to the witness as Mrs Calder. The witness was referred to as Ms Gibbs throughout his judgment. However, there is nothing in that point. As has been seen, the log itself described her as Calder (nee Gibbs), but the evidence that she was giving related to a time when she was Ms Gibbs and it was no doubt sensible to refer to her in that name so as to avoid complication. We note that the Court of Appeal judgment of 15 May 2009 also referred to her as Ms Gibbs, presumably on the same basis.

[80] We note also that both the brief and the transcript of questions and answers were included in the case on appeal and consequently would have been available in support of any contention sought to be advanced that, as a matter of substance, Heath J had not considered the transcript of questions and answers as well as the brief.

[81] Further, in their closing addresses at the trial both counsel for the Crown and for Mr Slavich made reference to the evidence that Ms Gibbs gave when she was questioned by telephone. For example, Mr McIvor's submissions included the following:

> 36. Under cross examination of GIBBS by phone conference the defence believes it has established that GIBBS of Legend International had made the application and that fact was always know [sic] to the Crown or should have been known to the Crown.
>
> 37. GIBBS also confirmed under cross examination that her brief of evidence was prepared and altered without her knowledge and when questioned in detail confirmed the specific additions of "the loan proposal" on a number occasions was not what she stated originally and would not be her belief. Her statement was they were Assets and Liability Statements to assist her only, to make the finance application.
>
> 38. GIBBS also confirmed under cross examination that her finance proposal was provided to the Police with a 66 page fax which also included her original "statement". These documents were not exhibited as evidence by the Crown in the case against the accused.

[82] The content in particular of paragraph 37 is inconsistent with Mr Slavich's contention that Heath J would have thought that he had before him the composite statement of Ms Gibbs's evidence that his minute of 20 September contemplated. It

may also be noted in passing that Mr McIvor plainly referred to the witness as Ms Gibbs, not as Mrs Calder.

[83] Another point made by Mr Slavich was based on a discussion which took place when Mr Slavich appeared before Heath J in the context of Mr Slavich's application for recall of the Judge's judgment giving his reasons for verdict. On 13 December 2011 there was a lengthy exchange in which Mr Slavich put before the Judge his version of events and the Judge responded. A record has been kept of what transpired. Mr Slavich submitted that during that discussion the Judge admitted that he read and considered the revised brief of evidence (which Mr Slavich insisted on calling the "second false brief") and that he had expected that to incorporate any areas reflecting disagreement by Mrs Calder with the original brief.

[84] We do not take what Mr Slavich asserts from the transcript of that discussion. We consider that the Judge was simply stating that he had read both the brief and the transcript of the questions and answers. While, in accordance with his minute of 20 September 2006, the Judge originally envisaged that there would be an agreed brief that reflected the content of the questions and answers, Heath J pointed out to Mr Slavich that after his minute "things had happened after that which led to the documents going in in the form they went in"; in other words, there was the brief and the transcript of questions and answers. We note also that Heath J, in the discussion, stated that he had read "whatever the parties gave to me" and that "something was handed up to me at some point in relation to this that everybody agreed upon and I went away and read it". This, of course, is exactly what the Court of Appeal said had happened. The discussion, occurring over five years later, does not advance Mr Slavich's argument.

[85] We note finally on this point that in the end Heath J's judgment itself makes Mr Slavich's contention untenable. Heath J said:

> [14] Mr Douch had intended to call Ms Gibbs to give oral evidence at trial. However, shortly before the hearing began, she gave birth. Medical advice meant that she was unable to travel to Hamilton or to attend at some other location to give evidence by video-link.
>
> [15] Counsel agreed that her evidence could be provided in written form with the addition of a transcript of answers given by her to questions put by

> both Mr Douch and Mr McIvor, for Mr Slavich, in the course of a telephone conference held during the hearing. Neither counsel required her answers to be verified on oath.
>
> [16] The telephone conference was conducted in my absence, in case counsel were unable to reach agreement about admission of the transcript in evidence. No credibility issues arise out of the answers given by Ms Gibbs.
>
> [17] My Associate was present during the telephone conference and, with my authority, made a shorthand note of the discussions before preparing the typewritten transcript which has been incorporated, by consent, as part of Ms Gibbs' evidence.

[86] It is inconceivable that the Judge was mistaken in this simple record of what had occurred and we do not understand Mr Slavich to contend to the contrary. What he says is that Heath J would not have appreciated that what he referred to as Ms Gibbs's evidence "in written form" was not a composite document (reflecting both the brief and the questions and answers) as had been contemplated by his Minute of 20 September. However, if such a composite document had been in existence, there would plainly have been no need for the transcript to be admitted into evidence as well as the brief.

[87] We conclude that counsel agreed that both the brief and the transcript would go into the evidence by consent. That is what occurred. His judgment shows that Heath J was well aware of what had happened and he knew that both would need to be taken into account.

The Court of Appeal – decision extending time for appealing

[88] Well after the expiry of the appeal period Mr Slavich decided that he wished to appeal against his convictions. In its decision of 12 May 2008, the Court of Appeal raised the issue as to whether Ms Gibbs's evidence should have been accepted, since it was unsworn.[11] We note that by the time of that hearing, Mr Haigh QC had been instructed to act for Mr Slavich. For present purposes, it is relevant to record that, at [49], the Court observed:

> Initially, Mr Haigh was of the impression that the Judge might not have seen this "transcript", and taken it into account. At an earlier point of time he asked this panel to direct a report from the trial Judge, prior to the hearing on

[11] *R v Slavich* [2008] NZCA 116 at [50]-[62].

> 17 April, as to whether he had seen the transcript and taken it into account. Mr Haigh now accepts that there are passages in the reasons for verdict judgment which suggest that the Judge had done so.

[89] The possibility of requesting a report from Heath J was subsequently not pursued before, or at, the substantive hearing of the appeal.

The Court of Appeal – substantive judgment

[90] In its judgment of 15 May 2009 dismissing Mr Slavich's appeal against conviction, the Court of Appeal recorded that although there had been a number of grounds advanced in the Notice of Appeal, Mr Haigh had agreed that the issues on appeal came down to two.[12] The first was the admissibility point in relation to the fact that Ms Gibbs's evidence was unsworn. The second issue was whether any of the verdicts were unreasonable having regard to the evidence.

[91] The Court noted that there was one "sub-issue" under the first issue.[13] That was the dispute, which it said had been "advanced by Mr Haigh but lightly", as to the exact form of Ms Gibbs's evidence. The Court said that issue needed to be cleared up.

[92] The "sub-issue" was dealt with at [9]-[16] of the judgment. The Court concluded that both the brief and the transcript were part of the evidence at the trial. The judgment discussed separately both the Gibbs brief and the transcript. It noted in relation to the former that:

> [11] … Ms Gibbs had given a deposition statement, which was, of course, supplied to Mr Slavich. Prior to the High Court hearing, however, that deposition statement was expanded. We shall call that document Ms Gibbs's "brief of evidence" to distinguish it from her deposition statement. It is clear that that brief of evidence somehow or other found its way on to the High Court file; there is also no doubt that a copy of it was given to Mr Slavich.
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> [12] The teleconference call (which we shall shortly describe in more detail) took place on 20 September 2006. It is apparent from the transcript of that teleconference call that counsel discovered that Ms Gibbs, following her marriage, was now calling herself Mrs Calder. It is also apparent from that transcript that Mr Slavich's trial counsel, Mr McIvor, had Ms Gibbs's brief

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12 *R v Slavich* [2009] NZCA 188 at [4].

