IN THE COURT OF APPEAL OF NEW ZEALAND

CA92/05

	BETWEEN	ALAIN MICHAEL YVES MAFART AND DOMINIQUE ANGELA FRANCOISE PRIEUR Appellants
	AND	TELEVISION NEW ZEALAND LIMITED Respondent

Hearing: 13 June 2005

Court: Anderson P, Chambers and O'Regan JJ

Counsel: G P Curry for Appellants
W Akel for Respondent

Judgment: 4 August 2005

JUDGMENT OF THE COURT

A The substantive appeal is dismissed for want of jurisdiction.

B Costs to the respondent of $6,000, together with usual disbursements.

REASONS

ANDERSON P

Introduction

[1] On 10 July 1985, French espionage agents, using limpet mines, sank the vessel Rainbow Warrior at its mooring in Auckland Harbour. Mr Fernando Pereira, a crew member of the vessel, was killed.

[2] Within a fortnight two of the agents, the present appellants, were arrested and charged with the homicide. Following a committal proceeding they pleaded guilty to manslaughter and, on 22 November 1985, they were sentenced in the High Court at Auckland to 10 years imprisonment. The Auckland Registry references for the sentencing files are *R v Mafart* S89/85 and *R v Prieur* S90/85.

[3] The committal proceedings were recorded on videotape for administrative reasons and, it seems, to provide the District Court Judge with a personal record of the proceeding. The tapes, along with copies, became the subject of a consent order of the High Court, made by Greig J – see *Mafart and Prieur v Gilbert and BCNZ* HC AK CP261/86 15 October 1987. That order characterised the video tapes as documents within the meaning of s 182 Summary Proceedings Act 1957, and as such they constituted part of the committal record.

[4] The High Court further ordered that the tapes be transmitted to the Registrar of the High Court as part of the record of the High Court in *R v Mafart* and *R v Prieur* in S98/85 and S90/85 "upon and subject to the provisions of the Criminal Proceedings (Search of Court Records) Rules 1974 and subject to the further directions" of the High Court.

[5] A procedural constraint was placed on the searching, inspecting or copying of all or any part of the record of the committal proceedings. The constraining order is in the following terms:

> 4. FOR the purposes of Rule 2(4) and (5) of the Criminal Proceedings (Search of Court Records) Rules 1974 IT IS HEREBY ORDERED AND DIRECTED that:

(i) Any application by any person for leave to search, inspect or copy all or any part of the record of the committal proceedings referred to in this Order and held by this Honourable Court shall prior to any consideration thereof being made be notified by the Registrar of this Court to the applicants in these proceedings by their solicitors, Messrs Russell McVeagh McKenzie Bartleet & Co., Solicitors, Auckland

(ii) No order granting leave to search, inspect or copy all or any part of the committal proceedings referred to in this order shall be made other than by a Judge of this Honourable Court and no such order shall be made by a Judge of this Honourable Court until such time as the applicants in these proceedings have been notified of the application to search, inspect or copy all or any part of the said record and have been given not less than 42 days notice of their rights to be heard on and to make submissions in respect of the application to search, inspect or copy all or any part of the said record held by this Honourable Court.

[6] The respondent, TVNZ, is a public broadcaster. Anticipating the twentieth anniversary of the sabotage of Rainbow Warrior, TVNZ sought leave of a Judge of the High Court to search and copy the video tapes so that they might be included in a documentary film for broadcast. Notice was given to the appellants, who objected. The defended application was heard in the High Court by Simon France J. He confirmed previous suppression orders, of no relevance in this proceeding, but directed the Registrar of the High Court otherwise to make the file, including the video tapes, available to TVNZ for inspection and copying.

[7] The appellants filed and served an appeal against that decision, the effect of which is presently stayed pursuant to aspects of the High Court judgment, pending the determination of the appeal.

