IN THE SUPREME COURT OF NEW ZEALAND

SC 18/2013
[2015] NZSC 98

BETWEEN	MAX JOHN BECKHAM Appellant
AND	THE QUEEN Respondent

Hearing:	3–4 March 2015
Court:	Elias CJ, William Young, Glazebrook, Arnold and O'Regan JJ
Counsel:	S J Mount, A F Pilditch and A H H Choi for Appellant D J Boldt, D G Johnstone and M J McKillop for Respondent
Judgment:	7 July 2015

JUDGMENT OF THE COURT

A **The application for leave to appeal against conviction is dismissed.**

B **The appeal against sentence is dismissed.**

REASONS

(Given by O'Regan J)

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Appeal and application for leave

[1] The appellant, Mr Beckham, appeals against a decision of the Court of Appeal in which his appeal against conviction for serious drug offending and money laundering was dismissed.[1] A Crown appeal against sentence was allowed. His sentence was increased to a term of imprisonment of 18 years with a minimum period of imprisonment of nine years.

[2] Mr Beckham sought leave to appeal to this Court on the basis that the Court of Appeal had wrongly stated and wrongly applied the test for sentence reduction as a remedy for police misconduct amounting to a breach of the New Zealand Bill of Rights Act 1990. Leave to appeal was granted.[2] The approved ground was:

> Should the appellant have received a reduction in his sentence for the breach of his rights under the New Zealand Bill of Rights Act 1990?

[3] The breach of the Bill of Rights Act on which the appeal was founded involved actions taken by the police that meant the police obtained access to recordings of calls made by Mr Beckham to his trial lawyer, Mr Murray Gibson, and in one instance, a call made by Mr Beckham to his son, Gary Beckham, who then handed the phone to a property lawyer acting for Mr Beckham, Mr Rick Palmer.

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1 *Beckham v R* [2012] NZCA 603, [2013] 1 NZLR 613 (Stevens, Venning and Dobson JJ) [*Beckham* (CA)].

2 *Beckham v R* [2013] NZSC 70 [*Beckham* (SC Leave)].

The focus of the appeal was therefore on breaches of legal advice privilege under s 54 Evidence Act 2006 ("solicitor/client privilege").[3] We will explain the nature of the allegations of breach of solicitor/client privilege later.

[4] Shortly before the scheduled hearing date for the appeal on 1 April 2014, counsel for Mr Beckham, Mr Mount, filed a memorandum seeking leave to file further submissions regarding allegations of additional breaches of privilege by the police. These allegations had not been made in the High Court or Court of Appeal. Mr Mount said these breaches had only come to light when he received a schedule prepared by police officers who had listened to recordings of calls made by Mr Beckham from prison to members of his family and others. This schedule recorded discussions during recorded telephone calls in which Mr Beckham had discussed trial strategy, actual and possible defence witnesses and possible defence evidence. The principal focus of the new submissions was, therefore, litigation privilege, rather than solicitor/client privilege.

[5] At the hearing on 1 April 2014, the Court granted leave to Mr Beckham to file further written submissions dealing with potential breaches of litigation privilege and set a new timetable for submissions. The Court then adjourned the hearing. On the same day, the Court also ordered the Crown to provide any further schedule prepared by the police in respect of recordings of Mr Beckham's telephone calls from prison and to provide details of the police officers to whom any such schedule was provided or shown. Subsequently, the Court granted extensions of time for the filing of further submissions.

[6] The police provided a further schedule to Mr Beckham's counsel in compliance with that order. That led to Mr Beckham filing a further application for leave to appeal. He sought leave to appeal against the decision of the Court of Appeal to dismiss his appeal against conviction. In effect, this intended appeal challenged the decisions made in the High Court on two occasions to refuse to stay the proceedings on the basis that the police action leading to breaches of the Bill of Rights Act would have made the trial an abuse of process. However, the argument

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[3] Evidence Act 2006, s 54.

intended to be pursued in this Court relied not just on the breach of solicitor/client privilege but on the new allegations of breaches of litigation privilege.

[7] The result of all this is that, at the hearing on 3 and 4 March 2015, the Court dealt with the appeal against sentence for which leave had been granted and the application for leave to appeal against conviction. The Court heard full argument on the issues relating to the proposed appeal against conviction.

[8] Mr Mount advanced the case for Mr Beckham on the basis of nine propositions. We will address each of those propositions in turn. In order to give context to these propositions, it is necessary to set out the factual background in some detail. We will also set out and evaluate the new allegations of breaches of privilege before turning to Mr Mount's nine propositions.

Factual background

[9] It is convenient to set out the factual background in the form of a chronology.

22 October 2008

[10] Mr Beckham was arrested on 22 October 2008 and charged with a number of serious drug offences. He was remanded in custody. The arrest followed the termination of a police operation known as "Operation Jivaro". The officer in charge of Operation Jivaro was Detective Sergeant Schmid.

10 August 2009

[11] Following receipt by the police of information to the effect that Mr Beckham was planning to escape from custody and had made threats against Detective Sergeant Schmid, the police commenced a new investigation on 10 August 2009. The investigation was undertaken by the Special Investigations Group (SIG) and was led by Detective Sergeant Lunjevich. This operation was called "Operation Valley".

The investigation was undertaken by different officers from those involved in Operation Jivaro.[4]

[12] During the period Mr Beckham was on remand, he made calls on a regular basis from prison to nine numbers. These calls were made from public pay telephones in the prison, which are known by prisoners to be monitored. In particular, there is a notice to this effect prominently displayed above the telephone and there is a recorded message at the outset of each call advising that the call will be monitored. Prisoners are given a PIN number to identify the maker of the call. The monitoring system operated by the Department of Corrections in prisons requires that the numbers to which calls are made from the public phone must be approved by Corrections. In Mr Beckham's case, nine numbers were approved, including Mr Gibson's number. A recording of calls made from the public phones is stored as a digital file in the Corrections computer system, and in addition a file recording the date, time and the number to which the call was made is recorded. Provision is made for "exempt" numbers for calls to counsel and others attracting exempt status under s 114 Corrections Act 2004. Such calls are not recorded.

[13] In the case of Mr Beckham, the telephone number of his lawyer had not been noted as an exempt number, so, contrary to normal practice, calls made by Mr Beckham from the public phone to Mr Gibson were recorded.

[14] Calls to counsel may also be made by prisoners from an office telephone which is not monitored. Accordingly, no calls from the office telephone are recorded. However, access to this phone is not always available. A log is made of calls from the office telephone.

11 August 2009

[15] On 11 August 2009, the New Zealand Customs Service issued a requisition to Corrections requiring it to produce Mr Beckham's call data for the period from 3 to

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[4] The High Court Judge, Andrews J, found that Operation Valley "was entirely independent of, and quarantined from, the drugs squad's Operation Jivaro investigation": *R v Beckham* HC Auckland CRI-2008-004-29112, 4 February 2011 [*Beckham* (HC) No 1] at [82](e). The Court of Appeal described the SIG unit as "operationally distinct and separate from the police unit responsible for the prosecution of the charges arising from Operation Jivaro": *Beckham* (CA), above n 1, at [9].

11 August 2009. This was made under s 161 of the Customs and Excise Act 1996, which empowers the chief executive of Customs to require a person to produce for investigation documents or records considered necessary or relevant to, among other things, an investigation under the Customs and Excise Act. Calls to Mr Gibson were not excluded from the requisition or from the call data provided by Corrections to Customs. This was contrary to the provision in s 162 of the Customs and Excise Act that communications between a lawyer and client for the purpose of obtaining legal advice are not to be disclosed under s 161.

17 August 2009

[16] Detective Sergeant Lunjevich obtained a search warrant on 17 August 2009 from the District Court at Auckland in respect of, among other things, call data for Mr Beckham's calls from the public (monitored) phone in the prison in which Mr Beckham was being held on remand. Before applying for the warrant, Detective Sergeant Lunjevich had obtained from Corrections an information report which listed the approved telephone numbers. Detective Sergeant Lunjevich had made inquiries about these numbers and was aware that one of the numbers was Mr Gibson's number. Corrections had apparently been unaware of this and Detective Sergeant Lunjevich did not advise Corrections of this fact. Despite this knowledge, Detective Sergeant Lunjevich included all of the approved numbers including Mr Gibson's number in the application for a search warrant and he did not disclose to the issuing officer that the warrant purported to authorise seizure of recordings of calls made by Mr Beckham from the public phone to his counsel.[5] Nor did the warrant make any reference to the possibility of privileged calls being intercepted or suggest any process for dealing with privileged calls.

[17] Counsel for the Crown accepted that Corrections should not have retained the recordings of Mr Beckham's calls to Mr Gibson and that the application for a search warrant should have set out measures to preserve legal professional privilege in those calls. It was also accepted that the application ought to have expressly

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[5] Of the nine numbers referred to in the application, four identified the person associated with the number. This was not the case in relation to Mr Gibson's number.

addressed the question of calls attracting privilege and set out a process for dealing with them.