13 At [6].

of evidence. Immediately after the teleconference call, Mr Douch, the Crown Solicitor at Hamilton, who was leading for the Crown on this prosecution, made one change to Ms Gibbs's brief of evidence. That was to change the first paragraph of the brief, so that, instead of reading "My full name is Carolyn Anne GIBBS", it read:

> My full name is Carolyn Anne CALDER. My maiden name was Carolyn Anne Gibbs.

[13] Mr Douch then sent what we shall call the revised brief of evidence to Ms Gibbs for signature. The next day (21 September), Ms Gibbs signed the revised brief of evidence, which concluded with the following attestation:

> This statement is true to the best of my knowledge and belief and I make this statement knowing that it might be admitted at a preliminary hearing, and that I could be prosecuted for making a statement that is known by me to be false and intended by me to mislead.

[14] Ms Gibbs returned the revised brief to Mr Douch. Mr Douch believes that he caused the original of the revised brief to be filed in the High Court. He thinks that because he now holds only a photocopy of the signed revised brief on his file. He annexed a copy of that photocopy to an affidavit.

[15] Unfortunately, no original of the revised brief appears on the court file. All the court file has is an unsigned copy of the original brief of evidence. In the end, we do not think it matters. It is quite clear that Ms Gibbs's brief of evidence did come into evidence on 21 September: the court transcript expressly refers to the brief of evidence as having been "read" and forming part of the evidence. There is no difference between the brief of evidence and the revised brief of evidence save for the inconsequential amendment to paragraph 1. It is clear that Ms Gibbs did sign the revised brief, although unclear whether the original signed copy has been mislaid in the High Court or in Mr Douch's office.

[93] The Court of Appeal dealt with the transcript at [16], where it said:

> We now turn to the second part of Ms Gibbs's evidence, namely the transcript of the teleconference call. We need to describe how that transcript came into existence. Counsel suggested a procedure by which Ms Gibbs's evidence (as contained in her brief) could be tested. On 20 September, the judge provisionally approved it. The agreed procedure was in brief this. The court set up a conference call with Ms Gibbs. Present in court were counsel, Mr Slavich, the registrar, and Heath J's associate – but not Heath J himself. Counsel then had the opportunity to ask Ms Gibbs questions, as if she were present in court and they were conducting a supplementary examination-in-chief and cross-examination. The question and answer session was recorded and later transcribed by Heath J's associate. The transcript was then given to counsel – but not, at that stage, to Heath J. Counsel then checked the transcript. It was only at that point that counsel agreed that Ms Gibbs's brief of evidence and the transcript would both go into evidence. Following that agreement, counsel gave Heath J the transcript, and at that point, on 21

> September, Ms Gibbs's brief of evidence and the transcript became part of the evidence of the trial.

[94] The Court concluded that the evidence of Ms Gibbs was admissible and that no prejudice arose from the judge's acceptance of the procedure that counsel had jointly agreed.[14] The Court then proceeded to deal with the second issue, whether any of the verdicts were unreasonable having regard to the evidence. In doing so the Court assumed,[15] in Mr Slavich's favour, that it should apply the approach of the Supreme Court of Canada in *R v Biniaris*[16] to the effect that in the case of an appeal from verdicts made by a judge sitting alone, the appellate court can and should identify defects in the analysis that led the trier of fact to an unreasonable conclusion. A verdict should be set aside as unreasonable when the reasons of the trial judge reveal a failure to apply an applicable legal principle, or there has been entry of a verdict inconsistent with the factual conclusions reached. However, even on this approach, the Court concluded that Mr Slavich had failed "by a wide margin" to show that the verdicts were unreasonable.[17]

[95] Having analysed the Crown case, and outlined the evidence in relation to the Booth and Hannon transactions[18] the Court turned to Mr Slavich's complaints. It is not without significance for present purposes that the Court observed[19] it had found it difficult to pin down exactly what the complaints made about Heath J's reasoning were, and also said that was partly because Mr Haigh's oral submissions had departed significantly from the written submissions that had been filed before the hearing.

[96] However, the Court noted that to a large extent the complaints stemmed from the judge's acceptance of Ms Gibbs's evidence. It appeared to the Court that the principal complaint was that Heath J was not justified in finding that Mr Slavich had met Mr Orchard (pretending to be Mr Adams) prior to the commencement of the Booth transaction. It characterised this as a key part of Heath J's reasoning[20] and

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14 At [27].
15 At [35].
16 *R v Biniaris* [2000] SCC 15, [2000] 1 SCR 381.
17 At [35].
18 At respectively [44]-[49] and [50]-[55].
19 At [56].
20 At [58].

recorded its understanding that Mr Haigh did not dispute that this was the key issue. It then reviewed Heath J's expressed reasons for his conclusion on this issue:

> [60] On this key issue, the judge was faced with Mr Orchard's testimony on the one hand and Mr Slavich's out of court explanation on the other. The judge accepted Mr Orchard's testimony and rejected Mr Slavich's explanation as "implausible" for seven reasons, which he carefully listed at [110]. Mr Haigh in his submissions made no attempt to challenge those reasons.
>
> [61] Rather, Mr Haigh concentrated on one aspect of the judge's reasoning, namely that Mr Slavich "had already met Orchard calling himself Adams". There was, Mr Haigh submitted, "no corroborating evidence of this allegation". There did not need to be. Mr Orchard had given evidence that he had first had dealings with Mr Slavich the previous year with respect to "the Heta transaction". On that occasion, he (Mr Orchard) had been using the name Paul Adams. Mr McIvor had not challenged Mr Orchard's evidence in that respect when cross-examining him. So the judge was fully entitled to conclude that the two men had previously met.
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> [62] Once one accepts there was evidence that the two men took forward the Booth transaction together, each playing a vital role in the fraud, then the inference that the two men decided to use the same modus operandi a week later to perpetrate the Hannon fraud is irresistible. Mr Slavich's innocent explanation of his role in the two transactions was rightly described by the judge as implausible. This case does not come even close to establishing that this court should interfere with the verdicts under s 385(1)(a).
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> [63] We may add that, even if Mr Slavich had not met Mr Orchard before the Burger King meeting, it would not have affected our conclusion that he nonetheless must have known that Mr Orchard was *planning to assume the persona of Justin Booth*. No other explanation is plausible. Why after the Burger King meeting did he never have contact with Mr Booth again? Why were all instructions taken from Mr Orchard (Adams)? Why did he take instructions as to disbursement of the loan from Mr Orchard (Adams)? Why did he not query why no money was going either to Mr Booth or to Mr Cameron? Why did $30,000 end up in his company's bank account? Why did he not send a bill to Mr Booth for his services? The only rational inference to be drawn from the evidence is that Messrs McKelvy, Orchard and Slavich agreed at the Burger King meeting that they would perpetrate a fraud. It may well be that Mr McKelvy had decided from past dealings with Mr Slavich that he would be of a mind to assist.

[97] The Court referred to two other matters that had been raised by Mr Haigh. The first was the time at which Mr Orchard, posing as Mr Hannon, had signed the Privacy Act waiver form that Ms Gibbs required before she could process the loan application made by Mr Slavich to Legend. The Court accepted on this point that Heath J erred when he found that Mr Orchard signed the form before 10.54 am on 6 November 2002. It agreed with Mr Haigh that, as counsel for the Crown accepted,

Mr Orchard did not sign the document until later that afternoon. However, this was a "trivial error" that "in no way undermined the point the judge was making at this part of his reasoning".[21] The Court considered that the speed with which Mr Slavich had got everything ready for Ms Gibbs following her request that morning was supportive of Mr Orchard's evidence that he signed the waiver document later that day in Mr Slavich's office.

