ORDER PROHIBITING PUBLICATION OF THE NAMES OR IDENTIFYING PARTICULARS OF THE APPELLANTS UNTIL FURTHER ORDER OF THE HIGH COURT.

ORDER PROHIBITING PUBLICATION OF THE JUDGMENT AND ANY PART OF THE PROCEEDINGS IN NEWS MEDIA OR ON THE INTERNET OR OTHER PUBLICLY AVAILABLE DATABASE UNTIL FINAL DISPOSITION OF TRIAL. PUBLICATION IN LAW REPORT OR LAW DIGEST PERMITTED.

NOTE: ORDER THAT NO SEARCH OF THE COURT FILE IS PERMISSIBLE EXCEPT BY ANY OF THE PARTIES WITHOUT THE PERMISSION OF A JUDGE REMAINS IN FORCE.

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 58/2019
[2020] NZSC 97

BETWEEN	S (SC 58/2019) First Appellant
	M (SC 58/2019) Second Appellant
AND	VECTOR LIMITED First Respondent
	DISTRICT COURT AT AUCKLAND Second Respondent
	H LIMITED (IN RECEIVERSHIP AND LIQUIDATION) Third Respondent

Hearing:	10 March 2020
Court:	Winkelmann CJ, Glazebrook, O'Regan, Ellen France and Williams JJ
Counsel:	J R Billington QC and A C Skelton for Appellants D P H Jones QC and S S McMullan for First Respondent C A Brook for Attorney-General as Intervener
Judgment:	21 September 2020

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The first and second appellants must pay the first respondent costs of $15,000 plus usual disbursements.

C We make an order prohibiting publication of the names or identifying particulars of the appellants until further order of the High Court.

D We make an order prohibiting publication of the judgment and any part of the proceedings in news media or on the internet or other publicly available database until final disposition of trial. Publication in law report or law digest is permitted.

SUMMARY OF RESULT
(Given by the Court)

[1] In accordance with the view of the majority, the Court has dismissed an appeal against the decision of the Court of Appeal thereby allowing the private prosecution initiated by Vector Ltd against the appellants and the third respondent to be accepted for filing under s 26 of the Criminal Procedure Act 2011.

[2] The appeal has focussed in particular on the approach to be taken to s 26(3)(a) of the Criminal Procedure Act, which provides that a direction not to accept a charging document for filing in relation to a proposed private prosecution may be given where the evidence provided by the proposed private prosecutor is "insufficient to justify a trial". Although differing on the application of the principles in relation to Vector Ltd's proposed prosecution, the Court is in agreement that s 26 is intended to operate as an initial or preliminary screening mechanism of proposed private prosecutions.[1]

[1] At [47]–[66] and [89] per O'Regan and Ellen France JJ, [106] per Glazebrook J and [129] per Winkelmann CJ and Williams J.

[3] The Court is also in agreement that, under s 26(3)(a), a District Court judge retains a discretion to consider material going beyond that of the evidence of the proposed private prosecutor including evidence and/or submissions from the proposed defendants.[2] A majority of the Court, comprising Winkelmann CJ, Glazebrook and Williams JJ, say this is a discretion to be exercised when it is in the interests of justice to do so.[3] It is not to be characterised as a residual discretion or one to be exercised only in exceptional cases.[4]

[4] Winkelmann CJ, O'Regan, Ellen France and Williams JJ agree that public interest factors are not relevant to the s 26(3)(a) assessment.[5] Glazebrook J considers that public interest factors are only relevant in extreme circumstances.[6]

[5] All members of the Court agree that it is not good practice to give proposed defendants the opportunity to file material and make submissions as a matter of course.[7]

[6] The Court is also in agreement that the threshold for determining evidential sufficiency is whether, on a prima facie basis, the evidence is sufficient to prove the elements of the charge to the required standard.[8]

[7] Applying these principles, a majority of the Court, comprising Glazebrook, O'Regan and Ellen France JJ, dismiss the appeal because the proposed defence evidence in issue only raises issues for trial.[9]

[8] The reasons of the Court for this result are given in the separate opinions delivered by:

---

2 At [67]–[71] per O'Regan and Ellen France JJ, [105] per Glazebrook J and [113](b) and [130]–[133] per Winkelmann CJ and Williams J.
3 At [106] per Glazebrook J and [133] per Winkelmann CJ and Williams J.
4 At [106] per Glazebrook J and [113](b) and [133] per Winkelmann CJ and Williams J.
5 At [75]–[76] per O'Regan and Ellen France JJ and [114] per Winkelmann CJ and Williams J.
6 At [104].
7 At [74] per O'Regan and Ellen France JJ, [107] per Glazebrook J and [134] per Winkelmann CJ and Williams J.
8 At [85] and [91] per O'Regan and Ellen France JJ, [106] per Glazebrook J and [121] and [125] per Winkelmann CJ and Williams J.
9 At [88] and [92]–[93] per O'Regan and Ellen France JJ and [110]–[111] per Glazebrook J.

REASONS

O'REGAN AND ELLEN FRANCE JJ
(Given by Ellen France J)

Table of Contents

The appeal

[9] This appeal concerns the approach to be taken where a person seeks to file a charging document in the District Court to commence a private prosecution and, in particular, the grounds on which a District Court judge may give a direction that such a charging document not be accepted for filing. The grounds are set out in s 26(3) of the Criminal Procedure Act 2011. Under s 26(3)(a), a direction not to accept the charging document for filing may be given where the evidence provided by the proposed private prosecutor is "insufficient to justify a trial". Under s 26(3)(b), a direction not to accept the charging document may be given where the "proposed prosecution is otherwise an abuse of process". The focus of this appeal is on s 26(3)(a)

and on the nature of the assessment to be undertaken by the District Court judge under that section.[10]

Background

[10] The question about the approach to s 26(3)(a) arose when the first respondent, Vector Ltd (Vector), sought to file charging documents alleging that the first and second appellants (the appellants) and the third respondent, H Ltd (in receivership and liquidation), committed criminal offences by overcharging Vector[11] in respect of a contract for the upgrade of an electricity substation.

[11] The facts are set out in detail in the judgment of the Court of Appeal and we draw on that description in the summary which follows.[12]

Narrative of events

[12] The contract began in May 2011. Vector's case is that H Ltd was to be paid under the contract for the reconstruction of the substation on a cost plus 3.25 per cent basis. Vector alleges that H Ltd and its employees (the appellants) negotiated reduced prices with subcontractors, but did not account to Vector for the reduced prices.

[13] Vector raised the matter with the Serious Fraud Office (SFO), having been alerted by a whistle blower. In early January 2013, the SFO decided not to prosecute. The SFO maintained that position in late July 2015 following a review of its initial decision.

[14] The dispute between Vector and H Ltd was the subject of an adjudication. In a determination released on 3 October 2016, the adjudicator concluded that Vector had

---

10 The second and third respondents abide the decision of the Court on the appeal. At the invitation of the Court, counsel for the Attorney-General appeared as intervener and provided submissions on the interpretation of s 26 of the Criminal Procedure Act 2011 and on the relevance of the Solicitor-General's Prosecution Guidelines to the s 26 determination (*Solicitor-General's Prosecution Guidelines* (Crown Law Office, 1 July 2013) [Prosecution Guidelines]).

11 Although we only refer to Vector, the charging documents alleged that offences were committed against Transpower New Zealand Ltd (Transpower) and Vector. Transpower and Vector were joint principals (collectively referred to as TPVL). The construction contract was between TPVL and H Ltd.

12 *Vector Ltd v [H Ltd] (in rec and liq)* [2019] NZCA 215, [2019] NZAR 1127 (Brown, Collins and Stevens JJ) [CA judgment].

unlawfully withheld payments and directed Vector to pay H Ltd over $13.5 million. As the Court of Appeal observed:

> [19] In the adjudication, [H Ltd] did not seek to reclaim from Vector the sum which Vector said had been obtained by [H Ltd] in breach of the terms of the contract. Through this process [H Ltd] effectively credited back the disputed amount to Vector.

[15] Vector decided to initiate a private prosecution and, on 10 February 2017, sought to file charging documents in the District Court. The documents sought to charge the appellants and H Ltd (the proposed defendants)[13] each with 17 charges of dishonestly using a document,[14] one representative charge of obtaining by deception[15] and one representative charge of theft by a person in a special relationship.[16] We understand that nine formal statements and over 1,300 exhibits were filed in support of the proposed prosecution.

[16] The Registrar referred the proposed prosecution to a judge as provided for in s 26(1)(b). On 16 February 2017 Judge Mary-Elizabeth Sharp by minute directed that the material advanced by Vector be served on the proposed defendants. The proposed defendants were given the opportunity to submit material on whether the charging documents should be received for filing and a three day hearing was allocated.[17] They filed a number of witness statements and a large number of exhibits in opposition to the commencement of the prosecution. Their case was essentially that the evidence filed by Vector was insufficient to show that their conduct was dishonest, deceptive and without claim of right. They said that the contract provided for a change to the basis on which H Ltd was to be paid and that during the relevant period, the charging arrangements "evolved from cost plus to a fixed price arrangement".[18] Accordingly, it was contended that there was no obligation on either H Ltd as the contracting party or on the appellants to account to Vector for the benefit H Ltd obtained by negotiating

---

13 We use the term "the proposed defendants" when referring collectively to the first and second appellants and H Ltd. We use the term "the appellants" to refer to the first and second appellants only.

14 Crimes Act 1961, s 228(1)(b).

15 Section 240(1)(a).

16 Section 220(1)(a).

17 The Judge recorded that this course was taken because of her "duty to prevent an abuse of process". As to evidential sufficiency, the Judge noted that an issue would arise as to whether there could be personal liability attaching to the appellants as they were employed by H Ltd at the relevant time.

18 CA judgment, above n 12, at [15].

reduced payments to the subcontractors. Finally, it was said that the appellants were not in a position of authority in relation to the administration of the contract.

[17] The question of whether the charging documents should be accepted for filing proceeded to a hearing before Judge Thorburn. In a judgment delivered on 15 March 2018 Judge Thorburn decided that, under s 26(3)(a), the evidence provided by Vector was sufficient to justify a trial in relation to all but one charge.[19] The Judge also rejected the argument that the proposed prosecution was an abuse of process. The appellants sought judicial review of that decision in the High Court. Whata J granted the application for judicial review, concluding that Judge Thorburn had erred in the approach to s 26(3)(a) by failing to properly consider the evidence from the proposed defendants and by not squarely addressing their claim of right.[20] The Judge remitted the case back to the District Court for reconsideration. Vector appealed successfully against that decision to the Court of Appeal. This Court granted the appellants leave to appeal on the question of whether the Court of Appeal was correct in its interpretation of s 26(3)(a).[21]

The judgments in the Courts below

[18] In the District Court, Judge Thorburn said that under s 26(3)(a) the assessment of the strength of the evidence was generally limited to the proposed prosecutor's evidence offered in the formal statements.[22] It was acknowledged that if the proposed defendant had statements that "demonstrate unequivocally that evidence in a proposed prosecutor's formal statement in support of an element of a charge has no credit, the judge may consider that material to determine whether to disregard the evidence".[23] The Judge also said there was no requirement for the court to consider the Solicitor-General's Prosecution Guidelines (Prosecution Guidelines),[24] nor to consider matters of policy and public interest. Where there was concern that the

---

19 *Vector Ltd v [H Ltd]* [2018] NZDC 3238 [DC judgment].
20 *[H Ltd] (in rec and liq) v District Court at Auckland* [2018] NZHC 2327 [HC judgment].
21 *[S] v Vector Ltd* [2019] NZSC 97 [Leave judgment].
22 DC judgment, above n 19, at [33] and [56(i)].
23 At [56(iii)].
24 Prosecution Guidelines, above n 10.

proposed prosecutor "may be obsessional and vexatious", the judge may consider other material, "but only insofar as that material has bearing on that issue".[25]

[19] Finally, the Judge considered that the test for sufficiency of evidence under s 26(3)(a) was the same as that under s 147(4)(c) of the Criminal Procedure Act, dealing with the dismissal of a charge on the basis that a properly directed jury could not reasonably convict the defendant. Applying this approach, the Judge held that there was sufficient evidence to justify a trial in this case in relation to all charges except the proposed charge alleging theft in a special relationship.[26]

[20] In the High Court, Whata J found that once the proposed defendants were given the opportunity to appear at the s 26 hearing, the District Court Judge should have considered their evidence. The Judge agreed with the District Court that there was no requirement to have regard to the Prosecution Guidelines but took a different view on the sufficiency of the evidence in this case. In particular, the Judge said there was "ample evidence" supporting the alleged claim of right and the District Court should have considered that evidence.[27] In remitting the matter back to the District Court, the Judge directed the District Court to reconsider in particular whether, after considering all of the evidence, Vector could sufficiently demonstrate the absence of a claim of right.[28]

[21] The Court of Appeal took the view that s 26(3)(a) provided "an uncomplicated screening mechanism that addresses only the formal statements and exhibits filed by the proposed prosecutor".[29] The Court noted that the position may be different under s 26(3)(b), dealing with the proposed prosecutor's abuse of process.