[18] In his evidence in the High Court, Detective Sergeant Lunjevich said that he assumed that Mr Beckham's calls to Mr Gibson were likely to be privileged and that he did not intend that any such calls would be listened to. However, he said that the calls would be "put aside" in case it became necessary to listen to the content of the calls, in which case he would have sought legal advice from the police management and legal section. He was aware that the Corrections' monitoring system retained recordings of calls for only 180 days, and he considered it was necessary to seize copies of the recordings to preserve them in case it became necessary to consider listening to them at a future date.

18 August 2009

[19] Police officers began listening to the recorded calls on the same day as the disks containing the recordings were received from Corrections on 18 August 2009. At that stage the police did not have any way of identifying calls before listening to them, and so an instruction was given that if a call was directed to Mr Gibson, it should not be listened to once that had been established.

[20] Although the officers listening to the calls were involved in Operation Valley, the screening report form they used sometimes also referred to Operation Jivaro. This meant the screening officers were asked to listen for anything of relevance to the drugs charges against Mr Beckham, as well as information about the planned escape and threats to Detective Sergeant Schmid.

19 August 2009

[21] On 19 August 2009, Detective Sergeant Lunjevich became aware that one call to Mr Gibson had been listened to in its entirety, albeit a call by a prisoner other than Mr Beckham. The following day he issued an email instruction to his analysts to remove all the calls to Mr Gibson's number from the shared access drive in the police computer on which the call recordings were stored. However, only three of the nine calls to Mr Gibson's number were, in fact, removed (including the call that

had been listened to). The remainder were not removed until 15 December 2010. On the same day Detective Sergeant Lunjevich issued an email instruction to his staff confirming that calls to Mr Gibson's number were not to be listened to.

[22] The evidence was that during the period between the commencement of the screening exercise and the issuing of this written instruction, three calls to Mr Gibson were listened to but, with the exception of the call from the other prisoner to which reference has already been made, these were listened to only to the extent of identifying that the call was to Mr Gibson. So no element of any privileged communication between Mr Beckham and Mr Gibson was listened to.

[23] On the same day, Corrections provided the police with a spreadsheet which set out the number to which each call on the disks provided by Corrections was made. Once this was received by police, this enabled the screeners to be made aware that a call was to Mr Gibson before they began listening to it. Steps were then taken to ensure that calls to Mr Gibson were not listened to by the officers undertaking the screening.

3 September 2009

[24] Customs issued a second requisition to Corrections on 3 September 2009, requiring Corrections to produce Mr Beckham's call data for the period between 11 August 2009 and 3 September 2009. Again, calls to Mr Gibson were not excluded from the data provided.

18 September 2009

[25] On 18 September 2009, Detective Sergeant Lunjevich received a disk from Customs containing recordings of telephone calls made covering the period from 7 August 2009 to 3 September 2009. Calls were identified by date and time, but not by the destination number. This meant that all calls had to be listened to and Detective Sergeant Lunjevich instructed his staff that if a call was to Mr Gibson, they were to stop listening once they had established that fact. Three calls to Mr Gibson were included in the data provided by Customs and, and in each case, the screener

recorded that he or she had not listened to the call beyond establishing that it was to Mr Gibson.[6]

14 December 2009

[26] Detective Sergeant Lunjevich provided a copy of the schedule of calls to Detective Peat, a detective working in the police Asset Recovery Unit, on 14 December 2009.[7] Sometime in December he also provided Detective Peat with two computer disks which contained the recordings of Mr Beckham's phone calls that had been derived from the searches, and to which the schedule referred.[8]

21 December 2009

[27] Mr Beckham applied for electronically monitored bail. On 21 December 2009, that application was dismissed by Duffy J.[9]

6 January 2010

[28] Detective Sergeant Lunjevich obtained a further search warrant on 6 January 2010 for the recordings held by Corrections of Mr Beckham's calls from 3 September 2009 onwards. Again, the application for the warrant referred to the numbers to which Mr Beckham was entitled to make calls, including Mr Gibson's number. The application for the warrant did not set out any process to deal with any privileged calls. However, Detective Sergeant Lunjevich did, when executing the warrant, request that Corrections exclude any calls to Mr Gibson from the data provided to the police by Corrections. This prompted Corrections to make arrangements to ensure that future calls to Mr Gibson from the public (monitored) phone were not recorded.

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6 It appears that in one of the calls Mr Gibson was unavailable in any case.

7 The significance of this is that Detective Peat was investigating money laundering aspects of Mr Beckham's alleged drug offending, although he was not a member of the drug squad team responsible for Operation Jivaro. He gave evidence at Mr Beckham's trial. Andrews J had found that no data obtained by the Operation Valley team was disclosed to the Operation Jivaro team: see *Beckham* (HC) No 1, above n 4, at [82](d).

8 As explained below, the fact that this material had been provided to Detective Peat did not come to light until after Andrews J had delivered her judgment in *Beckham* (HC) No 1, above n 4.

9 *Beckham v New Zealand Police*, HC Auckland, CRI-2009-404-258, 21 December 2009 [*Beckham* (HC) Bail No 1].

4 February 2010

[29] Corrections provided the data sought by the police pursuant to the 6 January 2010 warrant on 4 February 2010. This covered calls from 3 September 2009 to 11 January 2010.

25 June 2010

[30] An affidavit dated 25 June 2010 from Detective Inspector Good outlining the processes adopted by the police in relation to the call data received from Corrections revealed that "selected information obtained from the screened phone calls from Corrections was directed to the Proceeds of Crime Unit" on 14 December 2009.[10] The officer in that unit to whom the call data was provided was Detective Peat. This was the first time that Mr Beckham's counsel had become aware that the call information had been provided to Detective Peat.

7 July 2010

[31] Mr Beckham filed an affidavit in the High Court in support of a second application for bail on 7 July 2010. In the affidavit, Mr Beckham raised the concern that calls to Mr Gibson were being monitored and recorded by Corrections and call data was being provided to the police.

28 July 2010

[32] Mr Gibson, on behalf of Mr Beckham, filed a memorandum in the High Court in support of the second bail application on 28 July 2010. In that memorandum, Mr Gibson said that the fact that calls by Mr Beckham to him had been monitored and that call data had been provided to the police meant that it was no longer practical for Mr Beckham and Mr Gibson to make contact over the telephone. He said Mr Beckham was being denied the right to prepare properly for trial. He said releasing Mr Beckham on bail would be an "effective and efficient remedy", which would "ensure the integrity of the criminal justice system is protected".

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[10] The Proceeds of Crime Unit is referred to as the Asset Recovery Unit in other documents.

18 August 2010

[33] Mr Beckham's second bail application was successful and he was granted bail by Duffy J on 18 August 2010.[11] One of the reasons for granting bail was the difficulty Mr Beckham was having communicating with lawyers when conversations using prison telephones were regularly intercepted and copies of the intercepted communications forwarded to the police.[12]

19 August 2010

[34] Mr Beckham's counsel sought disclosure of relevant information from Operation Valley on 19 August 2010. The Crown responded on 23 September 2010. The Crown did not disclose significant amounts of information about the monitored calls, including the search warrant applications, the screening sheets, or the schedule that was provided to Detective Peat.

18 November 2010

[35] Mr Beckham filed his first application for a stay of the proceedings on 18 November 2010.

4 February 2011

[36] After a five-day hearing, Andrews J refused the first stay application in a judgment issued on 4 February 2011.[13]

7 February 2011

[37] Mr Beckham's High Court trial began on 7 February 2011. The trial continued until mid April 2011.

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11 *Beckham v New Zealand Police*, HC Auckland, CRI-2009-404-258, 18 August 2010 [*Beckham* (HC) Bail No 2].

12 At [20].

13 *Beckham* (HC) No 1, above n 4.

1 March 2011

[38] Affidavits from Detective Peat and Detective Sergeant Lunjevich were sworn on 1 March 2011, recording that call data, including recordings of privileged calls, had been provided to Detective Peat by Detective Sergeant Lunjevich. In his affidavit, Detective Sergeant Lunjevich also informed the Court that, contrary to his previous understanding (and his evidence at an earlier hearing before Andrews J), recordings of three calls from Mr Beckham to Mr Gibson had not been deleted from the police computer system in December 2010. Those calls were deleted on 7 February 2011.

14 March 2011

[39] Mr Beckham filed a second application for stay on 14 March 2011 (during the course of his High Court trial). At the same time, he filed an application for further evidence, seeking an order that the Crown be required to call further witnesses, namely all police officers to whom access to audio recordings of privileged calls between Mr Beckham and his counsel had been provided. This was so their evidence could be considered in the context of the second stay application.

11 April 2011

[40] The jury in the High Court trial returned its verdict on 11 April 2011. Mr Beckham was convicted on two counts of manufacturing methamphetamine, two counts of conspiring to manufacture methamphetamine, two counts of possession of methamphetamine for supply, eight counts of supplying methamphetamine and single counts of conspiracy to supply methamphetamine, supplying cocaine, supplying MDMA, possession of MDMA for supply, conspiracy to supply MDMA, conspiracy to produce cannabis oil, and possession of cannabis plant for supply. He was also convicted on three counts of money laundering.