[98] The other point raised by Mr Haigh concerned the deed relating to the Albacora trust. Mr Haigh complained that the judge had effectively ignored the evidence of Mr Smith, called for the defence, which if accepted would have established that the deed had been made on 15 November and was a genuine document, not one (as Heath J found) created by Mr Slavich on 25 November in an attempt to distance himself from the fraud practised upon the real Mr Hannon. Mr Haigh submitted that the finding on count 10 was unreasonable. However, for the reasons that it gave at [67]-[74] the Court of Appeal said it was satisfied beyond any doubt that the document was a sham and that the Crown had established guilt on count 10 beyond reasonable doubt.

[99] In conclusion the Court observed:[22]

> Our analysis of the evidence and the judge's reasoning goes far beyond what would normally be required on a s 385(1)(a) analysis following a judge-alone trial. We do not consider the judge's reasoning has been undermined at all by the challenges made to it. He did make one minor error, but it was immaterial. Mr Slavich has not shown the verdicts were unreasonable.

[100] Consequently the appeal was dismissed.

[101] Mr Slavich complained before this Court that the Court of Appeal had not dealt with all of the issues that had been raised in the points on appeal, and in precis submissions that had been filed by Mr Haigh in advance of the hearing. However, there can be no substance in that complaint having regard to the terms of the Court of Appeal's judgment. As we have earlier noted, the Court of Appeal commented on the extent to which Mr Haigh had departed from the written submissions filed before

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21 At [64].
22 At [76].

the hearing in the course of the argument.[23] That is, of course, a matter of common occurrence. Courts deal with the arguments as presented orally and are not bound to deal with every point raised in a written argument.

[102] Mr Slavich's submissions overlook the fact that in dealing with a conviction appeal the Court of Appeal is deciding pursuant to s 385(1)(a) of the Crimes Act whether the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence. This does not necessarily require a point by point disposal of every issue raised in an appeal. It was plain from the Court of Appeal's decision that it did not consider the verdict was unreasonable or insupportable on the evidence.

The Supreme Court

[103] Mr Slavich sought leave to appeal from the Court of Appeal's decision. His application was dated 12 June 2009. It alleged that the Court of Appeal had not determined his points on appeal as required by s 66 of the Judicature Act, and that where the Court of Appeal had made determinations they were not on what Mr Slavich had asked it to hear. Consequently, the Court had exceeded its jurisdiction. Mr Slavich asserted in the circumstances that his rights under s 25(a) and (f) of the New Zealand Bill of Rights Act 1990 were not considered, and his rights under s 25(h) had been "extinguished" by the Court of Appeal.

[104] The document repeated allegations that Heath J had considered the wrong evidence in the form of the brief of Ms Gibbs's evidence and that Heath J had not considered the transcript of questions and answers.

[105] The Supreme Court rejected Mr Slavich's application for leave to appeal. In its judgment of 10 August 2009,[24] the Court agreed with the Court of Appeal that the case against Mr Slavich was very strong. The Court observed:

> [2] Mr Slavich now seeks to appeal to this Court raising many detailed but ultimately unpersuasive arguments designed to cast doubt on the Judge's

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23 See [88] above.
24 *Slavich v R* [2009] NZSC 87.

> findings. Those findings have been confirmed by the Court of Appeal after hearing argument presented for the applicant by very experienced senior counsel. The applicant is, in essence, asking this Court to further review the facts. This is not our role in the absence of something suggesting that there may have been a miscarriage of justice, which we are satisfied has not occurred in this case.
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> [3] In particular, addressing a matter given special emphasis by the applicant, we are satisfied that it is not reasonably arguable that the Judge has fallen into error concerning the evidence of Mrs Calder.

[106] At that point, Mr Slavich had exhausted the formal remedies available to him by way of appeal against his conviction.

Subsequent proceedings

[107] However, Mr Slavich has since that point commenced a variety of proceedings for the purpose of mounting a collateral attack on his original conviction. These have been interspersed with applications to the Court of Appeal and the Supreme Court to recall respectively the decisions of 15 May 2009 and 10 August 2009.

[108] What follows is a brief summary of the steps that Mr Slavich has taken.

Private prosecutions

[109] On 2 June 2010 Mr Slavich laid eight informations in the District Court at Hamilton alleging that Mr Douch had committed various offences under the Crimes Act in relation to the trial and subsequent appeals. Mr Slavich alleged that Mr Douch had:

(a) obtained a signed brief of evidence from Mrs Calder by deception;

(b) sworn two false affidavits for the purposes of the hearing in the Court of Appeal;

(c) misled justice by fabricating evidence, namely Ms Gibbs's brief;

(d) conspired with other members of his firm by misleading the Court of Appeal regarding evidence at the trial;

(e) mislead justice by corrupting a witness (Mrs Calder) by withholding her evidence from the Court or removing that evidence from the Court;

(f) committed perjury in terms of the affidavits filed in the Court of Appeal;

(g) concealed evidence from the Court of Appeal; and

(h) concealed or destroyed evidence with the intent to deceive the High Court.

[110] Next, on 22 June 2010 Mr Slavich laid three informations in the District Court at Hamilton against Ms Mann, an employee of the Crown Solicitor at Hamilton, in relation to her conduct during Mr Slavich's appeal. It was alleged that Ms Mann had concealed the existence of evidence from the Court of Appeal, conspired by her submissions to the Court of Appeal to pervert or defeat the course of justice, and used or dealt with a document that she knew had been made or altered by Mr Douch. It was claimed that she had done this by her submissions to the Court of Appeal "that collaborated in Mr Douch's deception". Again, it is clear that the allegations made by Mr Slavich were without foundation.

[111] Mr Slavich also laid informations against Mr Crayton, another member of Mr Douch's firm. The informations alleged similar offending to that which had been alleged against Ms Mann. These allegations were also without foundation.

[112] Also on that day, Mr Slavich laid four informations in the Hamilton District Court against a Ms Foster, who was another employee of the Crown Solicitor at Hamilton, in relation to her conduct during Mr Slavich's trial. The informations alleged that Ms Foster had caused loss by deception, conspired to defeat justice,

fabricated the existence of documentary evidence and conspired to bring a false accusation to prosecute Mr Slavich.

[113] Finally Mr Slavich (also on 22 June 2010) laid four further informations against Mr Douch accusing him of causing loss by deception, conspiring to bring a false accusation, fabricating evidence and conspiring to defeat justice.

[114] All of these informations alleged offending against various provisions in the Crimes Act. The Court of Appeal's judgment of 15 May 2009 meant that they were without foundation. They were all stayed by Mr Mander under s 159 of the Summary Proceedings Act 1957 on 19 August 2010.

[115] Next, on 5 July 2010, Mr Slavich swore an information against Ms Ball, an employee of the Crown Law office, who had appeared for the Crown in relation to the application for leave to appeal to the Supreme Court. It was alleged that Ms Ball had conspired to obstruct, prevent, pervert or defeat the course of justice by not telling the Supreme Court of New Zealand that the Crown had tendered false evidence at his trial and that the actual evidence of the Crown witness was "missing". Again, having regard to the decision of the Court of Appeal, there was no proper basis for this charge. Mr Mander stayed that prosecution on 23 September 2010.

[116] Mr Slavich next laid an information in the District Court at Wellington against Mr Mander. It was alleged that Mr Mander had conspired to obstruct, prevent, pervert or defeat the course of justice in as much as he had conspired with Mr Douch and stayed prosecutions knowing they should not be stayed. On this occasion, the prosecution was stayed on 2 November 2010 by Ms Gwyn, another Deputy Solicitor-General.