---

25 DC judgment, above n 19, at [56(iv)].
26 The Court of Appeal summarised Judge Thorburn's findings in respect of the s 26(3)(a) assessment: CA judgment, above n 12, at [38].
27 HC judgment, above n 20, at [71].
28 At [83].
29 CA judgment, above n 12, at [67(a)].

[22] Further, the Court said that the test for evidential sufficiency was whether the proposed prosecutor's evidence on the essential ingredients of the charge "is sufficiently cogent and creditable to put a proposed defendant on trial".[30]

[23] The Court went on to say that even if the evidence was sufficient, it was still necessary to determine whether or not a trial was justified. The Court continued:[31]

> We would, however, not wish this acknowledgement to be construed as permitting a District Court Judge, once satisfied that the evidence presented by the proposed prosecutor is sufficient to support a charge, to take into account a broad range of public interest considerations when deciding whether or not a trial is justified. Once it is demonstrated that the proposed prosecutor's evidence is sufficient to justify a trial it will usually follow that the District Court Judge will direct the Registrar to accept the charging documents for filing. There is, however, wider scope for considering public interest considerations when considering whether or not a proposed prosecution is an abuse of process.

[24] The Court considered that while it was not usually necessary to do so, it was permissible in this case for the proposed defendants to be allowed to advance submissions, although not evidence, on the question of the sufficiency of evidence. That was because of the "relatively complex factual and legal issues" for Judge Thorburn to assess.[32] The Court found that Judge Thorburn had followed the correct procedure.

[25] The Court also said Judge Thorburn had carefully examined the evidence produced by Vector and decided it was sufficient to justify trial. The Judge had "appropriately discharged his responsibilities in this respect".[33] Finally, while accepting that there was "some latitude" in "rare" cases for a District Court judge to consider issues other than the sufficiency of the evidence when determining if a trial is justified, this was not such a case.[34] That was because of the seriousness of the allegations and the fact that they were based, prima facie, on cogent evidence. The

---

30 At [73], citing *Daemar v Gilliand* [1979] 2 NZLR 7 (SC) at 10–11 and with reference to the questions set out in *R v West London Metropolitan Stipendiary Magistrate, ex parte Klahn* [1979] 1 WLR 933 (QB) [*West London Justices*] at 935.

31 At [77].

32 At [81].

33 At [86].

34 At [88].

appeal was accordingly allowed. The directions of the District Court were reinstated.[35]

Section 26

[26] It is helpful at this point to set out s 26 in full:

> **26 Private prosecutions**
>
> (1) If a person who is proposing to commence a private prosecution seeks to file a charging document, the Registrar may—
>
> (a) accept the charging document for filing; or
>
> (b) refer the matter to a District Court Judge for a direction that the person proposing to commence the proceeding file formal statements, and the exhibits referred to in those statements, that form the evidence that the person proposes to call at trial or such part of that evidence that the person considers is sufficient to justify a trial.
>
> (2) The Registrar must refer formal statements and exhibits that are filed in accordance with subsection (1)(b) to a District Court Judge, who must determine whether the charging document should be accepted for filing.
>
> (3) A Judge may issue a direction that a charging document must not be accepted for filing if he or she considers that—
>
> (a) the evidence provided by the proposed private prosecutor in accordance with subsection (1)(b) is insufficient to justify a trial; or
>
> (b) the proposed prosecution is otherwise an abuse of process.
>
> (4) If the Judge determines under subsection (2) that the charging document should not be accepted for filing, the Registrar must—
>
> (a) notify the proposed private prosecutor that the charging document will not be accepted for filing; and
>
> (b) retain a copy of the proposed charging document.
>
> (5) Nothing in this section limits the power of a Registrar to refuse to accept a charging document for want of form.

---

[35] The Court noted that the prosecution had been transferred to the High Court under the protocol provisions of the Criminal Procedure Act: at [90].

[27] A "private prosecution" is defined in s 5 of the Act essentially as a prosecution that is not a public prosecution nor a prosecution "commenced by or on behalf of a local authority, or other statutory public body or board".[36]

The issues on appeal

[28] In determining the appeal, the following questions about the interpretation of s 26(3)(a) need to be addressed:

(a) whether the District Court judge, in deciding whether or not there is sufficient evidence to justify a trial, may consider evidence or submissions provided by a proposed defendant;

(b) whether any other broader public interest matters may be considered as part of this assessment; and

(c) the threshold to be applied by the judge in determining the sufficiency of the evidence.

The arguments as to the approach to s 26

[29] The parties differ as to the scope of the assessment required under s 26(3)(a), both in terms of the material from a proposed defendant that may be considered and as to the factors relevant to the inquiry.

[30] On the first issue, the material that may be considered, the appellants say the court may consider both evidence and submissions from a proposed defendant. The appellants say that s 26(3)(a) gives a broad discretion to the District Court judge which requires the exercise of a "judicial mind". This exercise should not be confined.

[31] On the second issue, the appellants' position is that public interest factors may be considered, if relevant, under s 26(3)(a), again relying on what they say is the

---

[36] A "private prosecutor" has a corresponding meaning. A "public prosecution" means a prosecution for an offence "commenced by or on behalf of the Crown" and includes prosecutions "commenced by or on behalf of a Crown entity within the meaning of section 7 of the Crown Entities Act 2004".

District Court judge's broad discretion under this section to consider all of the relevant circumstances.

[32] In developing the submissions, the appellants say that private prosecutions engage public resources and there are social costs to individuals who are wrongly prosecuted. The right to bring a private prosecution is not unfettered and all suspected criminal offending is not automatically the subject of prosecution. Ultimately, the appellants submit that the Court of Appeal's construction of s 26(3)(a) on both issues is unduly narrow and does not allow a District Court judge to deal adequately with cases like the present. The appellants emphasise it was necessary in this case for Judge Thorburn to consider, amongst other matters, the lapse of time, the fact the SFO had considered the matter, and that reparation had been provided for the harm.

[33] In contrast, both the first respondent and the Attorney-General say consideration of material from the proposed defendant is permissible only when addressing abuse of process under s 26(3)(b). Both also submit that the ability to consider public interest factors is confined to s 26(3)(b).

[34] Two further key points made by Mr Jones QC for the first respondent are, first, that s 26(3)(a) envisages a screening exercise to be undertaken on the papers, not a substantive hearing to determine rights or obligations. Second, it is submitted that a more expansive role for the judge has the potential to unduly restrict an individual's right to bring a private prosecution and would be unworkable.

[35] Ms Brook for the Attorney-General similarly submits that s 26(3)(a) envisages a streamlined ex parte process to enable hopeless or abusive private prosecutions to be weeded out.

[36] Both the first respondent and the Attorney-General emphasise there are other safeguards in the Act which are designed to protect against inappropriate private prosecutions.

[37] In terms of the third issue, although the parties all express the threshold for evidential sufficiency in different terms, we do not perceive a great deal of difference between them in practice on this question.[37]

The approach to s 26

[38] The approach to be taken to s 26 is determined by the statutory scheme, its text and purpose, to which we now turn.

Retention of the right to bring a private prosecution

[39] The starting point is that the right to bring a private prosecution is retained under the Criminal Procedure Act. Under s 15 of the Act any person may commence a proceeding and that is done by filing a charging document.[38]

[40] The right of an individual to bring a private prosecution has a long history in comparable common law jurisdictions.[39] Glanville Williams saw the ability to bring a private prosecution as "undoubtedly right and necessary" because "it enables the citizen to bring even the police or government officials before the criminal courts, where the government itself is unwilling to make the first move".[40] In a preliminary paper on criminal prosecution, the Law Commission cited *Gouriet v Union of Post Office Workers* for the proposition that private prosecutions provide "an important safeguard for the aggrieved citizen against capricious, corrupt or biased failure or refusal to prosecute offenders against the criminal law".[41]

---

37 The first respondent's concern is that the test that is applied should not allow consideration of defence evidence.

38 Criminal Procedure Act, s 14(1).

39 For example, in England and Wales and in Canada. In Scotland, as the Court of Appeal noted, private prosecutions have effectively fallen into disuse. See Peter Burns "Private Prosecutions in Canada: The Law and a Proposal for Change" (1975) 21 McGill LJ 269 at 270–271. See also J Ll J Edwards *The Law Officers of the Crown* (Sweet & Maxwell, London, 1964) at 237–238.

40 Glanville Williams "The Power to Prosecute" [1955] CrimLR 596 at 599.

41 Law Commission *Criminal Prosecution* (NZLC PP28, 1997) [Criminal Prosecution Preliminary Paper] at [436], citing *Gouriet v Union of Post Office Workers* [1978] AC 435 (HL) at 498. See also Bill Hodge "Private Prosecutions: Access to Justice" [1998] NZLJ 145 at 145–146.

[41] The right to bring a private prosecution has also been retained in England and Wales[42] and in Canada.[43] The position in the Australian jurisdictions is more variable.[44]

[42] In its preliminary paper, the Law Commission raised the question of whether private prosecutions should be retained and, if so, possible additional controls to curb abuse of the power to bring a private prosecution.[45] The two possible additional controls discussed were requiring private prosecutors to give security for costs and requiring private prosecutors to seek the leave of the District Court before bringing a private prosecution.[46] In its report, the Commission rejected the notion of security for costs on the basis this would "unfairly discriminate against those without the means to provide security".[47] The Commission did consider there was "a need for an accused person to be able to obtain an independent review of private prosecutions" on initiation.[48] The Commission saw this as necessary to avoid an abuse of process and "to protect defendants from vexatious or oppressive conduct".[49] The procedure envisaged would enable a District Court judge to require a proposed prosecutor to provide the proposed defendant with disclosure of all relevant material before a hearing date was set. Once that information was at hand, a procedure enabling an

---

42 Prosecution of Offences Act 1985 (UK), s 6(1).

43 Criminal Code RSC 1985 c C-46, s 504. The Code was amended in 2002 to add restrictions on the issuing of summonses for privately laid charges to try to prevent frivolous or vexatious prosecutions: s 507.1; and *R v Friesen* (2008) 229 CCC (3d) 97 (ONSC) at [9].