29 April 2011

[41] A hearing took place before Andrews J on 29 April 2011, at which Detective Sergeant Lunjevich and Detective Peat gave evidence. Significantly, this evidence disclosed two matters that had not been known to the Court when dealing with the

first stay application. These were that Detective Sergeant Lunjevich had given Detective Peat two disks which included calls to Mr Gibson and that Detective Sergeant Lunjevich had discovered on 28 February 2011 that the recordings of three calls to Mr Gibson had not been deleted from the police computer system as he had thought had occurred.

3 May 2011

[42] Having heard this evidence, Andrews J ordered that the disks held by Detective Sergeant Lunjevich (which had been returned to him by Detective Peat) be held by the Court pending resolution of the second application for a stay but declined to make an order that all members of the Operation Valley team and all officers working in the Asset Recovery Unit be required to give evidence. This judgment was issued on 3 May 2011.[14]

23 May 2011

[43] The second application for a stay was heard by Andrews J on 17 May 2011. She dismissed the application in a judgment delivered on 23 May 2011.[15]

12 August 2011

[44] On 12 August 2011, Mr Beckham was sentenced to a term of imprisonment of 13 years and six months cumulative on a sentence of seven and a half years that Mr Beckham was already serving.[16] A minimum period of imprisonment of seven years was imposed. The Judge recorded that if it had not been for the fact that Mr Beckham was already serving a sentence of seven and a half years' imprisonment on kidnapping charges, the appropriate sentence would have been a term of imprisonment of 18 and a half years.[17]

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14 *R v MB* HC Auckland CRI-2008-004-29112, 3 May 2011 [*Beckham* (HC) No 2].
15 *R v MB* HC Auckland CRI-2008-004-29112, 23 May 2011 [*Beckham* (HC) No 3].
16 *R v Beckham* HC Auckland CRI-2008-404-29112, 12 August 2011 (Sentencing notes of Andrews J).
17 At [35].

Allegations of breach of privilege dealt with by High Court and Court of Appeal

[45] As indicated earlier, the focus of the applications for stay in the High Court and the appeal to the Court of Appeal was on allegations of breach of solicitor/client privilege. It was argued that the two applications for search warrants made by Detective Sergeant Lunjevich to the District Court and the obtaining of call data from Customs all occurred in circumstances where the police knew that communications between Mr Beckham and Mr Gibson were likely to be included but did not take steps to notify the issuing judicial officer nor to exclude Mr Gibson's number from the applications. This led to the police obtaining access to calls between Mr Beckham and Mr Gibson and, in one case, between Mr Beckham and another solicitor, Mr Palmer, when it was obvious that solicitor/client privilege applied to these calls.

[46] The High Court Judge, having reviewed the evidence of how the calls were processed by the screeners under the supervision of Detective Sergeant Lunjevich, found that no calls from Mr Beckham to Mr Gibson were listened to, beyond the point necessary to identify that the call was to Mr Gibson.[18] She found that of the 12 calls made to Mr Gibson's number, one was listened to in its entirety, but was a call made by another inmate, and five were listened to only to the extent necessary to determine the call was to Mr Gibson. Of those five, three were calls made by Mr Beckham.[19] The Judge concluded that no other calls from Mr Beckham to Mr Gibson were listened to, inferring this from the fact that the notes prepared by the screeners omitted any reference to these calls. These findings were upheld by the Court of Appeal.[20]

[47] Mr Mount did not challenge further these findings of fact.

New allegations of breach of privilege

[48] As noted at [5] above, the Court granted leave to Mr Beckham to make further written submissions dealing with further alleged breaches of privilege. The focus was on calls made by Mr Beckham to persons other than Mr Gibson which, it

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18 *Beckham* (HC) No 1, above n 4, at [40]–[45].
19 At [40].
20 *Beckham* (CA), above n 1, at [87].

is argued, were either subject to solicitor/client privilege or to litigation privilege. No reference to these calls was made in the two applications for stay made in the High Court, nor was there any reference to them in the appeal to the Court of Appeal. The reason given for this by counsel for Mr Beckham is that Mr Beckham and his counsel were unaware of the nature of these calls until Mr Mount received a lengthy schedule of the report compiled by the screeners of the call data received by the police from Corrections and Customs. It was only when he scrutinised this schedule that these alleged breaches of privilege became apparent.[21]

[49] The schedule had not been disclosed by the police prior to Mr Beckham's trial, but was produced as an exhibit at the hearing of the second application for stay in the High Court on 29 April 2011. This arose when Detective Peat was giving evidence in the High Court and made reference to the schedule. When it became apparent that Mr Gibson did not know about the schedule, the Court adjourned to allow Detective Peat to return to the police station to retrieve a copy. That copy was then produced as an exhibit and Mr Gibson cross-examined Detective Peat on aspects of it. However, it seems that neither Crown counsel nor Mr Gibson was provided with a copy. So, although Mr Gibson knew of the existence of the schedule, he did not have a copy. Mr Mount says he was not made aware of the schedule until he was preparing for the appeal to this Court. It is for this reason that no mention of it was made in the Court of Appeal.

[50] Given that the existence of the schedule was known to counsel then acting for Mr Beckham before the appeal to the Court of Appeal, it is questionable as to whether the schedule should be able to be produced in this Court. Its production in this Court without having been considered by either the High Court or the Court of Appeal creates obvious problems for this Court in having to assimilate an extensive amount of factual data without the assistance of the Courts below. It also makes this Court effectively a Court of first and last resort in relation to any factual issues arising from the material.

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[21] Mr Beckham did however know that recordings of calls he made from the monitored phone had been obtained from the police from 2010 and would have known he had discussed his case with Ms Taylor and Gary Beckham during some of those calls.

[51] However, the Court gave leave for counsel to address the issues relating to the alleged breaches of privilege that are said to be evidenced by the schedule. We therefore address the issues now.

(a) Alleged breaches of solicitor/client privilege

[52] Mr Mount said three of the calls made by Mr Beckham to his partner, Jenny Taylor, involved material that was subject to solicitor/client privilege. We will deal with each of these in turn.

(i) 25 May 2009

[53] The first example given by Mr Mount relates to a call between Mr Beckham and his partner Ms Taylor, that took place on 25 May 2009. This call lasted eight minutes and 28 seconds. In one part of the call, which lasted about three minutes, there was a discussion during which Mr Beckham and Ms Taylor discussed the circumstances in which Mr Beckham had purchased an apartment property in Auckland. Ms Taylor said the police had sought an interview with her father about this. At one stage, it was suggested that Ms Taylor would ask Mr Gibson if he wanted Ms Taylor's parents to write to the police saying they did not agree to an interview by the police. Mr Beckham and Ms Taylor seemed to be concerned that if they did speak to the police it would be unhelpful to the defence case. This did not therefore relate to the obtaining of advice from Mr Gibson but (potentially) the procuring of advice for Ms Taylor's parents.

(ii) 5 July 2009

[54] The second example relates to a call made on 5 July 2009. In that call, Mr Beckham told Ms Taylor to contact Wayne McKean, a lawyer who had acted for Mr Beckham on other criminal matters, and ask him to send to Mr Gibson material held by Mr McKean that had been subject to police disclosure. This did not involve any privileged communication with Mr McKean. He then told Ms Taylor to tell Mr Gibson that a suggestion in the disclosure material that Mr Beckham had imported unspecified material (presumably drugs or products associated with drugs) was untrue. He then referred to the fact that there was a reference in the disclosed

material to the fact that Mr Beckham is known as "the boss" or "captain". Mr Beckham said it was not true that he was known as "captain" and that in fact "captain" referred to another person, Wayne Hunter.

[55] Mr Mount said that there had been reference to Mr Beckham being known as "captain" in an application for a call data warrant made by the police in October 2008, so it appears that the police believed Mr Beckham was, in fact, known by that name. By accessing this call the police became aware that Mr Beckham was instructing Mr Gibson that it was incorrect that he was known as "captain". This meant the police officers were forewarned that any evidence they adduced at the trial to that effect would be shown to be wrong, and this deprived Mr Beckham of an aspect of his defence.

[56] The particular extract is equivocal as to whether Mr Beckham was, in fact, telling Ms Taylor to instruct Mr Gibson along those lines. It is clear that he was telling Ms Taylor to tell Mr Gibson that it was not true that he had imported drugs, as the police disclosure material said. That was simply a statement of denial of offending, something his not guilty plea had already made clear. It disclosed nothing. But the material about the "captain" appears to be simply a discussion on the topic with Ms Taylor rather than an invitation for her to instruct Mr Gibson to that effect. As such, it appears to us to be, at best, a matter relating to litigation privilege, and not to trigger any solicitor/client privilege.

[57] It is notable that this exchange between Mr Beckham and Ms Taylor comprises less than one minute of a call which lasted six minutes and 18 seconds.