[117] On 15 December 2010 Mr Slavich laid an information alleging that Ms Gwyn had conspired to obstruct, prevent, pervert or defeat the course of justice by filing the notice of stay in relation to the prosecution against Mr Mander.

[118] This information was stayed by Mr Mander on 21 January 2011. We expressed some concerns to Mr Gunn at the hearing in relation to the fact that Mr Mander had stayed that prosecution. While there may be cases where, as the result of the actions of a private prosecutor, the doctrine of necessity may mean that office holders have to exercise powers notwithstanding that a prosecution that has been commenced implicates their conduct, we are not sure that necessity was made out in the present case. Mr Gunn also submitted, however, that the circumstances were such that the information was plainly an abuse of the process of the Court. Having regard to the extravagant and untenable allegations made in the information, we agree with that submission.

[119] Further prosecutions were commenced against the Solicitor-General Mr Collins (stayed by Mr Mander on 21 January 2011), and against Mr Mander himself, which was stayed on 17 March 2011 by Mr Palmer, another Deputy Solicitor-General. Those informations alleged conspiracy to obstruct, pervert, prevent or defeat the course of justice in relation to the orders for staying earlier prosecutions.

[120] Mr Slavich, next, in March 2011 laid informations against Mr Collins, Ms Gwyn, Mr Palmer, Mr Mander, and Mr Douch. There were two informations against Mr Palmer. One alleged conspiracy to obstruct, prevent, pervert or defeat the course of justice by filing notice of stay. The other prosecution, together with those against the other defendants named in this series, alleged offending against s 98A of the Crimes Act. In other words, it was said that the defendants were participants in an organised criminal group. It was alleged that the prosecutions had been stayed knowing they should not be stayed and knowing that staying the prosecution would contribute to achieving the objective of the "criminal group". Mr Mander stayed the "organised criminal group" proceedings against Mr Collins, Ms Gwyn and Mr Palmer on 12 April 2011. Ms Gwyn stayed the prosecution against Mr Douch and Mr Mander, on 13 April 2011. Mr Mander stayed the prosecution alleging that Mr Palmer had conspired to defeat justice on 15 April 2011.

[121] Mr Slavich endeavoured to argue that he had laid the informations reasonably on the basis that a District Court Judge had been satisfied on the basis of an affidavit

provided by Mr Slavich, sworn on 14 June 2010, that the prosecutions ought to be allowed to continue.[25] A similar argument had been raised by Mr Slavich before Andrews J and she rejected it in her judgment of 14 July 2011.[26] She noted that the District Court Judge had recorded that whether the issues raised by the charges against Mr Douch had been dealt with in the course of the prosecution of Mr Slavich, including the subsequent appeals, was "beyond the scope of his filtering practice" in respect of private prosecutions. Mr Slavich can derive no support for his argument on the basis that the prosecutions were allowed to proceed prior to being stayed by the Deputy Solicitors-General.

[122] In all, 33 prosecutions had been commenced against the Crown Solicitor at Hamilton and his employees, and against members of the Crown Law Office. Each related directly or indirectly to the evidence of Ms Gibbs at the trial before Heath J and each was without foundation, having regard to our earlier discussion of that evidence, and the Court of Appeal's judgment of 15 May 2009. We consider that in each case the allegations in the informations were baseless and an abuse of the process of the District Court.

Civil proceedings

[123] Mr Slavich also commenced a number of civil proceedings. At their core, these were also related directly or indirectly to Ms Gibbs's evidence.

[124] In November 2010, Mr Slavich commenced a proceeding in the High Court at Hamilton which alleged misfeasance and/or negligence on the part of the Crown Solicitor and his employees concerning an application that Mr Slavich had made for name suppression prior to the trial. The Attorney-General was named as the first defendant, and Mr Douch and three other members of his firm were named as the second defendants.

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25 *Slavich v Douch* DC Hamilton, Minute of Judge R L B Spear, 15 June 2010 at [4]-[6].

26 *Slavich v Judicial Conduct Commissioner* HC Hamilton CIV-2010-419-975, 14 July 2011 at [76].

[125] Next, Mr Slavich commenced five proceedings against respectively Mr Mander, Ms Gwyn, Mr Mander, Mr Palmer, and Mr Mander and Ms Gwyn jointly, seeking judicial review of the decisions to stay the private prosecutions.

[126] Another proceeding was commenced following dismissal of a complaint made to the Judicial Conduct Commissioner against Heath J. Mr Slavich named both the Judicial Conduct Commissioner and Heath J as defendants. He then sought leave to have Heath J answer interrogatories. On 1 December 2010, Potter J dismissed Mr Slavich's application that Heath J answer interrogatories.[27] In her decision, she described the interrogatories and the judicial review proceeding itself, as an abuse of process, amounting to a collateral attack on the previous decision of the Court, which had been upheld and confirmed by the Court of Appeal and the Supreme Court.

[127] In January 2011, Mr Slavich filed proceedings in the High Court at Auckland seeking judicial review of the decisions of the Legal Complaints Review Officer in relation to complaints that Mr Slavich had made about the Crown Solicitor at Hamilton and members of his staff. Those complaints had been dismissed by the Legal Complaints Review Officer.

[128] All of the civil proceedings described above were consolidated and struck out by Andrews J in a judgment delivered on 14 July 2011. The proceeding against the Attorney-General alleging misfeasance in relation to Mr Slavich's application for name suppression was struck out on the basis that it disclosed no reasonable cause of action. Each of the other proceedings were struck out on the basis that they were collateral attacks on decisions of the Court of Appeal and Supreme Court.

[129] Mr Slavich sought to pursue various interlocutory applications, despite the fact that the consolidated proceeding had been struck out. Priestley J issued a minute on 15 September 2011 holding that the Court no longer had jurisdiction to deal with the proceedings. Mr Slavich sought that Priestley J recall that minute. The Judge declined to do so in a further minute dated 27 September 2011.

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[27] *Slavich v Judicial Conduct Commissioner* HC Hamilton CIV-2010-419-975, 1 December 2010.

[130] Mr Slavich sought to both recall and appeal Andrews J's decision striking out the consolidated proceedings. Andrew J declined to recall her decision.[28] Mr Slavich needed an extension of time to appeal, but the Court of Appeal declined leave. At [8]-[10] of its judgment delivered on 22 February 2012, the Court said:[29]

> [8] The judgment of Andrews J contains a summary of the allegations in the eight proceedings the Judge struck out. All those allegations are challenges to the criminal processes that preceded Mr Slavich's conviction. In particular, Andrews J held that all seven applications for judicial review were "collateral attacks on the decisions of the Court of Appeal and Supreme Court, and are abuses of process".
>
> [9] We are satisfied that Mr Slavich's proposed appeal against a judgment that struck out challenges in a civil court to criminal processes already upheld by this Court and by the Supreme Court has no prospect of success.
>
> [10] There is no point in granting an extension of time to bring a hopeless appeal.

[131] Consequently, the application for an extension of time was dismissed. This decision was also the subject of an unsuccessful recall application.[30]

[132] A separate proceeding was commenced by Mr Slavich in April 2011 in the High Court at Hamilton. The defendants were the then Solicitor-General, Mr Collins, three Deputy Solicitors-General, the Attorney-General and the Registrar of the Wellington District Court. Mr Slavich sought judicial review of the stay decisions made by the Solicitor-General and Deputy Solicitors-General. Priestley J struck this proceeding out on 1 May 2012, being of the view that it was an abuse of process. Mr Slavich attempted to appeal against that decision but an application that he made to dispense with security for costs was declined on 6 August 2012. Security was not paid.