44 For example, private prosecutions may be brought in New South Wales: Criminal Procedure Act 1986 (NSW), ss 14 and 49. The registrar must sign a notice for the prosecution to proceed and must not do so if of the opinion that the notice does not disclose grounds for the proceeding, or if the proceeding is frivolous, vexatious, of no substance, or has no reasonable prospect of success: s 49(2); and Local Court Rules 2009 (NSW), r 8.4(1). In Queensland, a private prosecution may proceed with leave of the Supreme Court on provision of security for costs: Criminal Code Act 1899 (Qld), ss 686–687 and see s 694. In Western Australia, s 20(5) of the Criminal Procedure Act 2004 (WA) prohibits private prosecutions unless another written law expressly provides otherwise. Thus, there are "limited circumstances" under which a private prosecution can be commenced: Chief Magistrate of Western Australia *Practice Direction 1 of 2019: Private Prosecutions* (2 July 2019). In the federal jurisdiction, provision is made for private prosecutions in the Director of Public Prosecutions Act 1983 (Cth), s 10(2). See also Commonwealth Director of Public Prosecutions *Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process* at [4.7]–[4.13].

45 Criminal Prosecution Preliminary Paper, above n 41, at 137. The Law Commission noted that there were already some controls within the prosecution system at the time.

46 At [443]–[445].

47 Law Commission *Criminal Prosecution* (NZLC R66, 2000) [Criminal Prosecution Report] at [268].

48 At [270].

49 At [270].

application for a discharge equivalent to what is now s 147 of the Criminal Procedure Act would be available to the proposed defendant.

[43] As the Court of Appeal noted, s 26 appeared for the first time as cl 30 in the Criminal Procedure (Reform and Modernisation) Bill 2010.[50] The clause as introduced was substantially in the same form as s 26 and no relevant changes to the clause were made following the Select Committee process.[51]

[44] The explanatory note to the Bill as introduced said that cl 30 provided "the ability for District Court Judges to require a private prosecutor to establish a prima facie case prior to issuing a summons or warrant to arrest".[52] The note recorded the provision was "intended to prevent vexatious and unprincipled private prosecutions from proceeding".[53]

[45] A notable change under the Criminal Procedure Act is that the Crown cannot, as was the case previously, take over a private prosecution.[54]

[46] As the Court of Appeal also observed, since the late 19th century in New Zealand the authority to conduct prosecutions has been effectively handed over to state officials.[55] Accordingly, in New Zealand private prosecutions are now relatively rare. But the right of an individual to bring a private prosecution has remained.

[47] Against this background, we see the statutory scheme as recognising the importance of access to justice by this means whilst also making provision for inappropriate private prosecutions to be weeded out.[56]

---

50 Criminal Procedure (Reform and Modernisation) Bill 2010 (243-1).

51 Criminal Procedure (Reform and Modernisation) Bill 2010 (243-2), cl 23.

52 Criminal Procedure (Reform and Modernisation) Bill 2010 (243-1) (explanatory note) at 10.

53 At 10.

54 The definition of "Crown prosecution" in s 5 of the Criminal Procedure Act excludes private prosecutions. Ms Brook for the Attorney-General advised that between 2002 and the enactment of the Criminal Procedure Act, the Crown had not taken over a private prosecution although it did so after the Criminal Procedure Act was enacted but before the Act was applicable in the case of a private prosecution for electoral fraud: see *McCready v Banks* [2014] DCR 138 (DC) dealing with the issuing of a summons in that case.

55 CA judgment, above n 12, at [50]. The position in England and Wales is the same.

56 See also Simon France (ed) *Adams on Criminal Law – Procedure* (online ed, Thomson Reuters) at [CPA26.01].

A preliminary screening process

[48] Next, we see it as important that under s 26(1) the registrar may accept the document for filing without reference to a judge.[57] Section 26(1) provides:[58]

> (1) If a person who is proposing to commence a private prosecution seeks to file a charging document, the Registrar may—
>
> (a) accept the charging document for filing; or
>
> (b) refer the matter to a District Court Judge for a direction that the person proposing to commence the proceeding file formal statements, and the exhibits referred to in those statements, that form the evidence that the person proposes to call at trial or such part of that evidence that the person considers is sufficient to justify a trial.

[49] The fact that the registrar may make the decision to accept or reject a charging document without reference to a judge suggests this is a filing or preliminary screening exercise, not a more expansive one under which factual or other issues are resolved. As Cooke J noted in *Goodman Fielder New Zealand Ltd v District Court at Porirua*, it is apparent that the Criminal Procedure Act "contemplates that there will be some private prosecution where it is not necessary for the review by a Judge to be undertaken" at all.[59] Moreover, the registrar can deal with the matter solely on the basis of the charging document filed. This aspect of the statutory scheme supports the view that the scope of the inquiry and the material to be considered are generally confined.

[50] The latter point is also supported by the text of s 26, which suggests that consideration would generally be based on the specific documents described in the section. Hence, under s 26(2) the registrar is directed to refer the "formal statements and exhibits" filed "in accordance with subsection (1)(b)" to a judge for determination of whether the charging document should be accepted for filing. Section 26(3)(a) is similarly explicit that the judge may reject the charging document for filing if the judge

---

57 A registrar is defined to include a deputy registrar: Criminal Procedure Act, s 5.

58 Section 26(5) makes it clear that the section does not restrict the registrar's power to reject a document for want of form.

59 *Goodman Fielder New Zealand Ltd v District Court at Porirua* [2019] NZHC 599, [2019] NZAR 489 at [20(a)]. Cooke J in *Goodman Fielder* suggests that it would "only be appropriate" for the registrar to deal with the matter "in cases clearly involving no controversy": at [20(a)]. That may reflect a common sense rule of thumb but this aspect was not the focus of argument so we say no more about it.

considers "the evidence provided by the proposed private prosecutor" is not sufficient to justify a trial. The focus is on the evidence specified rather than a broader exercise directed to the underlying allegations and their appropriateness. Section 26(3)(b), the provision dealing with abuse of process, is not limited in this way. Accordingly, we do not accept the appellants' argument that the Court of Appeal confused the issue to be assessed with what can be considered in making that assessment.

[51] It is true that s 26 does not expressly constrain the receipt of other material. But there is an absence of those features usually associated with a more expansive procedure involving consideration of a broader range of material, such as provision for a hearing, and there is no right of appeal.[60] Under the Criminal Procedure Act there is no requirement for the proposed defendant to be notified of the charging document prior to filing or for service prior to that point. The exercise contemplated is accordingly generally one to be undertaken on the papers, as Mr Billington QC for the appellants accepted, at an early stage of a proceeding and without notice.[61] This scheme supports the view that the emphasis is on, as the Court of Appeal said, an "uncomplicated" mechanism.[62]

[52] Further, we do not see the reference to "justify a trial" in s 26(3)(a), relied on by the appellants,[63] as altering the position. It is the evidence from the proposed private prosecutor that must meet the test of sufficiency.

[53] The formulation "evidence sufficient to justify a trial"[64] has its immediate antecedents in Part 5 of the Summary Proceedings Act 1957 which, as enacted, contained provisions providing for a preliminary hearing for indictable offences. In

---

60 See *Goodman Fielder*, above n 59, at [20(b)]–[20(c)] and [27]–[28]. As in this case, challenges to the decision under s 26(3) have been brought by way of judicial review.

61 Section 26 is found in pt 2 of the Criminal Procedure Act which is described as dealing with the "Commencement of proceedings and preliminary steps" and in subpt 1 which is headed "Filing a charging document". For private prosecutions, it is only after the registrar accepts a charging document under s 26(1)(a), or the judge determines the charging document should be accepted for filing under s 26(2), that a summons is issued to the defendant: s 33. Section 33 is in subpt 2 of pt 2 which is headed "Notifying defendant of court appearance".

62 CA judgment, above n 12, at [67(a)].

63 The appellants contrast the language of "justify a trial" in s 26(3)(a) with what they argue is narrower language in s 147(4)(c) which refers to dismissal where "a properly directed jury could not reasonably convict".

64 The phrase is also used in s 85(4) of the Criminal Procedure Act. Section 85(1)(a) requires the prosecutor to file formal statements forming the evidence to be called at trial, "or such part of that evidence as the prosecutor considers is sufficient to justify a trial".

particular, under s 168, the defendant was committed to trial if the judge considered that "the evidence adduced by the informant [was] sufficient to put the defendant on … trial for an indictable offence". If the evidence was not sufficient, the defendant had to be discharged under s 167.

[54] The procedure changed with the amendments to the Summary Proceedings Act in 2008.[65] The phrase "sufficient evidence to commit the defendant for trial" was retained in the context of the procedure for committal hearings.[66] Sections 167 and 168 were re-enacted in ss 184F and 184G. At the end of the committal hearing, if "the evidence adduced by the prosecutor [was] sufficient to put the defendant on trial", the defendant was committed. If the evidence was not sufficient, the defendant was discharged.

[55] The phrase is also used in s 24 of the Extradition Act 1999 in the context of determining eligibility for surrender and in s 144 of the Health and Safety at Work Act 2015 in the provisions relating to private prosecutions.

[56] The appellants rely on aspects of the way in which courts approached the preliminary hearing to support the proposition that "justify a trial" conferred a more expansive role on the judge. Mr Billington referred us to the discussion in *W v Attorney-General*[67] which was endorsed in *Attorney-General v District Court at Christchurch*.[68]

[57] In *W v Attorney-General*, the Court of Appeal accepted that in preliminary hearings, the judge[69] "should be concerned only with the creditableness as distinct from the credibility of evidence and should not usurp the function of a jury".[70] But,

---

65 Summary Proceedings Amendment Act (No 2) 2008. The relevant sections came into force on 29 June 2009: Summary Proceedings Amendment Act (No 2) 2008 Commencement Order 2009.

66 The purpose of this part of the amendment was to replace the preliminary hearing procedure with a standard committal procedure which did not involve a hearing or consideration of the evidence. A standard committal procedure was followed unless an oral evidence order was made allowing a party to orally examine a witness. If an oral evidence order was made, a committal hearing was held: s 183. Sections 184F and 184G provided for how a committal hearing was to be determined. See also s 180(1)(a)(i) where the phrase "sufficient evidence to commit the defendant for trial" was also used.

67 *W v Attorney-General* [1993] 1 NZLR 1 (CA).

68 *Attorney-General v District Court at Christchurch* (1994) 12 CRNZ 263 (CA).

69 Or Justices of the Peace in some cases.

70 *W v Attorney-General*, above n 67, at 8, citing *Daemar v Gilliand*, above n 30, at 11–12.

noting the possibility there would be evidence from the defendant at the preliminary hearing, the Court went on to acknowledge that "the quality of the evidence is not to be totally ignored".[71] The Court said that "in extreme cases", the "Court may conclude on assessing all the evidence … that the likelihood of a jury bringing in a guilty verdict is so slight that the defendant ought not to be committed for trial".[72] The Court also acknowledged the possibility of cross-examination of a complainant "on matters going to credibility".[73]

[58] The primary focus of that case was on changes made to the Summary Proceedings Act in 1985 dealing with the approach to preliminary hearings concerning alleged sexual offences, including restrictions on cross-examination of complainants.[74] A Court of Appeal judgment released shortly after that case clarified that *W v Attorney-General* should not be read "as widening the scope of committal hearings",[75] observing that there was "nothing in the judgment amounting to a charter for an extensive inquiry on oath into collateral matters".[76] And, in any event, the process for preliminary hearings was quite different from that in the present case. Under s 165 of the Summary Proceedings Act (as enacted), a defendant had a right to call witnesses and could also cross-examine prosecution witnesses.[77] The clear differences in the processes envisaged by the statute for committal procedures and those in s 26 are such that we do not accept that the phrase "justify a trial" has the expansive effect for which the appellants contend.[78]

---

71 At 8.

72 At 8.

73 At 9. See also *Attorney-General v District Court at Christchurch*, above n 68, at 264–265.

74 Summary Proceedings Amendment Act (No 4) 1985, s 4.

75 *Police v D* [1993] 2 NZLR 526 (CA) at 530.