[8] There is an issue whether this Court has jurisdiction to entertain an appeal against a grant of leave to search, inspect and copy the criminal records of a court. The issue has been raised but left undetermined by this Court on at least two occasions, *R v Mahanga* [2001] 1 NZLR 641 and *Jackson v Canwest TVWorks Ltd* (formerly *TV3 Network Services Ltd) & Anor* CA114/04 4 May 2005. Having regard to the uncertainty about jurisdiction, this Court directed that the issue should be argued and determined before dealing with the appeal substantively. This judgment is confined to the issue of jurisdiction.

Legislative provisions

[9] The search of criminal court records in the High Court, Court of Appeal and Supreme Court is governed by the Criminal Proceedings (Search of Court Records) Rules 1974 ("the Search Rules"). Rule 2(2)-(12) provides:

> (2) Subject to subclauses (3) and (4) of this rule, a person who is a party to any criminal proceeding or is the solicitor acting for a party therein shall have the right, without payment of fee, to search, inspect, and take [or be issued with] a copy of the file pertaining to that cause or matter.
>
> (3) Where there is more than one defendant to any criminal proceeding documents on the file relating to that proceeding may be searched, inspected, or copied by or on behalf of a defendant[, or a copy issued to the defendant or his or her solicitor,] only with the leave of a Judge and subject to such conditions as the Judge may impose:
>
> Provided that during the absence of a Judge or the inability of a Judge to act, a Registrar (but not a Deputy Registrar) shall have the powers of a Judge under this subclause.
>
> (4) No document shall be searched, inspected, or copied[, and no copy shall be issued of a document,] which a Judge has at any time directed shall not be inspected without leave save in accordance with the direction.
>
> (5) Except as expressly provided in subclauses (1) to (3) of this rule, no person may search, inspect, or copy[, or be issued with a copy of,]—
>
> > (a) The Crown Book without the leave of a Judge or a Registrar (but not a Deputy Registrar) and subject to such conditions as the Judge or the Registrar may impose:
> >
> > (b) Any file, or part of a file, or document relating to a criminal proceeding without the leave of a Judge and subject to such conditions as the Judge may impose.
>
> (6) An application for leave under subclause (3) or subclause (5) of this rule may be made on an informal basis.
>
> (7) If an application for leave under subclause (3) or paragraph (a) of subclause (5) of this rule is refused by a Registrar the applicant may appeal to a Judge against such refusal.
>
> (8) Notwithstanding anything in the foregoing provisions of this rule any person shall, on payment of the prescribed fee, if any, be entitled during office hours to search, inspect, and take [or be issued with] a copy of any document or record filed or lodged in the Court more than 60 years before.
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> (9) For the purposes of this rule "document" includes:
>
> > (a) The record made of oral evidence given at any hearing but shall not include any notes made personally by the Judge:

(b) All exhibits produced in evidence:

(c) The record made of the reasons given by the Judge for his judgment but shall not include any notes made thereof personally by the Judge.

(10) These rules shall apply mutatis mutandis to proceedings in the Court of Appeal and to proceedings in the Supreme Court.

(11) Nothing in this rule shall affect any Act, regulations, or rules which contain express provisions of any kind in relation to the search of Court records, and this rule shall be subject to those provisions.

(12) Nothing in this rule shall limit the provisions of any order made under any of the provisions of sections 138 to 140 of the Criminal Justice Act 1985 or any other enactment restricting the publication, in any report relating to any proceedings in respect of any offence, of the name of any person.

Authority for Search Rules

[10] The preamble to the Search Rules states that they are made "pursuant to the Crimes Act 1961 and the Judicature Act 1908…". As to the Crimes Act, s 409 provides:

409 Rules of Court

(1) There may be made under the Judicature Act 1908 rules of Court regulating the practice and procedure in proceedings under this Act in the Supreme Court, the Court of Appeal, the High Court, and District Courts, or any of them.

(2) Until such rules are made, and so far as they do not extend, the existing practice and procedure of the High Court and the Court of Appeal remain and are in force in those Courts as far as they are not altered by or inconsistent with the provisions of this Act.

(3) The practice and procedure of the High Court must be followed by all District Courts in proceedings on indictment.