[133] In a further proceeding commenced in June 2010 Mr Slavich sought judicial review of a decision made by the Legal Complaints Review Officer which dismissed a complaint that Mr Slavich had made in relation to the conduct of Crown counsel during his application for leave to appeal to the Supreme Court. In a judgment

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28 *Slavich v Judicial Conduct Commissioner* HC Hamilton CIV-2010-419-000975, 15 August 2011.

29 *Slavich v Judicial Conduct Commissioner* [2012] NZCA 31.

30 *Slavich v Judicial Conduct Commissioner* CA626/2011, 28 March 2012.

delivered on 16 December 2010, White J ordered that Mr Slavich pay security for costs in the sum of $20,000.[31] The judicial review proceeding was stayed pending payment of that sum into Court. The security has not been paid. Mr Slavich subsequently applied to recall White J's decision. He complained that Mr Gunn, as counsel for Ms Ball, had failed to disclose the true position in relation to Ms Gibbs's evidence at the trial before Heath J and had therefore acted in contempt of Court in the hearing before White J. Woodhouse J rejected Mr Slavich's application, indicating that there had been no impropriety of any sort on the part of Mr Gunn.[32] He also dismissed the application because it was his view that it was an abuse of process, amounting to a collateral attack on final decisions of the Court.

[134] Mr Slavich made further complaints against the conduct of various Judges. When those complaints were dismissed by the Judicial Conduct Commissioner, Mr Slavich commenced six separate proceedings. In each case, the Judges were named as second respondents. In this way, Mr Slavich commenced proceedings naming 19 different Judges of the Supreme Court, Court of Appeal and High Court. These were subsequently consolidated by Ellis J. At the time of the hearing of the present application, the Judicial Conduct Commissioner had applied to strike out the proceedings because they are an abuse of process, but those applications have not been determined.

[135] A seventh proceeding, in which the Chief High Court Judge is named as a respondent together with the Judicial Conduct Commissioner, was not consolidated by Ellis J, but is itself the subject of a separate strike out application on the basis that it is an abuse of process.

[136] In summary, some 17 civil proceedings have been commenced by Mr Slavich calling into question the conduct of the Judges who dealt with his trial, the appeals against conviction and the Crown prosecutor at Hamilton and members of his staff, together with the Solicitor-General, Deputy Solicitors-General and others at Crown Law who have been engaged in the litigation against him. All of these actions turn in the end on the issue of what properly constituted Ms Gibbs's evidence at the trial,

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[31] *Slavich v Legal Complaints Review Officer* HC Auckland CIV-2010-404-003604, 16 December 2010.

[32] *Slavich v Legal Complaints Review Officer* HC Auckland CIV-2010-404-3604, 13 October 2011.

and the inferences that were available or should have been drawn from it in the context of the overall evidence on which the Crown relied at the trial and in defending the appeals. It is plain that Mr Slavich will not accept judicial decisions that are contrary to the claims that he makes, notwithstanding their full ventilation on appeals.

[137] It is characteristic of this litigation that there have been throughout applications for the recall of various judgments. The Supreme Court was asked to recall its judgment of 10 August 2009, declining Mr Slavich leave to appeal. It rejected that application[33] as well as a further application to recall its recall decision.[34]In decisions dated respectively 13 September 2011 and 22 September 2011, that Court declined to do so.

[138] There was a delayed application to the Court of Appeal to recall its judgment delivered on 15 May 2009. The Court rejected that application in a judgment delivered on 22 November 2011.[35] In doing so, the Court said:

> [5] Mr Slavich is abusing the recall jurisdiction. This Court's inherent power to revisit its decisions is exercised only in exceptional circumstances when required by the interests of justice. This is not such a case.
>
> [6] The confusion over the two versions of Mrs Calder's evidence and the question of whether the transcript of her cross-examination came into evidence have been the subject of detailed investigation already. Nothing Mr Slavich has included in the current application leads us to have any concern about any of the decisions made in this case. There is nothing to suggest a miscarriage of justice may have occurred.

[139] Notwithstanding the terms of that judgment, Mr Slavich advanced a further application for recall of the Court of Appeal's decision of 15 May 2009 to which he coupled an application for the recall of the Court's 22 November 2011 decision. That further recall application was dismissed in a judgment dated 21 September 2012 which said:[36]

> In its recall decision this Court described Mr Slavich's application as an abuse of the recall jurisdiction. The same comment applies even more forcefully in answer to this application. Mr Slavich has not approached

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33 *Slavich v R* [2011] NZSC 103.
34 *Slavich v R* SC52/2009, 22 September 2011.
35 *Slavich v R* [2011] NZCA 586.
36 *Slavich v R* [2012] NZCA 431 at [6].

> satisfaction of the high jurisdictional threshold required to justify an order recalling a substantive decision of this Court. We are satisfied that he is again attempting to revisit or reopen an issue which has been finally decided by an earlier decision of this Court and affirmed by the Supreme Court.

[140] The evidence placed before this Court in support of the present application also discloses further applications for recall made by Mr Slavich as follows:

(a) An application for the recall of Heath J's judgment of 12 October 2006 giving his reasons for verdict in the original trial. This application was not made until 10 October 2011, and was dismissed by Heath J on 13 December 2011. Heath J's decisions of 12 October 2006, and 13 December 2011 were again subject to an application for recall, dismissed by Priestley J on 3 May 2012.[37] Mr Slavich also advanced an unsuccessful appeal against the decision of 13 December 2011 in the Court of Appeal,[38] and attempted to file an appeal against Priestley J's decision of 3 May 2012.

(b) An application made on 18 July 2011 to recall the judgment of Andrews J delivered on 14 July 2011.

(c) An application that the Court of Appeal recall its judgment of 22 February 2012 dismissing Mr Slavich's application for an extension of time within which to appeal against the decision of Andrews J.

[141] All of the applications were dismissed.

The Pacesetter litigation

[142] We refer now to a quite different set of legal proceedings in which Mr Slavich has become involved. The Slavich Family Trust, of which Mr Slavich was a trustee, was a shareholder in a company called Pacesetter Print Group Ltd ("Pacesetter"). In 2006, Mr Slavich issued proceedings in an attempt to resolve a

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[37] *Slavich v R* [2012] NZHC 900.
[38] *Slavich v R* [2012] NZHC 432.

dispute as to relative shareholdings in the company. Following a settlement, the proceedings were discontinued.

[143] However, Mr Slavich then initiated various proceedings, including both private prosecutions and civil proceedings, apparently designed to relitigate issues supposedly resolved by the settlement. In his statement of defence, Mr Slavich denied that he had initiated the proceedings on which the Attorney-General relies; he alleged that the trustees issued the proceedings, and that the other trustee was a prominent and well-respected Hamilton solicitor. Some of the relevant background is set out in a judgment of Associate Judge Faire, delivered on 22 November 2012[39] in which the Judge recorded that the plaintiff trust was settled on 14 June 1996. The trustees at the time were Mr J K Slavich and Mr P Lang. The trustees acquired 30,000 shares in Pacesetter Print Group Ltd, constituting a 25 per cent shareholding in the company. In early 2005 the board of the company became concerned about its financial status and the management of the company. It hired the chartered accountancy firm Staples Rodway Waikato Ltd to carry out a review and to determine an accurate view of the company's financial position. Mr Hughes forwarded a report to the directors of the company on 27 June 2005. That report concluded that the company was significantly under capitalised, that it required a minimum of $600,000 in new equity and noted that if the directors could not see the potential to trade the company into a solvent position it should not continue to trade. The conclusion was recorded that the company was technically insolvent.