76 At 531.

77 Summary Proceedings Act, s 161(1) (as enacted). Under s 178 of the Summary Proceedings Act as amended in 2008, the prosecutor or defendant could apply for an oral evidence order allowing oral examination of witnesses. See also s 180(1)(a) and (b) and s 183(1) as amended in 2008.

78 Differences in the procedure for determining evidential sufficiency under the Extradition Act 1999 mean the use of this language in that context does not assist either. Under s 22(1) of the Extradition Act, a determination of eligibility for surrender proceeds as if it was a committal hearing under pt 5 of the Summary Proceedings Act. In that context, a person facing extradition can call witnesses to give evidence: see *Dotcom v United States of America* [2014] NZSC 24, [2014] 1 NZLR 355 at [46] per Elias CJ; and compare *The United States of America v Dotcom* [2012] NZHC 2076 at [85]–[87]; and *United States of America v Dotcom* [2013] NZCA 38, [2013] 2 NZLR 139 at [98]–[100].

[59] The Court of Appeal accepted that "in limited circumstances" the District Court may determine a trial was not justified because, for example, "the allegations are so trivial that they do not merit the expense of conducting a trial".[79] Because of our view on the interpretation of these provisions, we consider questions about the appropriateness of a proposed prosecution of that nature can be addressed in other ways, for example, by an application for a stay under s 176 of the Criminal Procedure Act.

[60] The appellants also rely on the word "otherwise" in s 26(3)(b), that is, the reference to the proposed prosecution being "otherwise" an abuse of process. They say that the word "otherwise" indicates that the s 26(3)(a) assessment can be directed to similar considerations to those raised under s 26(3)(b). In our view, that in fact emphasises that a different process is envisaged.[80]

Other safeguards

[61] In addition to the ability to reject charging documents which are an abuse of process under s 26(3)(b), there are other safeguards to protect a defendant against unmeritorious private prosecutions.[81] The principal safeguards are as follows:

(a) The court may dismiss a charge under s 147 of the Criminal Procedure Act where the prosecutor has not offered evidence at trial; the court is satisfied that there is no case to answer; or where the judge is satisfied that "as a matter of law, a properly directed jury could not reasonably convict the defendant".[82]

---

79 CA judgment, above n 12, at [77].

80 Contrast *Goodman Fielder*, above n 59, at [69].

81 See similarly Criminal Prosecution Preliminary Paper, above n 41, at [440]; and *Taka v Auckland District Court* [2015] NZHC 972, [2016] NZAR 1459 at [44].

82 Under s 147(2) the court may dismiss the charge on its own motion or on the application of the prosecutor or the defendant. The phrase "a properly directed jury could reasonably convict the defendant on that evidence" is also used in s 85(4) of the Criminal Procedure Act, dealing with the obligation on the prosecution to file formal statements and exhibits.

(b) The Attorney-General may "at any time after a person has been charged with an offence and before judgment is given, direct that the proceedings be stayed".[83]

(c) Section 23(1) of the Criminal Procedure Act makes it an offence to include, or to direct someone else to include, in a charging document any information known to be false or misleading.[84]

(d) Costs may be awarded in favour of a defendant under ss 5 and 6 of the Costs in Criminal Cases Act 1967.[85]

[62] There are also a range of other procedural mechanisms which provide some controls on private prosecutions. These controls may be characterised under two headings. First, there are those matters the registrar and the judge would need to be satisfied about in the usual way before accepting the document for filing. These are as follows:

(a) requirements as to the particulars to be included in a charging document;[86]

(b) jurisdictional requirements – some prosecutions require the informant to obtain the consent of the Attorney-General before they may be commenced,[87] and there are time limits for commencing certain prosecutions;[88] and

---

83 Section 176(1). Under s 9A of the Constitution Act 1986, the Solicitor-General may exercise a power conferred on the Attorney-General.

84 In the context of considering the ability of a prosecutor to take into account reparations made by a defendant in deciding whether or not to prosecute, this Court in *Osborne v Worksafe New Zealand* [2017] NZSC 175, [2018] 1 NZLR 447 at [71] referred to the duty to bring a "fair and honest mind to the consideration", citing *Jones v Merionethshire Permanent Benefit Building Society* [1892] 1 Ch 173 (CA) at 183.

85 See *Allied Press Ltd v Nottingham* [2017] NZHC 1681 at [43].

86 Criminal Procedure Act, ss 16 and 17; and Criminal Procedure Rules 2012, r 3.1. Under s 18, the court may order further particulars to be provided if that is necessary for a fair trial.

87 For example, s 106(1) of the Crimes Act requires that prosecutions under the specified sections, including various crimes alleging corruption of public officials, require the consent of the Attorney-General. See also Criminal Procedure Act, s 24.

88 Criminal Procedure Act, s 25.

(c) legislation may prescribe the informant who may bring a particular prosecution.[89]

[63] Second, there are more general procedural controls which apply to private prosecutions. We refer here to the fact that the relevant disclosure requirements in the Criminal Disclosure Act 2008 apply to private prosecutions.[90] Further, once a private prosecution has been commenced, the Prosecution Guidelines record the Solicitor-General's expectation that "law practitioners conducting a private prosecution" will adhere to "all relevant principles in [the] Guidelines".[91]

[64] Against this background we see no merit in the argument implicit in the appellants' case that the inability of a proposed defendant to advance submissions is inconsistent with the principles of natural justice. The proposed defendant will have other opportunities to challenge an inappropriate private prosecution.

[65] The appellants also argue that the other safeguards, such as the ability to seek a discharge under s 147 or a stay under s 176, are not sufficient because the proposed defendant is still required to go through the criminal justice process. That is true but the statutory scheme in our view is clear. As the written submissions for the first respondent put it, s 26 forms "the first stage of a legislative process which ensures a defendant is not vexed or improperly subject to sanction through the criminal justice process". In other words, these features of the statutory scheme are consistent with the concept that s 26(3)(a) is an initial screening mechanism only.

[66] We draw support for the latter point also from the contrast between s 26 and s 147. Section 147 on its face provides for the court to consider a broader range of material. Section 147(3) provides that the decision to dismiss a charge "may be made on the basis of any formal statements, any oral evidence taken … and any other evidence and information that is provided by the prosecutor or the defendant". In addition, as Ms Brook for the Attorney-General points out, if a charging document is rejected under s 26(3)(a), the proposed prosecutor may rectify the position and seek to

---

89 Health and Safety at Work Act 2015, s 143.
90 Criminal Disclosure Act 2008, s 4(1).
91 Prosecution Guidelines, above n 10, at [2.5].

file the charging documents again. By contrast, a dismissal under s 147 is deemed to be an acquittal on the charge.[92]

A residual discretion?

[67] The approach we adopt to s 26(3)(a) is accordingly narrower than the appellants contend. That said, we accept that ultimately there is no constraint for circumstances which are out of the ordinary, in which further material may be taken into account in considering the sufficiency of the evidence. As we shall explain, this was the approach taken in *R v West London Metropolitan Stipendiary Magistrate, ex parte Klahn* (*West London Justices*), relied upon by the appellants.[93]

[68] The proposed defendant in *West London Justices* objected to the issuing of a summons against him in a private prosecution alleging he had committed perjury. The Magistrate held that he had no power to hear counsel on behalf of the proposed defendant and nor did the proposed defendant have a right to be heard. The proposed defendant sought an order for mandamus directing the Magistrate to hear and determine the proposed defendant's objections to the issuing of a summons.

[69] Lord Widgery CJ noted that the duty of the magistrate in deciding whether to issue a summons is to exercise a judicial discretion. He said that the magistrate should at the very least ascertain the following:[94]

> (1) whether the allegation is of an offence known to the law and if so whether the essential ingredients of the offence are prima facie present; (2) that the offence alleged is not "out of time"; (3) that the court has jurisdiction; [and] (4) whether the informant has the necessary authority to prosecute.

[70] Lord Widgery CJ also said the magistrate "may and indeed should consider whether the allegation is vexatious".[95] Importantly for the present analysis, Lord Widgery CJ accepted the submission that the magistrate "has a residual discretion to hear a proposed defendant if he felt it necessary for the purpose of

---

92 Criminal Procedure Act, s 147(6).
93 *West London Justices*, above n 30.
94 At 935.
95 At 936.

reaching a decision".[96] Lord Widgery CJ said this residual discretion would be exercised in "exceptional circumstances".[97]

[71] Ms Brook points out that the context here is different. That is correct. In addition, it is difficult to conceive of a case where further material will be necessary other than in those cases where the concern is about a possible abuse of process. However, given that it is not possible to dismiss now the potential for such a case and, given the language of the section does not prevent the maintenance of such a safeguard, we do not consider it would be right to unnecessarily constrain the discretion of the District Court judge in this way. Our concern that the discretion of the District Court judge should not be unnecessarily constrained also means we would not restrict the material that could be filed to submissions. We differ in this respect from the Court of Appeal.[98]

[72] We envisage it would only be in a very unusual case that it would be necessary to consider a broader range of material so as not to undercut the fact that s 26 provides an initial screening mechanism. To illustrate this point, and as we shall explain, we do not consider the present case to be one where further material should have been called for on the question of evidential sufficiency.[99]

[73] Further, while the focus in *West London Justices* and in this case is as to the ability to consider material for the defence, equally there may be cases where the court may need to see a broader range of admissible evidence from the proposed prosecutor.[100] But again, we see those cases as likely to be uncommon.

[74] It is also helpful at this point to address the suggestion made in some High Court judgments that it would be "good practice" to give proposed defendants the opportunity to provide material and make submissions in the course of the s 26

---

96 At 936.

97 At 936.

98 See CA judgment, above n 12, at [81].

99 Compare the reasons given by Winkelmann CJ below at [150].

100 In *Goodman Fielder*, above n 59, at [61] and [66], the High Court noted that the proposed prosecutor may ultimately have to rely on evidence (other than the evidence disclosed in the witness statements) which the proposed prosecutor could say would be evidence given under subpoena at trial.

procedure.[101] It follows from our view of s 26(3)(a) and the statutory scheme that we do not support that practice.[102]

Relevance of public interest factors

[75] It also follows that on our approach the court would not generally have the necessary evidence before it to consider a broader range of public interest factors such as those that must be considered under the Prosecution Guidelines.[103] In England and Wales, the Code for Crown Prosecutors also requires Crown prosecutors to consider public interest factors when deciding whether to commence a prosecution,[104] but private prosecutors are not bound by the Code.[105]

[76] Nor would it be consistent with our construction of s 26(3)(a) for the judge to consider public interest factors. Broader questions about the appropriateness of a proposed prosecution such as whether "any useful purpose" would be served by continuing to trial, and whether the alleged offender would receive "only nominal punishment", are to be dealt with in other ways.[106]

Sufficiency of evidence

[77] We can deal with the threshold for evidential sufficiency briefly. This was not the central focus of the arguments which were directed primarily to the scope of the inquiry and the material to be considered as part of that inquiry. The potential for an expansion in the scope of the inquiry seems to have been the reason for the caution

---

101 *Wang v North Shore District Court (No 2)* [2014] NZHC 2756, [2014] NZAR 1428 at [60]. See also *Mitchell v Porirua District Court* [2017] NZHC 1331, [2017] NZAR 1077. Contrast *Taka*, above n 81, at [43].

102 See *Goodman Fielder*, above n 59, at [28]; and *Taka*, above n 81, at [41]–[45].

103 For the obligation of Crown prosecutors to observe the directions of the Solicitor-General as to the conduct of Crown prosecutions, see ss 187 and 188 of the Criminal Procedure Act.