(iii) 12 September 2009

[58] The third example relates to a discussion between Mr Beckham and Ms Taylor during a call on 12 September 2009. The total length of the call was 14 minutes and 58 seconds. There was an exchange comprising about one minute of that call, in which there was a discussion about Detective Sergeant Schmid. In this excerpt Mr Beckham referred to something he had said to Mr Gibson about the police having taken a car under the Proceeds of Crime legislation. But it is not clear that this involved any instruction to Mr Gibson. There was also a request to

Ms Taylor to contact Mr McKean in relation to the proceeds of crime issue, but this did not give any indication of what Mr McKean had been instructed to do. However, later in the call there was a reference by Mr Beckham to Detective Sergeant Schmid, including an allegation by Mr Beckham that Detective Sergeant Schmid has been threatening potential witnesses. Mr Mount said that the defence strategy was to impugn the integrity of Detective Sergeant Schmid at the trial, although ultimately this was ineffective. He said, however, listening to this part of the call informed the police of this trial strategy. That, however, is also a question, if anything, of litigation privilege, and we will deal with it in that context.

Our evaluation – new allegations of breaches of solicitor/client privilege

[59] Solicitor/client privilege is dealt with in s 54 of the Evidence Act. Under s 54(1), a person who obtains legal services from a legal advisor has privilege "in respect of any communication between the person and the legal advisor" if the communication was intended to be confidential and made in the course of, and for the purpose of, obtaining professional legal services from the legal advisor or the legal advisor giving such services to the person.

[60] In this case there was no communication between Mr Beckham and his legal advisor. Mr Mount relied on s 51(4) of the Evidence Act. That provision says:

> A reference in this subpart to a communication made or received by a person … includes a reference to a communication made or received … by an authorised representative of that person on that person's behalf.

[61] We accept the solicitor/client privilege could potentially apply where an accused person gives instructions to his or her lawyer through an intermediary, as Ms Taylor was here. However, for the reasons given in relation to each call, we do not think it has been established that they involved communications made in the course of and for the purpose of obtaining legal advice for Mr Beckham in relation to his case. It is not clear whether the discussions between Mr Beckham and Ms Taylor were communicated to Mr Gibson and it is, at best, equivocal as to whether that was even the intention.

[62] We conclude that solicitor/client privilege does not attach to the communications. We now turn to the claim of litigation privilege.

(b) Alleged breaches of litigation privilege

[63] Mr Mount said that there are a number of references in the calls between Mr Beckham and Ms Taylor, as well as between Mr Beckham and his son, Gary Beckham, in which trial strategy or potential witnesses are discussed. He identified 24 calls in which such references occurred. He acknowledged this was a very small proportion of the calls made by Mr Beckham (about one per cent). Mr Mount said these calls attracted litigation privilege because they were communications for the dominant purpose of preparing for his trial. Mr Mount provided us with a schedule of the 24 calls which he said included information subject to litigation privilege. In his oral submissions he highlighted nine of these and we will deal with each of those nine calls in turn.

(i) Innocent use of precursor substances

[64] In a call made on 3 August 2009, Mr Beckham referred to the chemicals found on his property which were alleged to be precursor substances. He referred to acetone, caustic soda, iodine and "zededine" and suggested that each had a legitimate use on the farm property. Mr Mount said this reflected the defence at trial. It is notable this exchange between Mr Beckham and Ms Taylor began seven minutes into a call that lasted nearly 13 minutes, and continued for less than two minutes. Earlier in the call, Ms Taylor had said to Mr Beckham:

> These are things you shouldn't be saying on the phone because it gives away everything you shouldn't be telling.

(ii) Fingerprints on glassware (1)

[65] In the call made on 5 July 2009, to which reference has already been made,[22] Mr Beckham told Ms Taylor that he had evicted a man called Frank Murray from his property because Mr Murray had been "doing something to do with … cooking or something" and that he had told Mr Murray to put material associated with Murray

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[22] Above at [54].

(which Mr Mount told us was, in fact, glassware associated with drug manufacturing) on Mr Beckham's farm. Mr Beckham said "[t]hat's why my prints possibly could be on something" which Mr Mount said was a reference to part of his defence explaining why Mr Beckham's fingerprints were on glassware associated with drug manufacturing found on Mr Beckham's property. This explanation was part of Mr Beckham's defence at the trial.

[66] The exchange relating to this topic appears to have taken about one minute in a call lasting six minutes and 18 seconds.

(iii) Fingerprints on glassware (2)

[67] In a call made by Mr Beckham on 20 August 2009 to Scott Piggott there was a discussion about glassware found on Mr Beckham's property. Mr Beckham first suggested that it seemed that the police had pulled fingerprints from other items and placed them on the glassware, but then also mentioned that "I was doing the olive oil and everything", which Mr Mount said was a suggestion that Mr Beckham's fingerprints were on the glassware because he had used it in the process of making olive oil. That explanation was also put forward at the trial. The olive oil reference was an exchange of a few seconds in a call lasting 15 minutes and 27 seconds. The wider discussion of glassware occupied about one and half minutes of the call.

(iv) Money from legitimate sources

[68] Part of the Crown case was that Mr Beckham's wealth could not be explained from legitimate earnings and that this therefore supported the case that he had made money from drug dealing. In the prosecutor's closing address, he referred to Mr Beckham having large amounts of cash, and money being invested in a boat, his partner's bank account and an apartment at Alpha Apartments.

[69] Mr Mount said that Mr Beckham's defence was that the funds had been obtained from legitimate sources, and this had been the topic of discussion in calls on 12 April, 16 April, 20 April and 25 May 2009. Details are as follows:

(a) The 12 April call was a call lasting just under 12 minutes from Mr Beckham to his son, Gary Beckham. During this phone call Mr Beckham and his son discussed various properties over a period of about five minutes, and at the conclusion of the call Mr Beckham said that the capital gains made from the properties were wrongly characterised by the police as drug money.

(b) The call on 16 April 2009 was another call between Mr Beckham and his son Gary which lasted just under nine minutes. In one exchange which appears to have taken a few seconds, Mr Beckham told his son that the police were trying to say that the money for his apartment came from drug deals but that the people who had given him money were not involved in drugs.

(c) The call on 20 April 2009 was another call between Mr Beckham and his son Gary which lasted ten minutes and 23 seconds. At various points in this conversation there were discussions of property transactions, the overall theme of which is that these transactions had led to Mr Beckham making legitimate profits, rather than this money having come from drug dealing. The conversation on this overall topic extended over about three and a half minutes.

(d) The call of 25 May 2009 was a call by Mr Beckham to his partner, Ms Taylor, to which reference has already been made above.[23] During that call there was a brief discussion lasting a few seconds in which Mr Beckham referred to money provided to Ms Taylor by her father.

(v) Editing of interception data

[70] In the call made on 20 April 2009 from Mr Beckham to his son Mr Beckham observed that the police had extracted a small amount of information from the voluminous amount of data derived from the interception of communications and that this information, when taken out of context, would seem incriminating. This

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[23] Above at [53].

was a brief exchange of about a minute and a half in a call of ten minutes and 23 seconds duration. Mr Mount said this was an aspect of the defence case. The point was made in defence counsel's closing at the trial that the apparently incriminating calls were a tiny proportion of all of the communications that were intercepted and that this had been taken out of context.

(vi) "Captain" reference

[71] This has already been discussed above.[24]

(vii) Denial of involvement in 10 December manufacture

[72] In the call made on 16 April 2009 from Mr Beckham to his son Gary Mr Beckham observed that the police were alleging that he received methamphetamine manufactured on 10 December 2008 and sold it, which he described as "all lies". The observation occupied a few seconds of the call which lasted nearly nine minutes. The allegation had been included in a summary of facts prepared by the police, but the allegation was not advanced at trial. Mr Mount suggested that this was because the police had become aware of Mr Beckham's denial. A more plausible explanation would be that the police did not make the allegation because they could not prove it.

(viii) Legitimate trips to China

[73] In Mr Beckham's defence counsel's closing address at the trial, he recorded that Mr Beckham's son Gary had given evidence about the legitimate purpose for trips to China. Counsel observed that it was now accepted that they were, indeed, legitimate. The trips to China were discussed by Mr Beckham with Gary in a call made on 26 March 2009. The call lasted six minutes and nine seconds. In an exchange lasting a few seconds Mr Beckham said to his son, Gary, that no trip he made to China had anything to do with methamphetamine. A similar discussion took place in a later call made on 22 July 2009 by Mr Beckham to his son, Gary. That call lasted just over 13 minutes and the exchange occupied less than one minute.

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[24] At [55].