[144] The board subsequently instructed Staples Rodway to provide a valuation calculation in relation to shares of the company. A valuation was prepared dated 21 September 2005 by another director of Staples Rodway, Mr Bridges. He concluded that the shares had no value as at the valuation date and that there was a deficiency in equity of $937,411. The board of the company (on which the trustees of the Family Trust was not represented) then resolved to raise $400,000 by the issue of further shares, with the offer being made first to all existing shareholders and that the shareholders would have ten days within which to take up and pay for the shares. The directors recorded their opinion that the consideration for, and the terms of issue

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[39] *Slavich v Hughes* [2012] NZHC 3117 at [8]-[25].

of the shares were fair and reasonable to the company and to all existing shareholders.

[145] The trustees sought legal advice, and an extension of time to consider the offer. However, that was declined by solicitors acting for the company who also wrote that information that had been sought by the trustees relating to the company's finances would be unlikely to be available by the deadline for acceptance of the offer. In those circumstances, the trustees subscribed to the share offer and paid by bank cheque.

[146] It subsequently transpired that if the other shareholders did not inject any new capital to the company. They acquired the new shares on the basis that money previously advanced by them to the company would be repaid by the allocation of shares.

[147] Further relevant background is conveniently summarised in the judgment of District Court Judge E M Thomas delivered on 28 February 2012.[40] In that judgment, the Judge stayed prosecutions brought by Mr Slavich against five defendants who were directors or shareholders of Pacesetter, and in one case, counsel for the company. In the course of his judgment, the Judge said:

> [9] It is relevant to set out a brief chronology:
>
> (a) April 2008 - Hearing of the Slavich civil proceedings brought against the directors ("Pacesetter proceedings").
>
> (b) 29 April 2008 - The Pacesetter proceedings were discontinued during the hearing. They were discontinued after Mr Slavich's case and on his initiative. A settlement agreement was signed and that is annexed as exhibit A to the affidavit of Mr [B].
>
> (c) September 2008 - Mr Slavich complained to the New Zealand Law Society regarding Mr [Br] ("the [Br] proceedings").
>
> (d) 29 July 2009 - The New Zealand Law Society dismissed the complaint against Mr [Br].

[40] *Slavich v B* DC Hamilton CRI-2011-019-007588, 28 February 2012.

(e) At some undetermined date between July and October 2009 - Mr Slavich applied to review the New Zealand Law Society decision with the Legal Complaints Review Office.

(f) 9 October 2009 - Legal Complaints Review Office upheld the findings of the New Zealand Law Society Standards Committee.

(g) 20 October 2009 - Mr Slavich wrote to the Legal Complaints Review Officer. He stated that he intended to go to the National Enforcement Unit of the Ministry of Economic Development in respect of his allegations against Mr [Br].

(h) Some time following that date - Mr Slavich filed judicial review proceedings in respect of the New Zealand Law Society decision.

(i) 16 July 2010 - Justice Ellis in the High Court ordered security for costs from Mr Slavich in respect of those judicial review proceedings.

(j) Subsequent to that Mr Slavich appealed to the Court of Appeal against that order for security for costs.

(k) 16 May 2011 - Mr Slavich abandoned his appeal to the Court of Appeal, citing lower Court proceedings (including private prosecutions) rendering the appeal and judicial review proceedings moot.

(l) At some date after 16 May 2011 - Mr Slavich applied for recall of the judgment of Justice Ellis ordering security for costs on Mr Slavich's judicial review proceedings.

(m) 29 July 2011 - These informations were laid.

(n) 29 September 2011 - Mr Slavich brought Fair Trading Act 1986 proceedings against Mr Branch.

(o) 1 November 2011 - Justice Allan in the High Court made an unless order in respect of security for costs ordered by Justice Ellis.

(p) 30 November 2011 - Judicial review proceedings were struck out due to Mr Slavich's failure to pay security for costs.

[148] In support of the present application, the Attorney-General relies on the following litigation commenced by Mr Slavich arising out of the Pacesetter dispute:

(a) A proceeding seeking judicial review against the professional conduct committee of the New Zealand Institute of Chartered Accountants concerning a complaint made by Mr Slavich about a chartered

accountant who had provided a valuation report relevant to the events leading to the proceedings *Slavich v Pacesetter Print Group Ltd.*[41] Security for costs was ordered against Mr Slavich,[42] and the claim was not pursued.

(b) A proceeding (referred to at [143] above) dealt with by Associate Judge Faire against Mr Hughes, a chartered accountant who had been engaged to review the financial position of Pacesetter and undertake a business appraisal. The proceeding alleged breach of fiduciary duty and a breach of s 9 of the Fair Trading Act 1986. Associate Judge Faire entered summary judgment against Mr Slavich on 22 November 2012.[43]

(c) A proceeding seeking review of the Legal Complaints Teview Officer's decision dismissing Mr Slavich's complaint about counsel who had acted for the company in *Slavich v Pacesetter Print Group Ltd*. Allan J directed that Mr Slavich should pay security for costs[44] and directed that the claim would be struck out unless security for costs was paid by 30 November 2011. The costs were not paid.

(d) The private prosecutions commenced against the directors of Pacesetter and counsel for the company. These are the prosecutions that were stayed by Judge Thomas in the Hamilton District Court on 28 February 2012 (see paragraph [147] above). He was of a view that each was an abuse of process.

(e) An application for judicial review of the District Court Judge's decision staying the informations against the former directors and counsel for Pacesetter. That proceeding has been stayed pending

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41 *Slavich v Pacesetter Print Group Ltd* HC Hamilton CIV-2006-419-318.

42 *Slavich v New Zealand Institute of Chartered Accountants* HC Tauranga CIV-2009-470-000826, 25 May 2010.

43 *Slavich v Hughes*, above n 39.

44 *Slavich v The Legal Complaints Review Officer* HC Hamilton CIV-2009-419-1674, 1 November 2011.

payment of security for costs, pursuant to a judgment delivered by Katz J on 12 November 2012.[45]

(f) Proceedings alleging that the defendants (who were partners in the law firm that represented Pacesetter) had acted in breach of a fiduciary duty owed to Mr Slavich in relation to the events that led to the original Pacesetter litigation. That proceeding was struck out by Associate Judge Faire on 1 August 2012 on the basis that it disclosed no reasonably arguable cause of action. [46]

[149] Although less extensive than the proceedings to which Mr Slavich's conviction has given rise, the Pacesetter-related litigation shares common characteristics with it. Civil proceedings have been commenced apparently lacking proper justification, prosecutions have been laid against a widening category of defendants because of their association with Pacesetter's affairs. These have included professional advisers and persons fulfilling professional disciplinary roles in relation to the advisers. Those claims that have been brought to the point of decision have been shown to be without substance.

The law

[150] Section 88B of the Judicature Act 1908 provides as follows:

> **88B Restriction on institution of vexatious actions**
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> (1) If, on an application made by the Attorney-General under this section, the High Court is satisfied that any person has persistently and without any reasonable ground instituted vexatious legal proceedings, whether in the High Court or in any inferior Court, and whether against the same person or against different persons, the Court may, after hearing that person or giving him an opportunity of being heard, order that no civil proceeding or no civil proceeding against any particular person or persons shall without the leave of the High Court or a Judge thereof be instituted by him in any Court and that any civil proceeding instituted by him in any Court before the making of the order shall not be continued by him without such leave.

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45 *Slavich v Hamilton District Couirt* [2012] NZHC 2995.
46 *Slavich v Middlemiss* [2012] NZHC 1909.