104 Crown Prosecution Service *The Code for Crown Prosecutors* (24 October 2018) at [4.1]–[4.2] and [4.9]–[4.14].

105 At [1.3]. The Private Prosecutors' Association's voluntary Code for private prosecutors recommends private prosecutors apply the test set out in *The Code for Crown Prosecutors* when deciding whether or not to institute a prosecution: Private Prosecutors' Association *Code for Private Prosecutors* (revised ed, 30 July 2019) at [5.1.2]. Under s 6(2) of the Prosecution of Offences Act (UK), the Director of Public Prosecutions can take over a private prosecution.

106 Contrast *Walters v Chow* DC Wellington CRI-2013-085-9988, 31 October 2013 at [14]. For cases following a similar test to *Walters*, see, for example, *Spratt v Savea* DC Christchurch CRI-2014-009-1492, 29 April 2014 at [22]–[26]; and *New Zealand Private Prosecution Service Ltd v Creser* DC Wellington CRI-2013-085-5869, 12 February 2014 at [9] (addressed the first question from *Walters*).

expressed by the Court of Appeal over a test based on s 147(4)(c) as had been adopted by the District Court.

[78] In preferring an approach adopting the questions discussed by Lord Widgery CJ in *West London Justices*, the Court of Appeal said that "[e]xpanding the role of s 26(3)(a) to equate with s 147(4)(c) risks complicating and confusing the threshold screening role of s 26(3)(a)".[107] The Court accordingly said that the District Court judge should ask:[108]

> (a) Whether the proposed charge is in respect of an offence recognised by New Zealand law.
>
> (b) Whether the essential ingredients of the proposed charge are prima facie supported by the formal statements and exhibits filed by the proposed prosecutor.
>
> (c) Whether the court has jurisdiction to hear the charge.[109] …
>
> (d) Whether the proposed prosecutor has the necessary authority to prosecute.[110] …

[79] The Court explained that "prima facie" meant "evidence that is sufficiently cogent and creditable to put a proposed defendant on trial".[111] The Court said the inquiry did not involve an assessment of the credibility of a proposed prosecutor's evidence but, rather, its creditableness.

[80] The parties do not differ greatly from this approach. The appellants agree that s 147 of the Criminal Procedure Act is not the appropriate analogy. They draw on the approach taken in *W v Attorney-General*, discussed above, albeit primarily in the context of the scope of the inquiry to be undertaken, and refer to whether the evidence suggests a jury would be able to reach a decision on the charge to the required standard.[112] The first respondent submits that the section requires a focus on pure evidential sufficiency. On this approach the question is, broadly, whether there is a

---

107 CA judgment, above n 12, at [71].
108 At [72].
109 The Court noted that this issue is likely to arise where there are time limits for commencing the prosecution.
110 The Court gave as an illustration those cases requiring the prior consent of the Attorney-General or the Solicitor-General to commence a prosecution: see above n 87.
111 At [73].
112 See above at [56]–[58].

case to answer on the charge. For the Attorney-General, Ms Brook submits that s 168 of the Summary Proceedings Act, which required some evidence of each of the elements of the charge, is an appropriate analogy in terms of the evidential threshold.

[81] The approach taken to this question to date in the authorities is something of an amalgam of these tests and that applicable under s 147 or its predecessor, s 347 of the Crimes Act 1961.[113] In *Walters v Chow* the Court said it was applying the test applicable to s 347 citing, amongst other cases, *R v Kim*.[114] In *Kim* the Court of Appeal said that the test under s 347 was "whether the evidence, if accepted by the jury, is sufficient in law to prove the essential elements of the charge to the required standard".[115]

[82] The District Court Judge in *Spratt v Savea* said the question was as set out in *Walters* and saw that question as capturing "whether the elements of [the] offence are prima facie met by the prosecutor's formal statements and exhibits".[116] The Judge in that case referred, amongst other authorities, to *Burchell v Auckland District Court*, an application for review of a decision of a District Court Judge not to issue summonses in relation to a private prosecution, as an example of the application of the test of whether the proposed prosecutor's evidence was sufficient to reach a prima facie case.[117] In *Mitchell v Tyson* the Court asked whether the intended prosecution stood "little or no chance of success".[118]

[83] We see these expressions of the tests and the various approaches advanced by the parties as variations on a theme with no great practical difference turning on the expression adopted. In our view, the closest analogy to the present case is provided by the approach to the issuing of a summons under either s 19 (for summary offences)

---

113 In our consideration of this aspect we have been assisted by a helpful appendix provided by Ms Brook on the approach taken in cases applying s 26.

114 *Walters*, above n 106, at [15]–[16], citing *R v Kim* [2010] NZCA 106. *Kim* has been referred to in a number of other s 26 cases including *Mitchell*, above n 101, at [32] and [61]; *Creser*, above n 106, at [8]–[9]; and *Dixon-McIver v Weston* DC Lower Hutt, 19 November 2013 at [13]–[14].

115 *Kim*, above n 114, at [5].

116 *Spratt*, above n 106, at [21].

117 At [11], citing *Burchell v Auckland District Court* [2012] NZHC 3413, [2013] NZAR 219. The Judge in *Hard v Koncke* DC Masterton CRI-2014-035-366, 28 March 2014 also referred to the need for prima facie evidence to prove the elements of the offence beyond reasonable doubt: at [8].

118 *Mitchell v Tyson* [2016] NZDC 3514 at [10], noting that something more than just a prima facie case was required.

or s 147 (dealing with indictable offences) of the Summary Proceedings Act (as enacted). Sections 19(a) and 147(1)(a) provided that, when an information had been laid, a magistrate, justice or registrar "may issue a summons to the defendant, in the prescribed form".[119]

[84] Section 147 of the Summary Proceedings Act was treated by the Court of Appeal in *Daemar v Soper* as conferring a judicial discretion which had to be exercised in a judicial manner.[120] The threshold in that case as subsequently applied by recent High Court decisions is whether the essential ingredients of the offence are prima facie present.[121] The first respondent cites *de Montalk v Hobbs* as approved in *Colman v The Police* and submits that the threshold under ss 19 and 147 was "a low one; … designed simply to weed out hopeless cases" and required consideration of whether the informant could "adduce any admissible evidence tending to give substance to the charge".[122]

[85] We agree that the threshold is not a high one and what is required is a prima facie assessment of the sufficiency of the evidence against the elements of the charges. We accordingly consider the Court of Appeal was correct as to the test to be applied and that the focus is generally on the cogency and creditableness of the evidence of the proposed prosecutor.[123] Ultimately, the question is whether assessed on a prima facie basis, the evidence is sufficient to prove the elements of the charge to the required standard.

---

119 Section 147(1)(a) was later re-enacted in the same terms in s 150(1)(a): see Summary Proceedings Amendment Act (No 2), s 12.

120 *Daemar v Soper* [1981] 1 NZLR 66 (CA) at 70, citing *West London Justices*, above n 30 and *Electronic Rentals Pty Ltd v Anderson* (1971) 124 CLR 27.

121 The Court in *Daemar v Soper* said, at 72, that its discussion as to the limits of the discretion conferred by s 147 went "no further than [was] strictly necessary in the circumstances of this particular appeal". The case has, however, been interpreted as importing into New Zealand law the prima facie case test from *West London Justices* set out at [78] above in terms of the discretion to issue a summons: see *Burchell*, above n 117, at [23]–[25]; *Wang v North Shore District Council* [2013] NZHC 3126, [2014] NZAR 101 at [10]; *Bright v Key* [2009] NZAR 532 (HC) at [17]; and *Kern v North Shore District Court* [2014] NZHC 896, [2014] NZAR 699 at [22]–[23].

122 *de Montalk v Hobbs* [1999] DCR 1115 (DC) at 1130; and *Colman v The Police* HC Whangarei CRI-2009-488-9, 22 December 2009 at [28].

123 The questions set out above in [78](a), (c) and (d) are relevant to jurisdiction, rather than evidential sufficiency. It is also not necessary on our approach to consider the view of the Court of Appeal as to the distinction between the tests in s 147(4)(b) and (c).

[86] The Court of Appeal considered Judge Thorburn had met his responsibility to "carefully examine the evidence produced by Vector" to "decide if it was sufficient".[124] Leave was not granted on the question of whether Vector's evidence met the evidential sufficiency test.[125] But we need to explain why we do not consider the fact that a decision to allow further evidence was made by Judge Sharp alters the position that would have been reached on our approach.[126]

[87] It is true that Judge Thorburn operated in this case on the basis there was no residual discretion to consider defence evidence. On our analysis that was not correct but we do not see that error as critical. We assume for these purposes that Judge Sharp's decision in part reflected a concern about evidential sufficiency in relation to the claim of right issue.[127] As we have indicated, we do not agree that this was an appropriate case to call for further evidence on that aspect. The matters relating to the claim of right were not matters able to be resolved in the context of a s 26(3)(a) exercise. Nor is this a case where the arguments of the proposed defendants were not heard at all.[128] Judge Thorburn put his conclusion on the point in this way:

> [153] In this case the statements relied upon by the [proposed] defendants simply raise differences of opinion, disagreement and alternative points of view against the proposed prosecutor's formal statements. In oral submissions the point was made that Vector was viewing the situation through the wrong lens – the lens of *cost plus.* Even that summation presupposes that there is another lens, the right one, the lens of *fixed pricing* that [H Ltd] was viewing the situation through.
>
> [154] That seems a very good way to describe an issue for a trial.

[88] It is clear that, absent some determination of credibility of the various witnesses, the matter could not be resolved without turning what is essentially an

---

124 CA judgment, above n 12, at [86].

125 Leave judgment, above n 21, at [7].

126 Compare the reasons given by Winkelmann CJ below at [156]–[158].

127 The Minute, as noted above at n 17, refers to evidential sufficiency as well as abuse of process and the better reading is that both matters were relevant. But the Court of Appeal said the reason for the direction was, quoting from the Minute, "because under s 26(3)(b) of the Criminal Procedure Act 2011, [the District Court has] a statutory duty to prevent an abuse of process": CA judgment, above n 12, at [79]. See also at [80]. Mr Jones for the first respondent adopted the same approach. Abuse of process was not pursued in the High Court, Court of Appeal or this Court.

128 Judge Thorburn said "[m]ore than two days was spent hearing from counsel for the [proposed] defendants who with extraordinary commitment to detail referred to statements placed before the court from possible defence witnesses" and so on: DC judgment, above n 19, at [142]. See also at [146]–[152].

initial screening process into a mini-trial. It follows that we also agree with the Court of Appeal that, in these circumstances, remittal back to the District Court for reconsideration of the conflicting evidence would be futile. As the Court of Appeal said, Judge Thorburn's approach to the assessment of claim of right was an orthodox one and these matters are incapable of being resolved in the context of the s 26(3)(a) exercise.[129] The appellants can pursue other means of redress either through an application for a discharge under s 147 or an application for a stay under s 176.

Summary

[89] We can summarise our approach in this way. First, s 26 provides a straightforward mechanism to ensure that obviously unmeritorious or abusive private prosecutions do not get underway. It operates as an initial screening mechanism to filter out a proposed private prosecution either because the proposed prosecutor's evidence is insufficient, or because the proposed prosecution is an abuse of process.

[90] Second, the decision whether to accept the charging document for filing under s 26(3)(a) will ordinarily be confined to a consideration of the material filed by the proposed private prosecutor. We would not, however, constrain the court in an exceptional case from considering a broader range of material to determine evidential sufficiency, including evidence and/or submissions from the proposed defendant, where the court sees that as necessary. The court is not limited in the same way in the material that can be considered in determining whether the proposed prosecution is an abuse of process.

[91] Finally, in terms of s 26(3)(a), a judge may refuse to accept charging documents in relation to a proposed private prosecution where it is apparent, on a prima facie assessment of the evidence filed by the proposed private prosecutor, that the evidence is not sufficient to establish the elements of the charges to the required standard.