(ix) Allegation of unethical conduct by Detective Sergeant Schmid

[74] This has been dealt with above.[25]

Our evaluation – new allegations of breaches of privilege

[75] We now evaluate the nine examples of alleged breach of litigation privilege and the three additional allegations of breach of solicitor/client privilege which, for reasons given above, we treat as involving claims for litigation privilege.[26]

[76] As noted earlier, we have faced a number of difficulties in evaluating the factual significance of these calls. First, we have no High Court or Court of Appeal findings of fact. Second, we have heard no evidence in response from the Crown, and indeed Mr Boldt did not really engage with the factual aspects of these calls in his submissions. Third, the transcripts provided to us are transcripts of the parts of the calls that Mr Mount wished to highlight to us without having transcripts of the rest of the calls (in all cases, the greater part of the call). In those circumstances, it is difficult for us to establish the context.

[77] Mr Mount argued that these communications attracted the privilege provided for in s 56 of the Evidence Act. Under that section, a person who is, or on reasonable grounds contemplates becoming, a party to a proceeding has privilege in respect of communications between that person and any other person, but "only if the communication … is made [or] received … for the dominant purpose of preparing for a proceeding or an apprehended proceeding".

[78] We will assess the claims for litigation privilege by first considering the dominant purpose criterion and then considering whether the communications were confidential (or whether the privilege requires that the communication be confidential).

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25 Above at [58].
26 Above at [59]–[61].

(i) Dominant purpose

[79] There is no doubt in the present case that Mr Beckham was, at the time of the relevant phone calls, a party to a proceeding (the prosecution for drugs offences). So the question that needs to be determined is whether the communications between Mr Beckham and the recipients of the phone calls were communications made or received for the dominant purpose of preparing for the trial.

[80] As is clear from our summary of the calls, only small portions of the calls are the subject of claims of litigation privilege. This suggests that the dominant purpose of the calls between Mr Beckham and his partner and son were family and personal matters, rather than preparation for the trial. However, Mr Mount argued that it was not necessary for Mr Beckham to establish that the dominant purpose of each call was preparation for trial, but rather that the dominant purpose of the particular excerpt from the call for which the privilege claim is made was for the purpose of preparing for trial. In support of that argument he cited the decision of the Federal Court of Australia in *Kennedy v Wallace*.[27] In that case, Allsop J said:[28]

> If a conversation or a note can be divided up such that privileged and non-privileged material can be segregated, the communications or writing made for the dominant purpose of obtaining legal advice will be privileged, even if the balance of the communications, perhaps even if most of the communications go to other matters.

[81] That case dealt with solicitor/client privilege rather than litigation privilege, and the statement was made in a context where the issue related to the requirement to discover non-privileged material in civil litigation. The other Judges (Black CJ and Emmett J) made no comment on this statement and decided the case on different grounds. It is notable that in the paragraph immediately preceding the extract quoted above, Allsop J said:[29]

> If there is one conversation or one body of writing incapable of being broken up into which there is intermingled privileged material and non-privileged material the communication as one or as a whole will only be protected if the dominant purpose of the communication or the creation of the writing was to give or receive or record legal advice.

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27 *Kennedy v Wallace* [2004] FCAFC 337, (2004) 142 FCR 185.
28 At [159].
29 At [158].

[82] There are other authorities supporting the proposition that, where privilege is claimed for a whole document but the document can properly be severed into non-privileged and privileged portions, then only the privileged portion can be withheld from disclosure.[30]

[83] The report of the Law Commission preceding the Evidence Act made it clear that the provision that is now s 56 was "intended to state the existing law as laid down by the Court of Appeal in *Guardian Royal Exchange Assurance of New Zealand Ltd v Stuart*".[31] In *Guardian Royal Exchange Assurance of New Zealand Ltd v Stuart*, the Court of Appeal adopted the dominant purpose test in place of an earlier more liberal, "appreciable purpose" test.[32] It is clear that the intention of the Court of Appeal in that case was to limit the scope of litigation privilege. In his judgment, Richardson J observed that "the public interest is best served by rigidly confining within narrow limits the cases where material relevant to litigation may be lawfully withheld".[33]

[84] We think it is consistent with the intention of the legislature to adopt the law set out in *Guardian Royal Exchange Assurance of New Zealand Ltd v Stuart* to apply the dominant purpose test with some rigour. We do not think that the approach suggested by Mr Mount is sustainable, essentially because it undermines the dominant purpose test and renders it meaningless.

[85] We accept that there may be cases where a proper delineation can be made between different parts of a document. However, applying an approach of severing material prepared for the purpose of trial from other material when dealing with written documents and in circumstances where legal advice can be obtained is easier than attempting to do this in relation to discursive and wide ranging telephone conversations where the topics discussed are varied and sometimes intertwined. The

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30 See for example, *Ensham Resources Pty Ltd v AIOI Insurance Co Ltd* [2012] FCAFC 191, (2012) 209 FCR 1; and *Waterford v Commonwealth of Australia* (1987) 163 CLR 54 at 66 per Mason and Wilson JJ and 85 per Deane J. There is also English authority supporting this approach, see for example: *GE Capital Corporate Finance Group Ltd v Bankers Trust Co* [1995] 1 WLR 172 (CA); and *Hellenic Mutual War Risks Assoc (Bermuda) Ltd v Harrison (*"*The Sagheera*") [1997] 1 Lloyds Rep 160 (QB) at 170.

31 Law Commission *Evidence, Volume 2: Evidence Code and Commentary* (NZLC R55, 1999) at 151.

32 *Guardian Royal Exchange Assurance of New Zealand Ltd v Stuart* [1985] 1 NZLR 596 (CA).

33 At 605.

exercise is even more difficult in the present case because we have only the material in respect of which litigation privilege is claimed, and do not have transcripts of the remainder of the telephone conversations concerned.

[86] But, doing the best we can on the basis of the information before us, we accept the submission made by Mr Boldt on behalf of the Crown that the overall purpose of the communications between the appellant and his partner and son appears to be simply keeping in touch and discussing normal domestic and business matters, rather than preparation for trial.[34] Certainly the material which is now said to be subject to (indirect) solicitor/client privilege and litigation privilege appears to be a very small proportion of the conversations overall. We do not consider that it is possible on the evidence before us to form a view that there are separately divisible parts of the conversations to which litigation privilege could attach.

[87] On the basis of the evidence we have, we consider that the dominant purpose of the conversations must be considered in reference to the conversation as a whole, and we are not able to find in respect of any of the conversations that the dominant purpose was preparation for trial.

(ii) Confidentiality

[88] Mr Boldt argued that, even if it could be established that the dominant purpose of any of the communications was preparation for trial, none of the communications was made in circumstances where confidentiality was assured or even expected. That is because the calls between Mr Beckham and Ms Taylor and Gary were all made from the monitored phone at the prison. As noted earlier, calls from the monitored phone are preceded by an automated warning that the call will be monitored and may be listened to.

[89] Mr Beckham said in evidence that he realised that calls made from the monitored phone were subject to this requirement. It is also clear from some of the conversations that he realised this, for example in one conversation he mentioned

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[34] Mr Boldt accepted that one call, from Mr Beckham to his son, Gary, could be said to have had the dominant purpose of discussing Mr Beckham's defence. Gary Beckham was with Mr Palmer at the time and handed the phone to Mr Palmer. The police officer did not listen to, or record, the discussion with Mr Palmer.

that he needed to talk about something but that he could not do so on the telephone because of the possibility of monitoring. We therefore accept Mr Boldt's submission that the calls from Mr Beckham to Ms Taylor and Gary were not made in circumstances where confidentiality was expected.

[90] Mr Boldt argued that confidentiality was a prerequisite for a claim of privilege: if that communication was made with no expectation of privacy or confidentiality, then privilege could not be asserted. In support of this he cited the Law Commission Report on Evidence,[35] *Guardian Royal Exchange Assurance of New Zealand Ltd v Stuart*[36] and the decision of the Court of Appeal in *Ophthalmological Society of New Zealand Inc v Commerce Commission*, in which the Court observed that "it is the essence of privilege that the material to which it attaches is confidential".[37] In oral submissions he also cited the post-Evidence Act decision in this Court of *Jeffries v Privacy Commissioner*, where Elias CJ observed that "[s]ection 56, like the common law of litigation privilege it replaces, is concerned, rather, with preserving confidentiality in the preparation for a proceeding."[38]

[91] Mr Mount had a number of answers to this.

[92] First, he argued that confidentiality was not a prerequisite for the assertion of litigation privilege. In that regard he noted that s 56 does not refer to confidentiality, unlike s 54, which deals with solicitor/client privilege.

[93] We accept that there is no reference to confidentiality in s 56. But we think a requirement for confidentiality is consistent with the fact that s 56 was intended to codify the law as stated in *Guardian Royal Exchange Assurance of New Zealand Ltd v Stuart*, given the reference in that decision not only to confidentiality but also to the need to confine the boundaries of litigation privilege. The law in both the

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35 Law Commission *Evidence, Volume 1: Reform of the Law* (NZLC R55, 1999) at [248].

36 *Guardian Royal Exchange Assurance Co of New Zealand Ltd v Stuart*, above n 32, at 601.

37 *Ophthalmological Society of New Zealand Inc v Commerce Commission* [2003] 2 NZLR 145 (CA) at [20].

38 *Jeffries v Privacy Commissioner* [2010] NZSC 99, [2011] 1 NZLR 45 at [21].