[11] The Judicature Act 1908 has several provisions relating to the making of rules. Those relevant to the present matter are ss 51C(1) and 51E. Those sections provide:

51C Power to make rules

(1) The Governor-General in Council, with the concurrence of the Chief Justice and any 2 or more of the members of the Rules Committee, of whom at least one shall be a Judge, may, for the purposes of facilitating the

> expeditious, inexpensive, and just dispatch of the business of the Court, or of otherwise assisting in the due administration of justice, from time to time make rules regulating the practice and procedure of the High Court and of the Court of Appeal and of the Supreme Court (including the practice and procedure on appeals from any court or person to the Supreme Court, the Court of Appeal, or the High Court)
>
> **51E Power to prescribe procedure on applications to High Court, Court of Appeal, or Supreme Court**
>
> (1) Notwithstanding anything to the contrary in any Act or in any Imperial Act in force in New Zealand, rules may be made under section 51C of this Act prescribing the form and manner in which any class or classes of applications to the High Court or a Judge thereof or to the Court of Appeal or to the Supreme Court shall be made.
>
> (2) So far as the provisions of any Act prescribing the form or manner in which any such applications are to be made, whether by petition, motion, summons, or otherwise, are inconsistent with or repugnant to the High Court Rules or the Court of Appeal Rules or to any rules made under section 51C of this Act, the Act prescribing that form or manner shall be deemed to be subject to the rules.

[12] Jurisdictional issues arise here because of the difficulties in identifying the nature of a Judge's decision to grant leave pursuant to Search Rules 2(3) and (5). Is it an administrative decision made pursuant to a statutory power of decision vested in a Judge? Or is it a judicial decision in proceedings, and if so, is it in the nature of a criminal or a civil order?

An administrative decision?

[13] In order to maintain the integrity of its records, a Court must be able to control access to and use of those records. However, other, possibly countervailing, interests may also be relevant. There may be specific private or general public interests which justify searching and copying records. There may also be privacy interests which need to be considered in connection with search requests. The Search Rules seek to accommodate these various interests by leaving it to a Judge to make what, generally speaking, is essentially an administrative decision. Support for that analysis of the Judge's function may be found in Search Rule 2(6), which envisages applications for leave on an informal basis, and in the fact that the rules contemplate applications by people who are not party to any proceedings. Thus, a

person declined leave on an informal *ex parte* application to search a Court's criminal records can have no more right to appeal than if they had been declined a request to search a Court building, or use a Courtroom for the purpose of shooting a film scene. Such decisions are plainly not in the nature of "judgments, decrees or orders", to use the expression in s 66 of the Judicature Act. Nor are they countenanced as appealable decisions pursuant to the terms of Part 13 of the Crimes Act. They are merely decisions made by a Judge in the general conduct of a Court's business other than the conduct of litigation.

[14] It is necessary, however, to consider the position where there is a more formal, possibly contested, process for determining an application for leave. Search Rule 2(6) allows, but does not mandate, an application for leave on an informal basis. This means that there could be a formal interlocutory application in the context of or related to a criminal proceeding. That is what happened in this case, where the respondent's application was brought as an interlocutory application in S89/85 and S90/85. Notice was given to the appellant's solicitors in terms of Order No 4 made by Greig J.

[15] Where, as here, there has been a formal application on notice, with arguments heard for and against the grant of leave, and a formal determination has been made on the application, it would seem more appropriate to regard that determination as a judicial decision in the nature of an interlocutory order, rather than as an administrative decision made by a Judge.

[16] But that would not, of itself, render the decision appealable. This Court's jurisdiction to hear appeals from orders relating to or made in criminal proceedings is constrained. As this Court affirmed in *Re Victim X* [2003] 3 NZLR 220, at [24] and [29], notwithstanding the apparent clarity of s 66 of the Judicature Act, for at least a century the Courts have held that the section does not apply to criminal matters. This Court referred to a "…basic, long-established distinction in legislation and in decisions of this Court between civil appeals and criminal appeals. Matters 'relating to criminal proceedings' are not in any general sense at least, civil appeals – the subject of s 66".