[92] For these reasons, we would dismiss the appeal.

---

129 CA judgment, above n 12, at [85].

Result

[93] In accordance with the view of Glazebrook J and ourselves, the appeal is dismissed. Costs should follow the event. The first and second appellants must pay the first respondent costs of $15,000 plus usual disbursements.

[94] To preserve the existing position, we make an order prohibiting publication of the names or identifying particulars of the appellants until further order of the High Court. For fair trial reasons, we also make an order prohibiting publication of the judgment and any part of the proceedings in news media or on the internet or other publicly available database until final disposition of trial. Publication in law report or law digest is permitted.

GLAZEBROOK J

Introduction

[95] This appeal concerns the commencement of a private prosecution and the nature of the assessment under s 26(3)(a) of the Criminal Procedure Act 2011. Section 26 is set out at [26] above. I write separately because I take a different view from O'Regan and Ellen France JJ on some of the issues in the appeal, although I agree with the result they reach.

The law

[96] Section 26(1) provides that, where a person proposing to commence a private prosecution (the prosecutor) seeks to file a charging document, the registrar can either:

(a) accept the charging document for filing (s 26(1)(a));[130] or

(b) refer the matter to a District Court judge for a direction that the prosecutor file formal statements and exhibits (s 26(1)(b)).

---

[130] For completeness, I note that the registrar may refuse to accept a charging document for want of form: Criminal Procedure Act 2011, s 26(5).

[97] When a direction under s 26(1)(b) is given, the statements and exhibits filed are then referred to a District Court judge to determine whether the charging document should be accepted for filing.[131]

[98] There are two grounds for not accepting a charging document for filing:

(a) where the judge considers the evidence is "insufficient to justify a trial";[132] or

(b) where the judge considers the proposed prosecution is otherwise an abuse of process.[133]

[99] We are not concerned with an abuse of process in this appeal, although in some cases the two issues may be related. We are also not concerned with the circumstances in which it would be appropriate for a registrar to decide whether to accept a charging document for filing rather than referring it to a judge. I thus make no comment on that issue, other than to say that I do not consider that the fact a charging document can be accepted by a registrar sheds any light on the nature of the inquiry or the material that can be considered in cases where the matter has been referred to a judge.[134]

[100] Once the matter has been referred to a judge, it becomes a judicial decision as to the extent of material the judge calls for and then, on the basis of that material, a judicial inquiry into the matters set out in s 26(3).

[101] Looking first at the nature of the inquiry, the statutory test under s 26(3)(a) "evidence … insufficient to justify a trial" has its immediate antecedents in the procedures for preliminary hearings for indictable offences.[135] The concept is also used in other contexts, including the Extradition Act 1999.[136]

---

131 Section 26(2).
132 Section 26(3)(a).
133 Section 26(3)(b).
134 Contrary to the reasons given by Ellen France J above at [49].
135 See the reasons given by Ellen France J above at [53]–[54].
136 See the reasons given by Ellen France J above at [55]. Under s 24(2)(d)(i) of the Extradition Act 1999, the threshold is a "prima facie case": see *Dotcom v United States of America* [2014] NZSC 24, [2014] 1 NZLR 355 at [25] per Elias CJ, [95]–[96] and [191(e)] per McGrath and Blanchard JJ, [202(a)] per William Young J and [263] and [283] per Glazebrook J. This means that "the admissible evidence, if accepted, could reasonably satisfy a properly directed trier of fact of the

[102] In my view, the phrase should be interpreted as consistently as possible across all the contexts in which it is still used and in light of the historical context of the use of the phrase. I accept the appellants' submission that *W v Attorney-General* sets out the appropriate test.[137] It is clear from that case that the inquiry is a preliminary one and that it is not a mini-trial: the issue is "the creditableness as distinct from the credibility of evidence".[138] Thus the test is effectively whether there is a prima facie case that the evidence is sufficient to prove the elements of the charge to the required standard.[139] This does not, however, mean that there is no consideration of the quality of the evidence. The Court of Appeal in *W v Attorney-General* recognised that in some "extreme" cases, a court can conclude that the "likelihood of a jury bringing in a guilty verdict is so slight that the defendant ought not to be committed for trial".[140]

[103] I accept that there are differences between the processes for committal procedures under the Summary Proceedings Act 1957 and those in s 26 of the Criminal Procedure Act.[141] Those differences in my view do not affect the test that should be applied.[142] I also accept that there are procedural and other safeguards that arise later in the prosecution process.[143] That these exist does not, in my view, justify a different meaning of the phrase "evidence sufficient to justify a trial" or any alteration to the longstanding test set out in *W v Attorney-General*.

---

defendant's guilt": *Ortmann v United States of America* [2018] NZCA 233, [2018] 3 NZLR 475 at [46].

137 *W v Attorney-General* [1993] 1 NZLR 1 (CA).

138 At 8.

139 In agreement with the reasons given by Ellen France J above at [85]. See also *Police v D* [1993] 2 NZLR 526 (CA) at 531.

140 *W v Attorney-General*, above n 137, at 8. This is not a matter of second-guessing a hypothetical jury but rather suggests that there may be "extreme" cases – effectively on public interest grounds – where, even if there is a prima facie case, a trial is not worthwhile because the chances of a guilty verdict are so low. The Court of Appeal in this case accepted that there may be such extreme cases: *Vector Ltd v [H Ltd] (in rec and liq)* [2019] NZCA 215, [2019] NZAR 1127 (Brown, Collins and Stevens JJ) [CA judgment] at [77]. It considered that the present case was not one of those extreme cases: at [88]. Contrary to the reasons given by Ellen France J on this point above at [57]–[59]. See also *Police v D*, above n 139, which does not overrule the extreme cases qualification set out in *W v Attorney-General*.

141 As noted by Ellen France J above at [58].

142 Contrary to the reasons given by Ellen France J above at [57]–[58].

143 Discussed by Ellen France J above at [61]–[63].

[104] I agree with Ellen France J, however, that it is not the function of the judge, aside from in the extreme cases referred to in *W v Attorney-General*, to consider public interest factors.[144]

[105] Turning now to the material the judge can direct to be filed, in agreement with Ellen France J, I do not consider that a judge is limited to directing the prosecutor to file statements and exhibits and that there is no ability to ask for and consider further material.[145] Further material including defence evidence can be called for, even where the only issue is the sufficiency of evidence under s 26(3)(a).

[106] I disagree with Ellen France J, however, that this is a residual discretion to be exercised only in exceptional circumstances.[146] It is a discretion to be exercised where it in the interests of justice to do so. In exercising the discretion, a judge should take into account the summary and preliminary nature of the exercise, that it is not a mini-trial and that the purpose of calling for further material must be to assist in a determination of whether the evidence provided by the prosecutor is sufficient to justify a trial (essentially to determine whether there is a prima face case). Evidence that merely shows doubt as to the reliability or credibility of the evidence put forward by the prosecutor will not suffice. Those issues are for trial, except in the "extreme" cases referred to in *W v Attorney-General* discussed above.

[107] It follows from this that I agree with the other members of the Court that it would not be necessary or in accordance with the statutory scheme to give defendants the opportunity to file evidence or to make submissions as a matter of course.[147] As it will depend on the circumstances of particular cases, however, I do not think it possible to pronounce on how frequently (or otherwise) it may be appropriate to exercise the discretion to ask for further material.

---

144 See the reasons given by Ellen France J above at [75]–[76] and Winkelmann CJ below at [114].

145 See the reasons given by Ellen France J above at [67]–[71] and Winkelmann CJ below at [113](b) and [130]–[133]. Contrast the CA judgment, above n 140, at [67(a)] and [81].

146 See the reasons given by Ellen France J above at [72] and [90].

147 See the reasons given by Ellen France J above at [74] and Winkelmann CJ below at [134].

This case

[108] In this case Judge Mary-Elizabeth Sharp exercised her discretion to call for further material both on the sufficiency of evidence and the abuse of process aspects of s 26(3). Evidence and submissions were filed by the appellants.[148]

[109] There was then a hearing before Judge Thorburn. He proceeded on the basis that there is no ability to consider material other than that put forward by the proposed prosecutor unless it shows "unequivocally that the prosecutor's formal statements are entirely without credit".[149] While that may be too narrow (particularly in light of the type of extreme case alluded to in *W v Attorney-General*), in this case Judge Thorburn considered that the appellants' evidence did no more than raise "differences of opinion, disagreement and alternative points of view" that would have to be resolved at trial.[150]

[110] I thus agree with Ellen France J's assessment that the issues in this case were not capable of being resolved without a mini-trial, which is not appropriate in the context of the s 26(3)(a) exercise.[151]

Result

[111] I too would dismiss the appeal. I agree with the costs order and the suppression orders.

WINKELMANN CJ AND WILLIAMS J
(Given by Winkelmann CJ)

[112] New Zealand law allows private individuals or entities to bring criminal prosecutions. Before they can do that, however, their charging documents must be accepted for filing by the District Court. This appeal concerns the nature of the

---

148 See the reasons given by Ellen France J above at [16].
149 *Vector Ltd v [H Ltd]* [2018] NZDC 3238 at [55]. See also at [56(iii)].
150 At [153]–[154].
151 See the reasons given by Ellen France J above at [88], agreeing with the Court of Appeal: CA judgment, above n 140, at [85]. Contrast the reasons given by Winkelmann CJ below at [158]–[159].

processes for acceptance for filing of those documents and the nature of any thresholds that apply.

[113] We are in substantial agreement with the reasons given by Ellen France J and Glazebrook J on a number of points, but disagree as to the outcome of the appeal. In summary:

(a) We consider the Court of Appeal was wrong to find error in the test adopted in the District Court and High Court concerning sufficiency of evidence for the purposes of s 26(3)(a) of the Criminal Procedure Act 2011.

(b) We agree with Ellen France J and Glazebrook J that the District Court judge retains a discretion to ask for, receive and consider material additional to the proposed prosecution evidence, and this discretion extends to proposed defence evidence, where that evidence is relevant to the issues before the judge under s 26(3)(a). However, like Glazebrook J, we do not characterise that discretion as residual, or limit it to exceptional cases.

(c) We agree with Ellen France J that in this case, Judge Thorburn misdirected himself as to the extent of the discretion to consider proposed defence evidence for the purposes of s 26(3)(a).

(d) We differ from Ellen France J and Glazebrook J on the significance of that error. It was an error of law which affected the material taken into account when considering the sufficiency of the evidence. Given the nature of the alleged offending, it is not possible to say the material would have made no difference to the Judge's assessment of the sufficiency of the evidence. We would therefore allow the appeal.

[114] Finally, we agree with the approach of Ellen France J as to the relevance of public interest factors to the task for the court under s 26(3)(a).[152] We make no further comment on that point.

[115] We are content to rely on the factual narrative set out by Ellen France J at [12]–[25].

The nature of the s 26 screening process

The meaning of the evidential sufficiency test

[116] The issue for the judge under s 26(3)(a) is whether the proposed private prosecutor's evidence is insufficient to justify a trial. The Court of Appeal rejected the approach of the District Court Judge and the High Court Judge that this test could be equated with the test set out in s 147(4)(c) of the Criminal Procedure Act – whether the judge was satisfied "as a matter of law, a properly directed jury could not reasonably convict the defendant". The Court of Appeal said:[153]

> The two sections are different and serve different purposes. Expanding the role of s 26(3)(a) to equate with s 147(4)(c) risks complicating and confusing the threshold screening role of s 26(3)(a).