United Kingdom and Australia requires confidentiality as an element of privilege.[39] Two Canadian cases suggest otherwise. But there is no substantive reasoning in either case supporting the conclusion that confidentiality is not required for the privilege.[40]

[94] The requirement for confidentiality is consistent with s 65 which deals with waiver of privilege, and applies to all of the different types of privilege described in ss 54–60 and in s 64 of the Evidence Act. Under s 65(2), waiver occurs when the person claiming privilege voluntarily discloses or consents to production of the privileged communication "in circumstances that are inconsistent with a claim of confidentiality". It is hard to see why that requirement would apply to privilege asserted under s 56 if there was no requirement in the first place for confidentiality.

[95] Second, Mr Mount argued that the fact that calls were monitored did not destroy the privileged status of the calls because the statutory power to monitor is restricted and specifically preserves privilege. He referred in particular to s 122 of the Corrections Act 2004, which says that evidence obtained by monitoring of a prisoner call would, but for the monitoring, have been privileged, remains privileged and must not be given in any Court except with the consent of the person entitled to the privilege.

[96] The nature of the privilege preserved by s 122 is somewhat enigmatic, because it is described in this section as privilege "by virtue of … any provision of Part 3 of the Evidence Amendment Act (No 2) 1980". Unfortunately that section was not updated when the Evidence Act was passed in 2006. Part 3 of the Evidence Amendment Act (No 2) 1980 did not refer to litigation privilege, that is, it had no equivalent to s 56 of the Evidence Act. Mr Mount said that s 22 of the Interpretation Act 1999 applies in this situation.

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[39] In Australia and the UK the existence of a separate litigation privilege at common law is contentious, and in both cases legal professional privilege has a requirement of confidentiality: J D Heydon (ed) *Cross on Evidence Australian Edition* (looseleaf ed, LexisNexis) at [25210] and H M Malek (ed) *Phipson on Evidence* (18th ed, Sweet & Maxwell, London, 2013) at 692–693). Australia also has a statutory litigation privilege which requires confidentiality: see Evidence Act 1995 (Cth), s 119. See also *Crisford v Haszard* [2000] 2 NZLR 729 (CA) at [29]–[30].

[40] *Blank v Canada (Minister of Justice)* 2006 SCC 39, [2006] 2 SCR 319 at [32] and *General Accident Assurance Co. v Chrusz* (2000) 180 DLR (4th) 241 (ONCA) at 255.

[97] Section 22(2) says that any reference in an enactment to a repealed enactment is a reference to an enactment that, with or without modification, replaces, or that corresponds to, the enactment repealed. In this case Part 2, subpart 8 of the Evidence Act 2006 is the part of the 2006 Act that replaces or corresponds to Part 3 of the 1980 Act. We agree with Mr Boldt that the difference in scope of Part 2, subpart 8 of the 2006 Act from the more limited Part 3 of the 1980 Act suggests that it would not be appropriate to treat the whole of Part 2, subpart 8 of the 2006 Act as the replacement for Part 3 of the 1980 Act when applying s 22(2) of the Interpretation Act.

[98] The definition of "enactment" in s 29 of the Interpretation Act refers to "a portion of an enactment", so the intention of s 22 can be fulfilled by treating the reference in s 122 of the Corrections Act to Part 3 of the 1980 Act as referring to the provisions of the 2006 Act that correspond with the provisions appearing in Part 3 of the 1980 Act. That avoids a substantial change in the scope of s 122 occurring by essentially a side wind. Accordingly, we conclude that s 122 does not preserve litigation privilege in monitored calls. If the legislature intends to extend the scope of s 122 in that way, it should do so expressly.

[99] Mr Boldt also argued that, if confidentiality had been preserved, the privilege had been waived in terms of s 65(2) of the Evidence Act because statements were made on monitored calls. We do not think this requires separate analysis given our earlier conclusions. We have concluded that the conversations did not have the necessary confidentiality from the outset.[41]

Conclusion – new allegations of breaches of privilege

[100] In those circumstances, we do not consider there is a sufficient evidential basis for us to take into account the new allegations of breach of privilege in considering the appeal against the Court of Appeal's refusal to grant a sentence reduction or the application for leave to appeal against conviction.

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41 Above at [89].

Evaluation of the facts: five propositions

[101] We have traversed the factual background in some detail because this was a major focus of the oral submissions made to us by counsel for Mr Beckham, Mr Mount, and because the allegations advanced by Mr Mount in support of Mr Beckham's case appeared to us to be out of step with the facts as found in the High Court and, in relation to the new information, with the evidence available to us. Five of the propositions advanced by Mr Mount related to the facts of the case, and it is convenient to address our evaluation of the facts by reference to those propositions.

Proposition 1

[102] Mr Mount's first proposition was:

> The Police unlawfully seized all the Appellant's recorded telephone calls over 11 months while he was on remand on [drugs] charges. The Police twice obtained search warrants that included calls to his lawyer, without telling the Court of their intention.

[103] The seizures referred to by Mr Mount were those pursuant to the two search warrants and also the material provided to the police by Customs. The High Court Judge found that the failure of Detective Sergeant Lunjevich to exclude Mr Gibson's number from the application for the search warrants and to ensure that provision was made to deal with privileged material was "an oversight".[42] She accepted that Detective Sergeant Lunjevich did not turn his mind to the need to disclose to the issuing officer the possibility of privileged information being seized pursuant to the warrant and that "he did not deliberately and consciously make a decision to withhold that information from the Court".[43]

[104] This finding was upheld by the Court of Appeal.[44]

[105] We consider that the finding that Detective Sergeant Lunjevich's actions were an oversight was an unduly favourable one given that he accepted that he was aware that one of the numbers listed in the application for search warrant was Mr Gibson's

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42 *Bcekham* (HC) No 1 , above n 4, at [82](a).
43 At [82](a).
44 *Beckham* (CA), above n 1, at [84] and [87].

number, but still did nothing to alert the issuing officer to the obvious likelihood that privileged information would be seized pursuant to any warrant that was issued. It is simply unacceptable for a police officer to seek a warrant that would involve seizure of privileged calls between a remand prisoner and his lawyer and equally unacceptable that the judicial officer who issued the warrant was not made aware of the situation.

[106] We accept that the appellant's proposition 1 properly reflects the factual situation.

Proposition 2

[107] Mr Mount's second proposition was:

> For approximately seven months, teams of officers systematically listened to and summarised the Appellant's calls, with a significant focus on extracting "value" for [the present] case. The calls and summaries revealed important aspects of the Appellant's trial preparation, instructions to counsel and strategy.

[108] It is true that officers reporting to Detective Sergeant Lunjevich listened to and summarised the calls. But, as the High Court Judge made clear, the officers did not listen to the calls subject to solicitor/client privilege between Mr Beckham and Mr Gibson or the discussion Mr Beckham had with Mr Palmer.[45] Mr Mount did not challenge the factual finding that no calls subject to solicitor/client privilege were listened to by police officers.

[109] So the focus of this proposition is the calls subject to litigation privilege. As we have found that litigation privilege did not apply to those calls, this aspect of the proposition is rejected.

[110] We also reject the statement that the monitoring had a significant focus on extracting value for the drugs trial by listening to information subject to litigation privilege. It is true that those listening to the calls were asked to note whether information obtained from them was of assistance to Operation Valley or Operation

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[45] *Beckham* (HC) No 1, above n 4, at [43]–[45].

Jivaro.[46] But, as the High Court Judge found, officers superior to Detective Sergeant Lunjevich directed that information derived from the calls (whether privileged or not) should not be provided to the officers involved in Operation Jivaro, and that direction was complied with.[47] The information was, however, provided to Detective Peat, a topic raised by Mr Mount's third proposition.

Proposition 3

[111] Mr Mount's third proposition was:

> The Police gave the summaries and a full set of the recordings to a key investigator and Crown witness in the case before trial. The Crown prosecutors also received a full set of the calls before trial.

[112] The first part of this proposition refers to the fact that disks containing the call data were provided to Detective Peat as outlined earlier. The second part of the proposition refers to the fact that when Detective Sergeant Lunjevich was preparing for the hearing of the first stay application he made copies of the disk containing the call data for defence counsel, but also prepared copies for counsel for the Crown, the Court and the police. The finding of Andrews J in relation to this was as follows:[48]

> His [Detective Sergeant Lunjevich's] evidence was that he created these copies not because Crown counsel had expressed any interest in receiving a copy, rather because it is his usual practice that anything provided to defence counsel is also provided to Crown counsel. The copy provided to the Crown was retrieved, at Crown counsel's request, almost immediately. The copy intended for the Court was not filed in Court.

[113] That finding was not challenged. We see this therefore as an error made by Detective Sergeant Lunjevich. The Crown prosecutor was alert enough to ensure that the call data was not listened to by Crown counsel and was returned to the police. In other words, even if there had been privileged information related to the drugs trial on the disks, this incident was of no practical consequence.

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46 See above at [20].