Appellant's submissions

[17] For the appellants, Mr Curry acknowledged the strictness of the long-established civil/criminal divide in relation to s 66 of the Judicature Act. He submitted, however, that the present proceeding is on the civil side of that divide. He propounded five reasons in support of that submission.

[18] First, the origin of the tapes lay in the exercise of a statutory power of decision by District Court Judge Gilbert in relation to the filming and videotaping of the committal proceeding. In his submission the tapes were not, in any meaningful sense, part of the criminal proceedings. He submitted that they were merely a by-product of those proceedings with a limited purpose of facilitating media access, security and creating a visual record for the District Court Judge's personal ownership and use. The consent order made by Greig J committing the tapes to the Court record did not change the underlying origin of the tapes in administrative rather than criminal law, and the Search Rules simply overlaid a statutory regime for managing access.

[19] The second ground is that the real character of the proceeding before Simon France J was not criminal, but rather in the realm of rights and freedoms and administrative law, invoking issues of privacy, freedom of expression, open justice and related issues. The fact that TVNZ's application was made pursuant to the Search Rules does not of itself make the application a criminal proceeding any more than if it were a request under the Official Information Act 1982 for information related to a criminal proceeding, or proceedings in privacy or defamation arising from criminal proceedings.

[20] In support of a submission that even decisions made in the course of criminal proceedings or related to them can be civil in character, Mr Curry cited *United States Government v Montgomery (Montgomery, third party)* [2001] UKHL 3 and *Attorney-General v Hawkins* [1992] 3 NZLR 664. In the former case, the English High Court had made orders restraining the respondent from dealing with realisable property. That was at the request of the United States government in whose favour forfeiture orders had been made in a US Federal District Court following convictions

for fraud and racketeering. Another High Court Judge set aside the restraint orders at the suit of the respondent and the United States government appealed. On the appeal, the respondent raised a preliminary objection. This was that the Court of Appeal had no jurisdiction to hear the appeal by virtue of s 18(1)(a) of the Supreme Court Act 1981, which excluded appeals "from any judgment of the High Court in any criminal cause or matter". The Court of Appeal and the House of Lords held that the Court of Appeal's jurisdiction had not been excluded. This was because the High Court's jurisdiction under the Criminal Justice Act 1988 is a civil jurisdiction, notwithstanding that it exists to enforce or determine disputes over the debts or proprietary rights created or consequent upon a confiscation order made by a criminal Court.

[21] In *Attorney-General v Hawkins*, an application had been made in the course of criminal proceedings against the respondent and others. The application was for an order directing the Crown to supply to the defence certain transcripts which, in any event, were disclosable to the defendants pursuant to the Official Information Act 1982. Because the criminal trial was still proceeding, the application for disclosure was dealt with by another High Court Judge, Williams J, who made the order sought. The Attorney-General appealed. On the appeal the issue of jurisdiction to entertain the appeal was raised, although not pressed. The argument centred on the merits of the application.

[22] On the matter of jurisdiction, Cooke P considered that the application fell within s 66 of the Judicature Act, both as to the language of that section and in the light of its spirit and intent. He considered that the restriction on the scope of s 66 established by prior judicial decisions need not be applied to a decision concerning the personal right to official information under the Official Information Act, which was an important civil right. He said that no machinery for enforcing that right in the Courts was laid down by the Act and he considered the legislature had left it to the Courts to adjust their own procedure, so as to provide effective mechanisms for giving effect to the right, subject to such protections as are required by the Act. In the event, however, the appeal failed on its merits.

[23] Hardie Boys J agreed that the appeal should be dismissed on the merits with the result that a view on jurisdiction was strictly unnecessary. However, he tended to the view that an application to the Court under the Official Information Act should be regarded as a self contained matter or proceeding, so that even if it occurs in the course of a criminal trial there is an appeal to the Court of Appeal by virtue of s 66 of the Judicature Act. He considered that such approach was necessary in order to give the statute practical effect in such a setting.

[24] McKay J had reservations on the jurisdictional issue but he also felt it unnecessary to reach a concluded view. He preferred the matter to be decided in some other case when it could be given more detailed consideration.