[117] Instead, the Court of Appeal adopted a modified version of the four point test articulated by Lord Widgery CJ in *R v West London Metropolitan Stipendiary Magistrate, ex parte Klahn* (*West London Justices*):[154]

(a) whether the proposed charge is in respect of an offence recognised by New Zealand law;

(b) whether the essential ingredients of the proposed charge are prima facie supported by the formal statements and exhibits filed by the proposed prosecutor;

---

152 See the reasons of Ellen France J at [75]–[76].

153 *Vector Ltd v [H Ltd] (in rec and liq)* [2019] NZCA 215, [2019] NZAR 1127 (Brown, Collins and Stevens JJ) at [71].

154 At [72], citing *R v West London Metropolitan Stipendiary Magistrate, ex parte Klahn* [1979] 1 WLR 933 (QB) at 935.

(c) whether the court has jurisdiction to hear the charge; and

(d) whether the proposed prosecutor has the necessary authority to prosecute.

[118] We make two points. First, we do not see it as useful to adopt this as the test for the purposes of s 26(3)(a). Only paragraph (b) addresses the issue of evidential sufficiency – paragraphs (a), (c) and (d) address jurisdictional matters. While paragraphs (a), (c) and (d) may provide a useful checklist for the registrar when deciding whether to accept documents for filing pursuant to s 26(1)(a), they are issues which arise prior to the issue of evidential sufficiency. This is not to say that the judge could not take the matters identified in paragraphs (a), (c) and (d) into account. If the judge is satisfied that the charging documents do not charge an offence recognised by New Zealand law, that the court does not have jurisdiction to hear the charge or that the proposed prosecutor lacks the authority to prosecute, then the judge could, in the exercise of the judge's inherent powers, direct the registrar to reject the documents for filing.

[119] The second point relates to the potential confusion stemming from the Court of Appeal's discussion of the evidential sufficiency threshold. As noted, paragraph (b) of the *West London Justices* test does address the issue of evidential sufficiency. The expression "prima facie case" is another formulation of the "no case to answer" test,[155] which also appears in s 147 of the Criminal Procedure Act. For the purposes of s 147 it is the test to be applied in judge-alone trials, while the test of whether, as a matter of law "a properly directed jury could not reasonably convict the defendant" is applied in the jury trial context.[156] These tests may be applied, as appropriate, by the court at any point before or during trial, when deciding on its own motion or on the application of the prosecutor or defendant to dismiss charges.[157] They are therefore applied in a range of evidential circumstances depending upon the point the proceedings have reached.

---

155 *R v Flyger* [2001] 2 NZLR 721 (CA) at [16].
156 Criminal Procedure Act 2011, s 147(4)(b) and (c).
157 Section 147(1) and (2).

[120] The confusion here arises from the Court of Appeal's finding that the District Court and High Court erred in adopting the "properly directed jury" test when deciding upon the sufficiency of the evidence, and that instead the "prima facie case" test should have been adopted. We are concerned this finding suggests a difference of significance between these two tests. The issue as to the proper formulation of the test for evidential sufficiency under s 26(3)(a) was not the focus of the arguments before us. Nevertheless, we consider it important that the approach of the Court of Appeal not be allowed to create confusion in the law.

[121] We agree with Ellen France J that there should be little practical difference between the various expressions of the test for evidential sufficiency,[158] and with Glazebrook J that the phrase "evidence … insufficient to justify a trial" should be interpreted as consistently as possible across all the contexts in which it is used.[159]

[122] Although it is not necessary to decide the point, we doubt there is any difference of substance between the two expressions of the test for insufficiency of evidence, being "no case to answer" (which is now reflected in s 147(4)(b)) and "properly directed jury could not reasonably convict" (now reflected in s 147(4)(c)). We make this point by reference to the Court of Appeal decision in *R v Flyger*.[160] The principles established in that case, and in the later case of *Parris v Attorney-General* which applied and further explained *Flyger*,[161] are now codified in s 147(4)(c).[162]

[123] *Flyger* was an appeal following a judge-alone trial. The appeal was against the trial Judge's refusal to discharge the defendant at the close of the Crown case on the grounds of insufficiency of evidence under the then s 347(3) of the Crimes Act 1961, a provision which conferred a discretion on the judge to direct a discharge of the accused at any stage of the trial, whether before or after verdict.

[124] Writing for the Court, Anderson J said the correct judicial approach to an application for discharge under s 347 on the grounds of insufficiency of evidence was

---

158 See the reasons given by Ellen France J above at [83].
159 See the reasons given by Glazebrook J above at [102].
160 *Flyger*, above n 155.
161 *Parris v Attorney-General* [2004] 1 NZLR 519 (CA).
162 *R v Hong* [2018] NZCA 97 at [28]–[29]. See also Simon France (ed) *Adams on Criminal Law – Procedure* (online ed, Thomson Reuters) at [CPA147.05].

the same as when dealing with an application of no case. He said the "principle of no prima facie case, or no case to answer, is founded in the common law".[163] As to the content of those principles, he drew upon the discussion of Lord Lane CJ in *R v Galbraith* who articulated the test as being whether a properly directed jury could properly convict on the evidence.[164]

[125] A review of the development of the case law in connection with the "no case to answer" and "properly directed jury" tests, then, suggests that the same principles infuse and have shaped both. This point was also made evident by Lord Diplock in *Haw Tua Tau v Public Prosecutor*, who said the attitude of mind a judge should adopt in deciding whether there is "no case to answer" in a judge-alone trial is most easily identified by considering the question for a judge in a jury trial as to whether the evidence, if accepted by the jury, would establish each essential element of the offence.[165] In light of this, we do not consider the District Court or High Court Judges erred in the test they formulated for evidential sufficiency under s 26(3)(a).

What evidence is to be considered under s 26(3)(a)?

[126] The range and nature of private prosecutors and prosecutions is wide and varied. In its 2000 report on criminal prosecutions, the Law Commission identified five categories of private prosecutors:[166]

(a) local and quasi-public bodies, including state-owned enterprises;

(b) private agencies as recognised or established by statute that either have the responsibility for the enforcement of a particular enactment, or have assumed it, such as the Real Estate Institute of New Zealand;

---

163 *Flyger*, above n 155, at [16].
164 At [17], citing *R v Galbraith* [1981] 1 WLR 1039 (CA) at 1042.
165 *Haw Tua Tau v Public Prosecutor* [1982] AC 136 (PC) at 151.
166 Law Commission *Criminal Prosecution* (NZLC R66, 2000) at [256]–[257]. Note that the first category identified is no longer within the definition of "private prosecution" under s 5 of the Criminal Procedure Act.

(c) organisations accepted as having an interest in enforcing particular statutes, such as the Society for the Prevention of Cruelty to Animals (SPCA);

(d) individuals or commercial enterprises (such as insurance companies) acting in their own cause; and

(e) in what the Law Commission identified as a new development, private prosecutions undertaken as a business.

[127] As Ellen France J describes, the availability of the private prosecution mechanism serves an important purpose.[167] But it is equally clear that private prosecutions allow non-state entities or individuals to, as Whata J in the High Court said, deploy "the power and machinery of the State to enforce criminal law and penalise criminal wrongdoing".[168] There is potential for "individuals acting improperly or maliciously to bring a prosecution and imperil a person's liberty".[169] The Law Commission identified a number of problems associated with private prosecutions:[170]

(a) A private prosecutor is not bound by the Solicitor-General's Prosecution Guidelines, which are designed to ensure that no prosecution is brought without an impartial and rigorous consideration of reasons for and against prosecution based on an objective assessment of the facts, and consideration of whether the public interest requires a prosecution to proceed.

(b) It is unlikely that there will be the separation of the investigation and prosecution functions which is vital to the integrity of the prosecution system.

---

167 See the reasons given by Ellen France J above at [40].
168 *[H Ltd] (in rec and liq) v District Court at Auckland* [2018] NZHC 2327 [HC judgment] at [53].
169 Law Commission *Criminal Prosecution* (NZLC PP28, 1997) at [439].
170 Law Commission, above n 166, at [258].

(c) There was an absence of provision for disclosure of relevant information to defendants.[171]

(d) Some private prosecutions are unduly vengeful or vexatious.

[128] Although the s 26 screening mechanism was not among the Law Commission's recommendations following its review of criminal prosecutions, the inclusion of that provision was clearly designed to address some of the risks highlighted by the Commission.

[129] We agree with Ellen France J that s 26 is intended to operate as an initial screening mechanism.[172] Section 26 describes a simple but flexible process. The registrar may reject documents for want of form, accept documents for filing, or refer them to a District Court judge for directions. There is no indication as to what test the registrar should apply in deciding when to refer the documents to a District Court judge. This absence of a threshold or criteria undoubtedly provides the flexibility to navigate the variety of circumstances in which private prosecutions are filed – from those filed by well-established organisations with an interest in enforcing particular statutes, through to those filed by private individuals and entities; from those charging straightforward offences, to those charging complex allegations of fraud.

[130] Where the registrar does refer the matter to a judge, s 26(3) prescribes the issues a judge must address when deciding whether or not to direct acceptance of the charging documents for filing. It is clear that the judge must have regard to the documents filed by the proposed prosecutor when addressing the issues of sufficiency of evidence and abuse of process. But the section does not preclude the judge having regard to other material in deciding those issues – the judge may have regard to material other than that initially provided by the proposed prosecutor. Again, such flexibility is appropriate given the wide range of criminal offences which may be charged and the variety of people and organisations who may seek to bring a private prosecution.

---

171 This observation predates s 4(1) of the Criminal Disclosure Act 2008, under which a prosecutor's disclosure obligations apply equally to private prosecutors.

172 See the reasons given by Ellen France J above at [89].

[131] Nevertheless, the issues for the judge are those set out in s 26(3)(a) and (b), and thus the additional material a judge may have regard to is necessarily limited to material relevant to those two issues. Judges, applying legal principle, can only seek further material where they consider it may be relevant to either of these two issues.

[132] In our view, although the focus under s 26(3)(a) will generally be on the cogency and creditableness of the prosecution evidence, this will not invariably be so. Defence material may, for example, be relevant to the s 26(3)(a) inquiry where it provides a complete answer to the prosecution case – for example, by evidencing legal title to an item alleged stolen. There will no doubt be other circumstances where defence material will assist with the s 26(3)(a) inquiry – as we come to, the facts of this case provide a good example. It is not possible to catalogue – in the abstract – what these circumstances will be.

[133] For these reasons we agree with Ellen France J that the discretion of the District Court judge should not be unnecessarily constrained beyond the limitations that flow from the issues the judge must address under s 26.[173] But we consider it unnecessary and undesirable to add any further words of limitation such as "residual" or "exceptional" to this statutorily prescribed framework.[174] Although these words may simply be intended as a predictor of how often it will be that judges will need to seek or receive additional material, adjectives such as these have a habit of finding their way into the test as applied.

[134] It also follows from this analysis of s 26(3) that it is an overstatement to describe it as "good practice" to give proposed defendants the opportunity to provide material and make submissions in the s 26 procedure.[175] It will only be appropriate to do so where the judge considers it necessary or desirable in the interests of justice, in order to undertake the s 26(3) exercise.

---

173 See the reasons given by Ellen France J above at [71].

174 Contrary to the reasons given by Ellen France J above at [67]–[72] and [90]; and in agreement with the reasons given by Glazebrook J above at [106].

175 In agreement with the reasons given by Ellen France J above at [74]. See, for example, *Wang v North Shore District Court (No 2)* [2014] NZHC 2756, [2014] NZAR 1428 at [60].

Did the Judge apply the wrong legal test as to how he could use the defence material?

[135] Although the District Court Judge did not consider defence evidence should have been called in this case, he said that because the proposed defendants had been given directions that they would be heard, he was obliged to receive their evidence. But the Judge said that for the purposes of s 26(3)(a), the proposed defendant could only rely on that material to show that the proposed prosecutor's formal statements are entirely without credit. When considering the relevance of the material submitted by the proposed defendants, the Judge acknowledged that although it "may well be relevant to the issue of … claim of honest belief", it did not show that the proposed prosecutor's statements were entirely without credit.[176] Therefore, the defence evidence had no bearing on the test under s 26(3)(a) as to evidential sufficiency.