> (2) Leave may be granted subject to such conditions (if any) as the Court or Judge thinks fit and shall not be granted unless the Court or Judge is satisfied that the proceeding is not an abuse of the process of the Court and that there is prima facie ground for the proceeding.
>
> (3) No appeal shall lie from an order granting or refusing such leave.

[151] In order to succeed on the present application, the applicant must satisfy the Court that Mr Slavich has persistently and without reasonable grounds instituted vexatious legal proceedings in the High Court or in any inferior Court.

[152] We were advised by counsel for the Attorney-General that the present is only the tenth application that has been made since the enactment of the predecessor to s 88B in 1965. The small number of applications that have been made reflects what the Court of Appeal in *Brogden v Attorney-General* described as "an appropriately conservative approach by successive Attorneys-General, no doubt mindful of the fundamental constitutional importance of the right of access to the Courts".[47]

[153] In *Attorney-General v Hill*[48] a Full Court of the High Court quoted with approval what was said by Staughton LJ in *Attorney-General v Jones*:[49]

> The power to restrain someone from commencing or continuing legal proceedings is no doubt a drastic restriction on his civil rights, and is still a restriction if it is subject to the grant of leave by a High Court Judge. But there must come a time when it is right to exercise that power, for at least two reasons. First, the opponents who are harassed by the worry and expense of vexatious litigation are entitled to protection; second, the resources of the judicial system are barely sufficient to afford justice without unreasonable delay to those who have genuine grievances, and should not be squandered on those who do not.

[154] Relevant principles to be applied were discussed in *Brogden v Attorney-General.*[50] The jurisdiction to make an order under the section exists only when multiple proceedings have been commenced by the respondent. Whether proceedings have been instituted "persistently" will depend not merely on the number of proceedings but, just as importantly, on their character, the lack of any reasonable grounds for them and the way in which they have been conducted. Even

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47 *Brogden v Attorney-General* [2001] NZAR 809 (CA) at [20].
48 *Attorney-General v Hill* (1993) 7 PRNZ 20 (HC).
49 *Attorney-General v Jones* [1990] 1 WLR 859 (CA) at 865.
50 At [21]-[22].

where the number of separate proceedings is not great, a litigant can be held to have persisted in litigating if the proceedings clearly represent an attempt to relitigate an issue already conclusively determined against that person. This is particularly so if the attempt to re-litigate is "accompanied by extravagant or scandalous allegations which the litigant has no prospect of substantiating or justifying".

[155] The Court of Appeal further observed that:[51]

> The Court may also take into account the development of a pattern of behaviour involving a failure to accept an inability in law to further challenge decisions in respect of which the appeal process has been exhausted, or attacking a range of defendants drawn into the widening circle of litigation solely because of an association with a defendant against whom a prior proceeding has failed.

[156] The Court of Appeal noted also that the fact that one or more proceedings had been struck out may be a strong indication that the litigation has been vexatious. The Court held that:[52]

> What is required is an appropriate assessment of the whole course of the respondent's conduct of the litigation in question, including the manner in which and apparent purpose for which each proceeding has been conducted, including resort to the appeal process where that has been done without any realistic prospect of success.

[157] More recently, in *Heenan v Attorney-General*[53] the Court of Appeal reaffirmed[54] what was said in *Brogden*. It said:

> [22] In discussing the jurisdiction conferred by s 88B this Court in *Brogden* made the following points:
>
> (a) Recognition of the fundamental constitutional importance of the right of access to the courts must be balanced against the desirability of freeing defendants from the burden of groundless litigation, particularly where its target is a lawyer or judge unfortunate enough to have encountered the litigant simply in a professional capacity.
>
> (b) Section 88B is concerned with proceedings that the person under consideration has instituted.

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51 At [21].
52 At [22].
53 *Heenan v Attorney-General* [2011] NZCA 9, [2011] NZAR 200.
54 At [22].

(c) The requirement that the institution of proceedings be persistent does not depend simply on the number of proceedings instituted. Just as important is the character of the proceedings, whether they have a reasonable basis and how they have been conducted. Accordingly, although the number of proceedings instituted may be small, it may be sufficient if the proceedings constitute an attempt to re-litigate issues already determined, contain scandalous and unjustifiable allegations and/or draw in as defendants persons whose only involvement has been to act in a professional capacity in earlier litigation.

(d) Overall, the test is whether the proceedings at issue have been conducted in a way that can properly be described as vexatious.

(e) Because s 88B contemplates that a person who is subject to an order under it may obtain leave to institute proceedings where justified, it is a reasonable limit on the person's right of access to the courts for the purpose of the New Zealand Bill of Rights Act 1990 (the NZBORA). [citations omitted]

[158] We note also that in *Heenan*, the Court of Appeal expressed agreement at [23] with the determination of the Full Court of the High Court in that case[55] that proceedings brought in a representative or fiduciary capacity may be taken into account in this context:

> … we see no reason to restrict the meaning of the phrase "any person" in s 88B by limiting it to persons acting in their personal capacity. That would run counter to the purpose of the section, which is to protect those against whom proceedings are brought.

Consequently, even if in the context of the Pacesetter litigation Mr Slavich was acting as a trustee, his conduct in respect of those proceedings is relevant for present purposes.

[159] The case law is unclear as to whether the bringing of an appeal qualifies as the institution of legal proceedings. In *Wiseman v Attorney-General*[56] the Court of Appeal treated appeals as within the ambit of the current section's predecessor. Similarly, in *Attorney-General v Hill*[57] the Full Court thought that "legal proceedings" "arguably include appeals" from the High Court to the Court of Appeal, but expressed no concluded view on the issue. In *Attorney-General v*

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55 *Attorney-General v Heenan* [2009] NZAR 763 (HC).
56 *Wiseman v Attorney-General* CA10/68, 28 May 1969.
57 *Attorney-General v Hill*, above n 48, at 23.

Collier[58] and *Attorney-General v Reid*[59] the Full Court on each occasion refrained from expressing any concluded view on that issue while expressing reservations about the inclusion of appeals within the ambit of the provision. As in those cases, it is not necessary for us to decide the point here. The Attorney-General is content not to rely, on the issue of persistence, on the many appeals and applications to recall judgment which Mr Slavich has filed.

[160] However, in accordance with the approach in *Collier*, *Reid* and *Heenan*, we proceed on the basis that an appeal may nevertheless be taken into account in the overall assessment of the respondent's litigious behaviour.[60] In our view, applications for recall should be treated in the same way.

[161] The Full Court in *Attorney-General v Hill*[61] also reserved for future decision the question of whether "legal proceedings" include criminal proceedings, preferring to express no concluded view on that issue.

[162] However, in *Attorney-General v Palmer*[62] the Full Court discussed at [63]-[66] private prosecutions instituted by the respondent as if they were within the ambit of the section and in *Attorney-General v Reid*, the Court held that the term "legal proceedings" encompassed criminal as well as civil proceedings.[63]

[163] We agree with that approach. We note that it is also in accordance with what was said by Michael Taggart and Jenny Klosser in "Controlling Persistently Vexatious Litigants"[64] where the learned authors contrasted the use of the phrase "legal proceedings" near the beginning of s 88A(1), with the phrase "any civil proceeding" used near its end. Taggart and Klosser wrote that the drafting of s 88B(1) makes it clear that the phrase "legal proceedings" covers both civil and

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58 *Attorney-General v Collier* [2001] NZAR 137 (HC).
59 *Attorney-General v Reid* [2012] NZHC 2119, [2012] 3 NZLR 630.
60 *Collier*, above n 58, at [32]; *Reid*, above n 59, at [54]; *Heenan*, above n 53, at [30].
61 At [23].
62 *Attorney-General v Palmer* [2005] NZAR 46 (HC).
63 *Reid*, above n 59, at [46].
64 Michael Taggart and Jenny Klosser "Controlling Persistently Vexatious Litigants" in Matthew Groves (ed) *Law and Government in Australia* (Federation Press, Sydney, 2005).

criminal proceedings, while the order restricting the institution of proceedings may apply only to the former.[65]

Evaluation

[164] The evidence called in support of the present application shows that following the Court of Appeal's judgment dismissing his conviction appeal of 15 May 2009, and the Supreme Court's refusal of application for leave to appeal that decision on 10 August 2009, Mr Slavich has instituted 35 private prosecutions. He did so in the face of a Court of Appeal ruling upholding the convictions that had been entered by Heath J at the trial. The purpose of those prosecutions was to impugn the conduct of those who had been involved in the prosecution at the trial, and those who had acted for the Crown on appeals and the Solicitor-General and Deputy Solicitors-General who had stayed prosecutions.