[25] Next, Mr Curry submitted that the passage of 20 years between the completion of the civil proceedings and the application presently under consideration rendered the application other than one "in" criminal proceedings. The applications under the Search Rules in both *Mahanga* and *Jackson* were made during the criminal trial and that distinguished them from the present case, where the trial process had been completed two decades ago.

[26] A fourth ground relied on by Mr Curry was that the judgment was noted as having been delivered pursuant to r 540(4) of the High Court Rules 1985 which apply to civil, not criminal proceedings. This argument refers to the notation on the cover sheet of the written reasons for judgment:

> This judgment was delivered by Justice Simon France on 23 May 2005 at 11.45 a.m. pursuant to r 540(4) of the High Court Rules 1985.

[27] That particular argument can be disposed of immediately as unsound. The endorsement is on the cover sheet of the judgment and is attributable to the Registrar pursuant to r 540(4). Even if it had been the Judge's own endorsement, that would make it neither part of the judgment nor determinative of the nature of the proceedings.

[28] Mr Curry further submitted that a dictum of this Court in *Re Victim X* that there was no meaningful distinction between an order "relating to" and "in" criminal

proceedings was dependent upon the facts of that case, and did not establish a general proposition. He argued that even if the present case relates to a criminal proceeding, it does not involve a decision made in a criminal proceeding and is, therefore, insufficiently associated with the criminal process to be excluded by the civil/criminal divide.

Respondent's submissions

[29] Mr Akel submitted that the judicial review context in which the consent orders were made was irrelevant to the issue of jurisdiction in the present proceeding. By virtue of those orders, the videotapes became part of the Court record in the criminal proceedings against the appellants and became searchable in accordance with the Search Rules, albeit subject to the provisions as to notice stipulated in order 4 made by Greig J.

[30] He submitted that there is no right of appeal in the Crimes Act from a decision under the Search Rules because the Crimes Act is concerned with pre-trial and post-trial appeals. Nor could jurisdiction for an appeal be found in s 66 of the Judicature Act, which does not cover orders made in criminal proceedings or relating to criminal proceedings. Mr Akel invoked *Re Victim X* for this proposition.

[31] Mr Akel argued, contrary to Mr Curry's submission that this Court's observations in *Re Victim X* about appeals "relating to" criminal proceedings were confined to the case before it, that this Court had made it plain in that case that:

> Matters "relating to criminal proceedings" are not, in any general sense at least, civil appeals – the subject of s 66.

[32] In any event, Mr Akel submitted, the facts in the present case do not justify a distinction being made between an order "relating to" and "in" criminal proceedings when such a distinction did not exist in *Re Victim X*. It is convenient to set out the text of Mr Akel's written submissions on this point:

> Having said that, the facts in the present case do not justify a distinction being made between an order "*relating to*" and "*in*" criminal proceedings in the present case, when it did not exist in *Re Victim X*. In fact the opposite.

(a) The appellants pleaded guilty in open court to manslaughter and related charges. They were the accused. *Victim X* was a witness as victim. The appellants were the primary parties to the criminal proceedings.

(b) There are no name suppression issues.

(c) The appellants acknowledged in the consent order of 15 October 1987 the likelihood of future applications to search the criminal court records, and that such searches would be under the Search Rules.

(d) Thus they were fully aware and proceeded at that time on the assumption that the video at some time in the future could be made public.

(e) At the forefront of the submission on behalf of *Victim X* was his privacy interests and that of his family, the Courts particularly referring to the Victims Rights Act 2002 in para 28. In the present case the appellants' photographs have appeared in public and they have written books themselves on the *Rainbow Warrior* incident in which they both extensively refer to what took place at the committal proceedings.

IN these circumstances it would be incongruous for someone in the position of *Victim X* not to have a right of appeal under s 66 of the Judicature Act, and yet the appellants as accused having such a right of appeal. To grant the appellants a right of appeal would blur the long-established distinction between civil and criminal appeals.