47 *Beckham* (HC) No 1, above n 4, at [48]. Disclosure of non-privileged information to officers involved in Operation Jivaro would not have been unlawful if the information had been obtained pursuant to a valid search warrant.

48 At [50].

[114] Provision of the disk to Detective Peat would have been potentially significant if there was privileged information on the disks because, although he was not part of the drug squad and not part of the Operation Jivaro team, he was a prosecution witness. The fact that Detective Peat had access to the information was the subject of detailed consideration by Andrews J in the second High Court judgment. In that judgment, Andrews J dismissed an application by Mr Beckham for an order that evidence be called from all of the officers who had had access to the drive on which the call data had been stored in the police computer (14 people) and all officers in the Asset Recovery Unit be required to give evidence. The Judge accepted Detective Peat's evidence that he did not tell anyone that he had the disks. She was satisfied that there was no realistic possibility that anyone else in the Asset Recovery Unit may have obtained access to the disks. She confirmed her earlier finding that no calls made by Mr Beckham to Mr Gibson had been listened to by any police officer. She also accepted Detective Sergeant Lunjevich's evidence that he did not turn his mind to the possibility that the disks given to Detective Peat would contain privileged calls.[49]

[115] We conclude in relation to proposition 3, therefore, that it is true that access to the call data was provided to Detective Peat. It is also true that he was a witness at the trial. Whether he was a "key investigator" is doubtful, but of no consequence. On the Judge's findings of fact, which were upheld by the Court of Appeal and not challenged in this Court, Detective Peat did not reveal that he had the call data to anyone in the Operation Jivaro team and did not listen to any of the privileged calls. His focus was on identifying safety deposit boxes, and for that purpose he listened to about 15 calls, although he could not recall which ones. The call data did not assist his investigation and he then "parked" the disks and did not listen to them again. So, even if there had been privileged information on the disks, it would not have come to the attention of the Operation Jivaro investigators or the prosecution team.

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[49] *Beckham* (HC) No 2, above n 14, at [42].

Proposition 4

[116] Mr Mount's fourth proposition was:

> The Police selectively used a small number of excerpts from the summaries to oppose bail. The Appellant learned about the seizure of calls to counsel, and this interfered with his ongoing access to counsel.

[117] The first sentence of this proposition appears to refer to Detective Sergeant Good's affidavit referred to earlier.[50] Mr Mount did not elaborate on what information he was referring to. It is true that the affidavit disclosed the existence of Operation Valley and the fact that the police had seized call data, and that this included recordings of calls to Mr Gibson. So we accept the second sentence of the proposition as accurate.

[118] However, it omits the key point about the bail application, namely that bail was granted. As mentioned earlier, Mr Gibson had filed a memorandum in support of the bail application in which he set out the difficulties in preparing for trial, particularly in light of the apparent recording of calls between Mr Beckham and Mr Gibson.[51] In that memorandum, he argued that the granting of bail would be "an effective and efficient remedy" for the difficulties that Mr Beckham had in preparing for trial, including his concerns about calls to Mr Gibson being monitored. That "effective and efficient remedy" was granted by Duffy J when she granted bail. Thus, to the extent that the police activity had interfered with trial preparation, the most effective remedy (bail) was granted.

Proposition 5

[119] Mr Mount's fifth proposition was:

> Police did not disclose the nature or extent of their systematic review and dissemination of the Appellant's trial preparation and strategy until after trial.

[120] There was not, in fact, a systematic dissemination of the data. We have already dealt with this aspect. In fact the data was retained within the Operation

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50 Above at [30].
51 Above at [32].

Valley team, apart from its provision to Detective Peat, who did not disseminate it to anyone else involved in the Asset Recovery Unit or to anyone in the Operation Jivaro team.

[121] The police did disclose the fact that Operation Valley existed and that calls had been intercepted before the second bail hearing. They did not, however, disclose the schedules that had been prepared by the screeners until the hearing of the application for further evidence, which led to the third High Court Judgment. In that judgment, Andrews J found that until the first application for a stay was made on 3 December 2010, the request for disclosure related only to the drugs trial, and not to Operation Valley. She accepted that the Crown queried the relevance of any Operation Valley material to the trial, so it did not intend to rely on any of the intercepted communications in relation to the trial.[52]

[122] Accordingly, Andrews J rejected the submission made on behalf of Mr Beckham that there had been a delay in disclosure. She noted that the disk containing the call data was provided on 22 November 2010, well before the trial.[53] The Court of Appeal found that the Judge's factual findings were supported by the evidence.[54] Mr Mount did not challenge this factual finding in this Court. Accordingly, proposition 5 has little significance in the resolution of the appeal.

Conclusion on propositions relating to the facts

[123] Our conclusion on the factual propositions advanced in support of Mr Beckham's case is that they overstate the allegations against the police and their impact on Mr Beckham. They are simply not consistent with the factual findings made in the High Court and upheld in the Court of Appeal. There was no challenge to those findings in this Court, apart from the finding that Detective Sergeant Lunjevich's failure to alert the judicial officer to the fact that recordings of calls to Mr Gibson could be obtained under the search warrants issued by the District Court was an "oversight". The suggestion that privileged information came into the hands of the prosecutors at Mr Beckham's trial, with the implication that his fair trial right

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52 *Beckham* (HC) No 3, above n 15, at [21].
53 At [21].
54 *Beckham* (CA), above n 1, at [87].

was affected, is not borne out by the evidence. There is no proper factual underpinning for Mr Beckham's claims.

Alleged breaches of the Bill of Rights Act: two propositions

[124] We now turn to the two propositions advanced on Mr Beckham's behalf as to breaches of the Bill of Rights Act.

Proposition 6

[125] Mr Mount's sixth proposition is:

> Police breached the right to be free from unreasonable search and seizure:
>
> a. Seizures unlawful
>
> i. Search warrants invalid / seizure by and from Customs unlawful;
>
> ii. Privileged material unlawfully seized
> - legal advice privilege
> - litigation privilege
>
> b. Seizures and subsequent searches unreasonable.

[126] As noted earlier, the application for the first search warrant included, among the nine telephone numbers that were specified, Mr Gibson's number. Detective Sergeant Lunjevich knew it was Mr Gibson's number and therefore knew that communications from Mr Beckham to his lawyer about his trial would be included in the material seized by police from Corrections if the warrant were issued. He did not refer to this in the application, nor did the application make any provision for dealing with material that was subject to solicitor/client privilege in order to protect that privilege.

[127] This was a clear breach of the requirement for the applicant to be candid with the judicial officer to whom the application for the warrant was made and also failed to make provision to deal with the privileged information.[55] We agree, therefore, that the search warrant issued on 17 August 2009 was invalid, because of these

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[55] *Tranz Rail Ltd v Wellington District Court* [2002] 3 NZLR 780 (CA) at [21]–[22]; *A Firm of Solicitors v District Court at Auckland* [2004] 3 NZLR 748 (CA) at [55]. See also Andrew Roberts "*R v Turner (Elliott Vincent)*" [2013] Crim LR 993.

deficiencies in the process leading to its issue. Substantially similar problems applied to the search warrant issued on 6 January 2010. In that latter case, there was also the problem that no disclosure was made that calls to Mr Gibson had been obtained under the 17 August 2009 warrant.[56] We accept Mr Mount's submission, therefore, that the seizures made pursuant to these warrants were unlawful.

[128] The requisitions made by Customs were also unlawful because calls to Mr Gibson were included among the material that Customs required to be disclosed to it notwithstanding the clear prohibition against the requisitioning of privileged information under s 162 of the Customs and Excise Act.

[129] We therefore accept that the seizure of material subject to solicitor/client privilege was unlawful, as submitted by Mr Mount. We have, however, rejected the claims of litigation privilege. However, this does not alter the fact that the breaches of solicitor/client privilege and the lack of candour in the applications for the warrants rendered the process leading to the issue of warrants defective and rendered the warrants themselves unlawful.

[130] We also accept that the seizure of material pursuant to the invalid warrants was unreasonable and in breach of s 21 of the Bill of Rights Act. If any evidence had been obtained from this material and the Crown had sought to adduce it in support of its case at Mr Beckham's trial, it would have been necessary to determine whether that evidence should be admitted under s 30 of the Evidence Act. However, as no such evidence was obtained, that issue does not arise.

Proposition 7

[131] Mr Mount's seventh proposition was:

> Police also breached the right to a fair trial and right to counsel:
>
> Where a member of a prosecution team unlawfully acquires privileged details of a defendant's trial preparation (including strategy, defence evidence or instructions to counsel) there is a rebuttable presumption that the fairness of the trial process has been compromised.

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[56] There was a passing reference to the fact that all the recordings of calls obtained under the 17 August 2009 warrant had been listened to "except those deemed to be privileged (such as calls to a solicitor)".