[136] Ellen France J says the Judge erred in directing himself that a proposed defendant's statements may only be considered to determine whether they demonstrate unequivocally that evidence in a proposed prosecutor's formal statements in support of an element of a charge has no credit. But she says this error was not critical, because she does not consider defence evidence on the issue of claim of right should have been called for in this case.[177]

[137] We do not see this as relevant to the appellants' entitlement to relief. This is not a judicial review of the decision of Judge Mary-Elizabeth Sharp to call for material from the defence – it is a review of Judge Thorburn's decision as to the relevance of the proposed defendants' material already before him. In any case, as we come to, we are of the view that it was open to Judge Sharp to call for this material.

[138] Although relief in judicial review is discretionary, where an error of law is found the starting point is that an applicant is generally entitled to relief.[178] Relief

---

176 *Vector Ltd v [H Ltd]* [2018] NZDC 3238 (Judge Thorburn) [DC judgment] at [152].

177 See the reasons given by Ellen France J above at [87]. Glazebrook J considers the error was not critical because the appellants' evidence raised differences of opinion, which would need to be resolved at trial: at [109]–[110]. We also disagree with this analysis, for the reasons we give below at [156]–[158].

178 *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056 at [112] per Elias CJ and Arnold J.

may be withheld where the outcome would "inevitably have been the same".[179] For the reasons that follow, we are satisfied this is not such a case.

The significance of this error

[139] On the basis of the Judge's mistaken view as to the use to which the proposed defendants' evidence could be put, he did not take that evidence into account when considering the issue of evidential sufficiency as to claim of right.[180] In order to understand the significance of this error, it is necessary to outline the elements of the offences Vector Ltd (Vector) proposes to charge.

[140] The charging documents filed allege 19 offences with the appellants and H Ltd (in receivership and liquidation) jointly charged on each. The allegations against each are as follows:

(a) Seventeen specific allegations of dishonestly using a document under s 228(1)(b) of the Crimes Act. These charges relate to monthly payment claims made throughout the course of the contract.

(b) One representative charge of obtaining by deception under s 240(1)(a) of the Crimes Act. This was drafted as a representative charge, reflecting the entirety of the benefit Vector alleges was dishonestly claimed by H Ltd, in the sum of $1,253,210.74.

(c) One representative charge of theft by persons in a special relationship under s 220(1)(a) of the Crimes Act.

[141] Judge Thorburn directed that the registrar not accept the s 220(1)(a) charge for filing and so the issues under appeal relate only to ss 228 and 240. It is common ground that the elements of the charges are as follows. In respect of the proposed charges under s 228(1)(b), the elements of the charge are:

---

179 *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [69] per Blanchard, Tipping, McGrath and Anderson JJ (with whom Elias CJ agreed: at [1]); and *Birss v Secretary for Justice* [1984] 1 NZLR 513 (CA) at 521 per Richardson J.

180 DC judgment, above n 176, at [97]–[98].

(a) a document was used;

(b) with intent to obtain a pecuniary advantage;

(c) use of the document was dishonest (without belief there was express or implied consent to use the document); and

(d) use of the document was without claim of right.

[142] In respect of the charge under s 240(1)(a), the elements are:

(a) the defendant obtained a pecuniary advantage;

(b) it was obtained by deception; and

(c) it was obtained without claim of right.

[143] Before the District Court Judge, the proposed defendants resisted any allegations of dishonesty. Their case was that the contract specifically envisaged transition from a cost plus to a fixed lump sum payment regime, and this transition had occurred in respect of the works to which the invoices forming the basis of the proposed charges relate (which involved the use by H Ltd of sub-contractors). Further, if that transition had not occurred, the proposed defendants believed that it had.

[144] The contractual issues which lie at the heart of Vector's case are relevant to whether there is sufficient evidence of dishonesty/deception for the purposes of ss 228 and 240, and are also relevant to the issue of claim of right. However, as to the latter, although both offences have as an element that the actus reus was committed without claim of right, the prosecution need only rebut claim of right if there is evidence tending to suggest such a claim.[181]

[145] Prior to 19 March 2012, s 2 of the Crimes Act defined claim of right as:

---

[181] Simon France (ed) *Adams on Criminal Law – Offences and Defences* (online ed, Thomson Reuters) at [CA2.04.03].

> … a belief that the act is lawful, although that belief may be based on ignorance or mistake of fact or of any matter of law other than the enactment against which the offence is alleged to have been committed

[146] That definition was amended so that claim of right is now defined as:

> … a belief at the time of the act in a proprietary or possessory right in property in relation to which the offence is alleged to have been committed, although that belief may be based on ignorance or mistake of fact or of any matter of law other than the enactment against which the offence is alleged to have been committed

[147] The time frame within which the alleged offending took place means both definitions applied at some point. However, the parties agreed in the High Court that nothing turns on this change in definition in the present case.[182] In both definitions, the belief described is subjective – the defendant's belief need only be honestly held, even if it is unreasonable.[183] If the prosecution or defence evidence raises the issue of claim of right, the prosecution must establish beyond reasonable doubt that the defendant did not honestly believe they had a lawful right to the property in question.

[148] Because the leave granted in this appeal did not extend to the issue of sufficiency of evidence, we had neither the proposed prosecutor's evidence nor the defence material before us.[184] However, issue was not taken with Whata J's observation that even on the material filed by the proposed prosecutor, it was apparent that the proposed defendants claimed to have been contractually entitled to invoice the amounts that are the subject of the proposed charges.[185]

[149] When the proposed charging documents were filed they were referred to District Court Judge Sharp. The Judge issued a minute directing service of the documents upon the proposed defendants and allowing them to submit material on whether the charging documents should be accepted for filing. The reasons she gave for doing so were as follows:

> I take this course of action because under s 26(3)(b) of the Criminal Procedure Act 2011, I have a statutory duty to prevent an abuse of process. As to evidential sufficiency, or otherwise, I note that the [second appellant] and [first

---

182 HC judgment, above n 168, at [68].
183 *Jardine v R* [2016] NZCA 371 at [34].
184 *[S] v Vector Ltd* [2019] NZSC 97 at [7].
185 HC judgment, above n 168, at [71], n 32.

> appellant] were at the relevant time employed by [H Ltd] and an issue will arise as to whether there could be personal liability attaching to them and whether this might be more properly, classified as a civil claim.

[150] In our view, this was a case where the discretion to call for and receive defence evidence could properly be exercised. On one view of the facts, this was simply a dispute as to the nature of the contract between the parties. The s 26(3)(a) issue as to evidential sufficiency for dishonesty/deception and claim of right hinges upon whether the invoicing practices were in accordance with the contract, and if not, whether the proposed defendants honestly believed them to be. These are the elements that take the dispute out of the civil realm.[186]

[151] When the matter came before Judge Thorburn, he addressed both the dishonesty/deception and claim of right issues without reference to the defence material. He said as to the first:

> [94] If there is conflict between statements of prosecution and defence witnesses upon the core issue of what the parties understood to be the system they were working to for payments, that would be a clear issue of credibility the resolution of which could only be by assessment of the … witnesses and settling the facts that each witness would rely upon for their point of view, via a trial.

[152] As to claim of right, the Judge said he was unsure what the proposed defendants might maintain as their claim of right. But in any case, he said, the proposed defendants' submission that the proposed prosecutor must establish on the evidence it proffered that claim of right is excluded would mean that a prosecutor would need to anticipate the possibilities of what claim of right there might be, and then provide evidence excluding any possibilities of its existence. He said this could not be the right approach.[187] The better approach, he said, was to:[188]

> … assess whether the proposed prosecutor's formal statements provide adequate proof of the *actus reus* elements for deceit and fraudulence to the required standard. The strength of an inference that can be drawn from such evidence might easily lead to a safe conclusion that the conduct is without claim of right. Whilst it will always be the burden of the Crown to exclude claim of right, the claim does need to be raised, and usually that would need a specific intentional step on the part of the defence because what is being

---

186 We do not, however, consider the Judge should have allocated a three day hearing. This procedure is intended to operate as a straightforward screening mechanism.

187 At [97]–[99].

188 At [100].

> claimed will have to be identifiable at an evidential level by a degree of particularisation that will enable a prosecutor to know what must be excluded.

[153] The proposed defendants do not rely upon the Judge's apparent failure to appreciate the nature of their claim of right. The point they raise is that the Judge should have addressed the defence material on claim of right. We agree that he should have. First, as Whata J observed, the proposed prosecutor's statements raised the issue of claim of right. Secondly, defence material had been filed, with the leave of the Court, which further expanded on that claim of right.

[154] Although the Judge did not appreciate what the proposed defendants' claim of right was, he did summarise the effect of their evidence as follows:

> [143] The [proposed] defendants have stated the crux of the case to be that … *[H Ltd] believed it was progressively agreeing to fixed lump sum prices for work packages as between itself and [Vector]* (which) *means it cannot be shown that there was any criminal conduct. There is more than adequate evidence that [H Ltd] was acting with this belief.*
>
> [144] And also, that it was [H Ltd's] understanding that subcontractor work packages … *became a series of "mini lump sum contracts" for the various stages or sections of the works pending agreement of an overall lump sum price.*
>
> (footnotes omitted)

[155] The Judge said, however:

> [145] Given that the prosecutor's formal statements provide evidence of Vector's completely different belief, and given that at the screening stage of evidential sufficiency that s 26 requires, the proposed prosecutor's formal statements are all that are necessary for the court to make a direction to the Registrar – these submissions seem to amount to a disclosure of what [H Ltd's] defence would be if there was a trial. Indications of what evidence it would adduce to show its trial defence … is not relevant at this stage.

[156] The short point is that on the evidence before him, both the proposed prosecutor's evidence and the proposed defendants' material raised the issue of a claim of right. As the lack of claim of right is an element of both offences, the Judge was then required to address the issue of evidential sufficiency in relation to that

element.[189] He did not. His point that Vector had a different belief as to H Ltd's contractual entitlement is, on the facts of this case, irrelevant to the issue of claim of right – the question is whether it is reasonably possible that the proposed defendants had an honest belief in a claim of right.

[157] It may be that if the Judge had addressed the issue of evidential sufficiency in regard to lack of claim of right, he would have concluded the relevant threshold was met. The threshold under s 26(3)(a) is low – the judge need not be satisfied that claim of right is excluded – only that there is some evidence which, if accepted, would exclude it. But, as we have said, the Judge did not address this issue because he misdirected himself as to the use to which the proposed defendants' material could be put when making the s 26(3)(a) assessment.

[158] For two related reasons, it is our view that there is no option but to remit the matter to the District Court for reconsideration. First, leave was not granted on the substantive question of whether the evidence was sufficient to meet the s 26(3)(a) threshold, so that question is not before us. Second, and as a result of that limitation, neither the proposed prosecutor's evidence nor the proposed defendants' material that was put before the District Court is available to us. We are therefore unable to resolve the question anyway.

---

[189] We would also not rule out the possibility that a proposed defendant's potential defence to a charge might, in rare cases, be so clear that it may also be necessary to address evidential sufficiency as to this defence at this stage: see, for example, *Wallace v Abbott* [2003] NZAR 42 (HC).

[159] We would allow the appeal and direct reconsideration by the District Court of evidential sufficiency under s 26(3)(a). We agree that for fair trial reasons the suppression orders set out above at [94] should be made.

Solicitors:
Kensington Swan, Wellington for Appellants
Gilbert Walker, Auckland for First Respondent
Crown Law Office, Wellington for Second Respondent and Attorney-General as Intervener
Spencer Legal, Auckland for Third Respondent