Discussion

[33] I do not find *United States Government v Montgomery* of assistance in the present case. That authority takes the matter no further than showing that, at least under English legislation, proceedings for the enforcement of criminal penalties and forfeitures lie within the civil jurisdiction of the High Court. In any event, the position is essentially the same in New Zealand in that applications pursuant to the Proceeds of Crime Act 1991 are specifically envisaged by the High Court Rules Part 4A, r 458D(1)(xvii).

[34] Nor, with respect, can I draw much assistance from *Attorney General v Hawkins*. The obiter observations of Cooke P and Hardie Boys J, made in the course of *ex tempore* judgments, following arguments where the issue of jurisdiction had been mentioned but not seriously argued, must be considered of doubtful authority.

[35] In the course of the criminal trial against Mr Hawkins and others, the Crown came into possession of relevant documents in the nature of transcripts of evidence

given to the National Crime Authority of Australia. The Crown disclosed to the defence the existence and their possession of such documents but said they would not be disclosed to the defence for more than two and a half months. Not only would such material normally be disclosable to the defence, pursuant to the Crown's obligation of disclosure in criminal proceedings, the defendants were also entitled to such information pursuant to the Official Information Act 1982.

[36] Cooke P thought that no machinery for enforcing the Official Information Act Right is laid down in the Act itself, and that the legislature had left it to the Courts to adjust their own procedures so as to provide effective mechanisms for giving effect to the right. Implicit in the approach taken by Cooke P is that an interlocutory application in criminal proceedings is not only an appropriate mechanism for judicial enforcement of the right but also, notwithstanding the criminal context, the application is in the nature of a civil originating process. With respect, that simply cannot be correct.

[37] The Official Information Act has its own regime for enforcement of the right to information declared by s 24 of that Act. The regime begins with Ombudsman review in terms of Part V of the Act. When an Ombudsman recommends disclosure of information, s 32 of the Act imposes a public duty on the department or organisation withholding the information to observe the Ombudsman's recommendation within a specified period. That obligation may be pre-empted by an Order in Council made in accordance with s 32A of the Act, but such Order in Council is itself reviewable by the High Court, pursuant to s 32B. Any party to an application under s 32B who is dissatisfied with any final or interlocutory order of the High Court may, by virtue of s 32C, appeal to the Court of Appeal, and s 66 of the Judicature Act 1908 is declared to apply to any such appeal.

[38] Cooke P was therefore in error when he said that the legislature had left it to the Courts to adjust their own procedures so as to provide effective mechanisms for giving effect to the right to information. On the contrary, the Act stipulates specific procedures, culminating in public law processes of review and appeal therefrom. It cannot be the case that the elaborate statutory regime and the longstanding principle of public law that normally other existing avenues of review need to be exhausted

before recourse to the Courts, can be disregarded by adopting a stratagem of an alternative civil proceeding which takes its form and expression as an interlocutory application in a criminal proceeding. At best, the alternative civil course must be an application for judicial review pursuant to the Judicature Amendment Act 1972 and/or the Court's prerogative powers; in which case the procedure is governed by the High Court Rules, as in the case of any other civil proceeding in that jurisdiction.

[39] In my view, with respect, the discovery application dealt with by Williams J was the subject of an order made in or relating to criminal proceedings and as such was not amenable to appeal. For these reasons I cannot regard *Attorney-General v Hawkins* as assisting the appellant's case.

[40] If a Judge's decision under the Search Rules is in the nature of an order rather than a merely administrative decision, then it must be either an order in or relating to criminal proceedings or an order in or relating to civil proceedings. If the latter, what is the civil proceeding? I do not think it can be said that an informal application for leave, say a letter addressed to the Court Registrar, can sensibly be regarded as equivalent to an originating application under Part 4 or Part 4A of the High Court Rules. It certainly falls far short of the prescribed requirements for commencing proceedings under those Rules. Nor will there be the context of an existing civil proceeding which might colour the application as an interlocutory application in such a proceeding.

[41] This is not to say that an applicant under the Search Rules will necessarily be prohibited from seeking leave by way of originating application under Part 4A because, as I have mentioned, the process of informal application is permissive not mandatory and because High Court Rule 458D(1)(e) envisages:

> Any other proceeding that the Court, in the interests of justice, permits to be commenced by the filing of an originating application.