[165] We have already held that the allegations made in the informations were an abuse of process. In our opinion they were "extravagant and scandalous", relating to very serious misconduct. The defendants were an expanding group targeted because of their association with the successful prosecution of Mr Slavich. Mr Slavich ought to have known that he had no prospect of sustaining the allegations having regard to the Court of Appeal's judgment of 15 May 2009.

[166] The evidence also shows that Mr Slavich initiated 17 civil proceedings attacking the lawfulness of decisions made rejecting complaints that he had made about the conduct of those who had prosecuted him, those who had stayed his private prosecutions, and against the Judicial Conduct Commissioner's decision dismissing complaints made about the conduct of numerous Judges of this Court, the Court of Appeal and the Supreme Court. All of those proceedings related directly or indirectly to his conviction by Heath J at the trial, and the steps that he took subsequently to challenge that conviction.

[167] We do not need to discuss all of these proceedings in detail. They share common characteristics being based as the starting point on what the statements of

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[65] At [282]-[283].

claim call the "core subject matter". This core subject matter is an allegation that Mr Douch prepared a false brief of evidence for Ms Gibbs which he later tampered with. There was then allegedly a cover-up in which the Solicitor-General, Deputy Solicitors-General and the Crown Solicitors (including Mr Douch) were said to have participated: false affidavits were sworn, and false submissions made to the Courts. All of these allegations were without foundation. The Court of Appeal had explained what happened in relation to Ms Gibbs's evidence at [9]-[16] of its judgment of 15 May 2009.

[168] Then, in relation to the claims made against the Judges, it is said that they too participated in corrupt acts and that the Judicial Conduct Commissioner acted unlawfully when he dismissed Mr Slavich's complaints. We take as an exemplar the application made under the Judicature Amendment Act 1972 against the Judicial Conduct Commissioner alleging that he unlawfully rejected complaints made about the conduct of Blanchard, McGrath, Chambers JJ and other Judges.[66]

[169] Paragraph 4 of the statement of claim in that proceeding alleges:

> **4. How the 'Core Subject Matter' was Covered-up: the corruption:**
>
> 4.1 The Complaints to the Commissioner was that the Judges involved themselves, in breach of their Judicial Oaths, in covering-up the 'Core Subject Matter'; and that they did this by, before making their decisions, using corrupt conduct.
>
> 4.2 That corrupt conduct included discarding, changing, excluding or ignoring (a) the issues relating to the concealing of the 'Agreed' Transcript, and the planting of the FALSE BRIEF, (b) the affidavits of Defence Counsels, (c) the documentary facts, (d) the Contempt of Court charges against Douch and the other Crown Prosecutors, and (d) the evidence 'record' and what Justice Heath ruled was in the 'record' (a record that cannot be changed).
>
> 4.3 That despite the fact that all those legitimate matters and facts were before them which allowed them to consider fairly the issues, the Judges purposely, in their decisions, made false statements, suppressed subpoenas that would prove the 'Core Subject Matter' and breached the Applicants rights undere the NZ Bill of Rights Act 1990 to fair hearings.
>
> In essence, the Judges demonstrated a total lack of integrity.

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66 *Slavich v The Judicial Conduct Commissioner* HC Auckland CIV-2012-404-4609.

[170] These are all scandalous allegations and totally devoid of any justification.

[171] The various appeals that Mr Slavich has lodged contribute to the conclusion we have formed that Mr Slavich will not accept that litigation has been determined against him. In this case too, there have been numerous applications for the recall of judgments. As we have held earlier, those applications can also be taken into account in determining the nature of Mr Slavich's conduct.

[172] In our opinion, when the various civil proceedings are set alongside the criminal proceedings, the statutory test of persistent institution of vexatious legal proceedings without reasonable grounds has been very clearly met, even without reference to the Pacesetter-related litigation which we have also discussed above.

[173] The Pacesetter-related litigation shows a similar pattern of conduct, albeit on a smaller scale. Mr Slavich, whether or not acting in a representative capacity, has commenced proceedings which have been dismissed and subsequently brought proceedings against persons responsible for giving professional advice in relation to the claims. His conduct in this respect reinforces the conclusion that would be compelled in any event by his conduct following his exhaustion of his appeal rights against his conviction by Heath J.

[174] We have no doubt that unless Mr Slavich is restrained from doing so he will continue to engage in the institution of vexatious legal proceedings. The Attorney-General's application should be granted accordingly.

Relief sought

[175] In its amended statement of claim the Attorney-General sought orders that:

(a) No civil proceedings shall, without leave of the Court, be instituted by Mr Slavich and/or by his agent in any Court; and

(b) None of the civil proceedings so far instituted by Mr Slavich in any Court shall be continued by him and/or his agent without such leave.

[176] During the hearing, Mr Gunn suggested an amended form of relief, in which the following orders were sought:

(a) No civil proceedings shall, without the leave of this Court, be instituted by the respondent in any Court either on his own behalf or in any fiduciary or representative capacity;

(b) No civil proceeding instituted by the respondent in any Court either on his own behalf or in any fiduciary or representative capacity shall be continued by him without the leave of this Court; and

(c) The respondent shall remain entitled, however, to pursue any appeal to the Court of Appeal or the Supreme Court.

[177] The last paragraph of the amended relief reflects the fact that, as we understand it, there are proceedings on foot in both the Court of Appeal and the Supreme Court which are yet to be resolved. We do not regard it as competent for this Court to make an order which would purport to limit rights of appeal or applications for leave to appeal whether to the Court of Appeal or the Supreme Court.

[178] We fully expect that Mr Slavich will wish to appeal this decision and for the avoidance of doubt his right to do so should also be acknowledged in granting relief. Subject to those reservations, we are in no doubt that an order should be made along the lines sought by the Attorney-General.

Orders

[179] In the circumstances we grant the Attorney-General's application. We order that:

(a) No civil proceedings shall, without the leave of this Court, be instituted by the respondent in any Court either on his own behalf or in any fiduciary or representative capacity;

(b) No civil proceeding instituted by the respondent in any Court either on his own behalf or in any fiduciary or representative capacity shall be continued by him without the leave of this Court; and

(c) The orders made in paragraphs (a) and (b) shall not prevent the respondent from prosecuting any appeal to the Court of Appeal or the Supreme Court which is currently on foot, or which the respondent may seek to pursue in relation to this decision.

[180] Mr Slavich's application for summary judgment is dismissed.

[181] If the Attorney-General seeks costs against Mr Slavich, a memorandum should be filed and served within 14 days of the date of this judgment. Mr Slavich will have 14 days thereafter to file and serve any memorandum in response.

[182] Finally, we express our gratitude to Mr Gray for his assistance as *amicus curiae*.

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Cooper J Toogood J