[42] The procedure adopted in the present case was not by way of originating application under the High Court Rules but, essentially, it was in the nature of an interlocutory application in the Criminal Proceeding S89/85 and S90/85.

[43] Because the order made by Simon France J cannot be considered a judgment decree or order in civil proceedings, it must either have the character of a judgment, decree or order in criminal proceedings or the character of a purely administrative decision. It is unnecessary to decide which of those alternatives is more appropriate because an appeal to this Court will not lie in either case.

[44] It follows that this Court does not have jurisdiction to entertain the present appeal.

[45] Mr Curry asked for a temporary stay in the event that this Court should find against the appellants on the issue of jurisdiction. This was to allow him to seek leave to appeal to the Supreme Court. Of course the order dismissing the appeal cannot be stayed because it is non executory; and since this Court does not have jurisdiction to entertain the appeal it cannot have ancillary powers of stay. The appellants will have to apply to the High Court for a further stay of Simon France J's order.

[46] The Court being unanimous that it does not have jurisdiction, the substantive appeal brought by the appellants must be dismissed. The respondent will have costs of $6,000, together with usual disbursements.

CHAMBERS AND O'REGAN JJ

(Given by Chambers J)

[47] In our view, this appeal can be simply disposed of.

[48] The videotape became part of the High Court's record pursuant to s 182 of the Summary Proceedings Act 1957. As such, the videotape, like all the other documents comprising the record of the appellants' criminal proceeding, became subject to the Criminal Proceedings (Search of Court Records) Rules 1974.

[49] A High Court judge's decision under the Criminal Proceedings Rules cannot be the subject of an appeal under s 66 of the Judicature Act 1908, as that section authorises appeals only in civil proceedings: *Re Victim X* [2003] 3 NZLR 220. Nor has Parliament conferred any appeal right under the Crimes Act or any other Act. That is not surprising for three reasons. First, a decision as to whether court records can be inspected is, in the High Court context, a very low level decision, that being reflected in the fact that generally speaking it is made by the registrar. Secondly, the Rules themselves provide for a right of appeal in normal circumstances – to a High Court judge. Thirdly, it is essentially a matter for the High Court as to how it keeps its records and to whom access should be permitted. It is by no means surprising that Parliament did not see this court as needing to exercise supervisory control of the High Court's record-keeping function.

[50] On a normal application to search a criminal file, neither the registrar nor the High Court judge on appeal is required to consult either the defendant or the Crown before making a decision as to whether to allow access. The fact that in this case Greig J imposed notice requirements on any subsequent search of the file does not alter the essential nature of the record-keeping regime. Certainly Greig J's order cannot create a right of appeal to this Court if one does not generally exist.

[51] In our view, it is irrelevant how Simon France J's decision is precisely categorised: all that matters is that it was not a decision within the High Court's civil jurisdiction. It is irrelevant how the videotape came to be made. Clearly there cannot be one rule for the videotape and another for all other documents on this criminal proceeding file.

[52] In our view as well, it is irrelevant how the application to search is made. Rule 2(6) of the Criminal Proceedings Rules makes it clear that an application for leave to search may be made on an informal basis. As we know from our High Court experience, appeals under subcl (7) are also, almost invariably, made on an informal basis. It does not matter what form of search application is used: adopting a more formal process does not convert the nature of the process into something different. A decision made on a formal application is no different from a decision made on an informal one. We respectfully disagree with the President when he

suggests that, in some circumstances, a disaffected applicant could bring an application under Part 4A of the High Court Rules. The High Court Rules govern the practice and procedure of the High Court only in civil proceedings: r 2(1). This is not a civil proceeding.

[53] For these reasons, we are satisfied that there is no jurisdiction for this appeal. We agree with the President that it is appropriate that any application for a further stay be considered in the High Court.

Solicitors:
Russell McVeagh, Auckland for Appellants
Simpson Grierson, Auckland for Respondent