[132] We see the first part of this proposition as failing on the facts. No one in the prosecution team, including Detective Peat, listened to any material subject to solicitor/client privilege. We do not accept that the call data seized by the police included material subject to litigation privilege. But even if it had, it was not disclosed to the prosecutors or to the Operation Jivaro team. The only basis on which the issue of fair trial rights could be raised would be the disclosure of the call data to Detective Peat. However, given the factual finding made by the High Court Judge and upheld by the Court of Appeal that he "parked" the information after listening to only 15 calls and did not disclose to anyone else that he had the data, there would have been no impact on the fairness of Mr Beckham's trial in any event, even if the material disclosed to Detective Peat had attracted litigation privilege.

[133] In support of the second part of the proposition, Mr Mount argued that the actions of the police in obtaining access to legally privileged information created "at least possible prejudice" to Mr Beckham's fair trial rights. He argued that in those circumstances there is a rebuttable presumption that the fairness of the trial process has been compromised. Since that presumption had not been rebutted, we should find that Mr Beckham did not have a fair trial and we should give leave to appeal against conviction, allow the appeal and quash the conviction. In view of our finding that this claim fails on the facts, it is not strictly necessary for us to deal with this. But having heard full argument on the issue, we will address it.

[134] In his oral submissions, Mr Mount expanded on the rebuttable presumption approach by reference to four cases. These cases all involve breaches of solicitor/client privilege (or both solicitor/client privilege and litigation privilege) rather than litigation privilege alone. Mr Mount argued that this was not a reason for distinguishing them. We analyse each briefly.

R v Bruce Power Inc

[135] *R v Bruce Power Inc* is a decision of the Court of Appeal of Ontario.[57] Bruce Power owned a nuclear power plant in which the employee of a subcontractor was seriously injured. A prosecution was commenced under the legislation relating to

[57] *R v Bruce Power Inc* (2009) ONCA 573, (2009) 98 O.R. (3d) 272.

occupational health and safety. Bruce Power had received an investigation report which was found to be covered by both solicitor/client privilege and litigation privilege. The report came into the hands of the Crown prosecutors. The issue before the Court was whether the defendant had the burden of proving prejudice or whether prejudice would be presumed in those circumstances.

[136] The Court found that there was a rebuttable presumption of prejudice where solicitor/client privilege had been breached. This was justified on the basis that the prosecution should be able to demonstrate a lack of prejudice if it keeps proper records. This could be compared to the difficulty that the defence would face in establishing actual prejudice. The presumption was not rebutted by the Crown. Although the Court found that it did not necessarily follow that the charges should be stayed, it determined that a stay was appropriate in that case.

R v Desjardins

[137] *R v Desjardins* is a decision of the Newfoundland Supreme Court.[58] The Court was faced with a situation where the police had unlawfully intercepted communications between defendants in an upcoming drugs trial and their lawyers. The Court did not accept that the information obtained from the interceptions had been insulated from the prosecuting lawyer, and so proceeded as if the prosecutor had received the information. They found that insulation was impossible, as there remained a real risk that the information would influence the actions of the police in preparation for trial, even unconsciously.[59] The Judge formed the impression that the information obtained by the Crown gave it an unfair advantage and would prevent the defendants from obtaining a fair trial. He found that the Crown had not provided sufficient evidence to neutralise that impression of unfairness. He found that the appropriate remedy was a stay, and a stay was accordingly entered.

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58 *R v Desjardins* (1991) 274 APR 149 (NLSCTD).
59 At [63]–[64].

USA v Levy

[138] *USA v Levy* was a decision of the United States Court of Appeals Third Circuit.[60] In that case the defendant had been in a criminal operation with an informer and both had the same lawyer. As a result of information received from the informer, the enforcement agency and the prosecutor became privy to elements of the defence strategy. The Court found that once it was established there had been actual disclosure of defence strategy, it was not possible to assess the prejudice on a case by case basis. It found that, once this was established, the only appropriate remedy was dismissal of the indictment.

State of Connecticut v Lenarz

[139] *State of Connecticut v Lenarz* is a decision of the Supreme Court of Connecticut.[61] In that case the majority found that confidential communications contained on the defendant's computer came into the hands of the prosecution. Although there is disagreement between the judgments, it appears that this occurred in circumstances that were unintentional and the prosecutor disclosed the receipt of the information to the defendant immediately. The Court found that this unintentional intrusion into confidential communications necessitated the dismissal of the charges against the defendant as the information contained aspects of the defendant's trial strategy. This case is notable for the very strong dissent, which highlights the fact that the government was not given the opportunity to rebut the inferences drawn in the majority decision and the fact that the decision under appeal had included a finding that there had been no actual prejudice to the defendant.

[140] Mr Mount asked us to deduce from these authorities that in circumstances where privileged information comes into the hands of the prosecution, there is a rebuttable presumption of prejudice to the defendant and an abuse of the Court's process. If the presumption is not rebutted, then a stay of proceedings is the appropriate remedy.

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60 *USA v Levy* (1978) 577F 2d 200 (3d Cir 1978).
61 *State of Connecticut v Lenarz* 22A. 3d 536 (Conn 2011).

[141] The approach taken in the four cases relied on by Mr Mount reflects that taken by the England and Wales Court of Appeal in *R v Grant*, a decision relied upon by Mr Mount in the Court of Appeal.[62] That decision has been criticised and described as wrongly decided in later decisions of the Supreme Court of the United Kingdom[63] and the Privy Council.[64]

[142] The approach is also not consistent with the approach taken in abuse of process cases in New Zealand, as outlined in *Fox v Attorney-General*,[65] *Moevao v Attorney-General*,[66] and *Antonievic v R*.[67] That is a more nuanced approach taking into account a number of factors such as the seriousness of the violation of the defendant's rights, the presence or absence of bad faith, whether there was any emergency or necessity for the conduct, other available sanctions, the seriousness of the charges and the causal link between the conduct and the trial or proposed trial.[68] As Lord Dyson said in *Warren*:[69]

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

[143] Mr Mount's argument in favour of the granting of leave to appeal against conviction depended on our acceptance of the "presumed abuse of process" approach. He accepted the obvious difficulties faced by this Court in considering claims based on evidence that was not before the High Court and Court of Appeal and therefore not considered by either Court. He argued that the new evidence was sufficient to establish breaches of privilege and consequent breaches of Mr Beckham's rights and, in the absence of any rebuttal of the presumption of abuse of process, we should find that a stay ought to have been granted.[70] That would lead to the quashing of Mr Beckham's convictions because the fact that the trial went ahead constituted an abuse of process.

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62 *R v Grant* [2005] EWCA Crim 1089, [2006] QB 60.
63 *R v Maxwell* [2010] UKSC 48, [2011] 1 WLR 1837 at [28].
64 *Warren v Attorney-General for Jersey* [2011] UKPC 10, [2012] 1 AC 22 at [36].
65 *Fox v Attorney-General* [2002] 3 NZLR 62 (CA).
66 *Moevao v Department of Labour* [1980] 1 NZLR 464 (CA).
67 *R v Antonievic* [2013] NZCA 483, [2013] 3 NZLR 806.
68 At [97] and [99], following *Warren v Attorney-General for Jersey*, above n 64 at [24].
69 *Warren v Attorney-General for Jersey*, above n 64 at [26].
70 We do not accept that Mr Beckham has established breaches of privilege for the reasons given earlier.

[144] The approach we take to abuse of process requires us to engage with the facts and make clear findings about the conduct of the police or prosecutors and the impact of that conduct on the rights of the defendant. As our evaluation of the new allegations shows, we do not accept that the allegations of breach of privilege are made out. Even if they had been, the claimed breaches related to matters of only peripheral relevance to the drugs trial and matters that were readily apparent in any event. In short, there is not a sufficient evidential foundation for the allegations of abuse of process justifying a stay to provide a proper basis for the granting of leave to appeal against conviction in this case.

[145] If any evidence had been derived from the screening of the calls highlighted by Mr Mount and the Court had found the police conduct constituted unreasonable search and seizure in terms of s 21 of the Bill of Rights Act, the appropriate remedy would have been exclusion of the evidence. But that remedy would be granted only after the balancing exercise required under s 30 of the Evidence Act had been undertaken. That exercise would have required a determination whether or not the exclusion of the evidence was proportionate to the impropriety, taking into account the need for an effective and credible justice system.[71] The argument advanced on behalf of Mr Beckham would require that where the same conduct does not yield any admissible evidence, a presumption of abuse of process follows, for which a stay is the right remedy. The contrast between those two scenarios highlights the unreality of the argument advanced on Mr Beckham's behalf.

[146] Even if Mr Mount had succeeded in convincing us that the presumptive approach should be adopted, we would not have been prepared to apply it in the present case given the circumstances in which the argument has been made, which has effectively deprived the Crown of the opportunity to rebut any rebuttable presumption. Mr Mount accepted that there were real problems having the litigation privilege material dealt with by this Court effectively as a first instance court, but he laid the blame for this on the part of the police for not disclosing the call schedule to him until just before the present appeal was being argued.

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[71] Evidence Act, s 30(2)(b).

[147] We do not accept that the matter can be entirely laid at the feet of the police, given that the call schedule was dealt with in the hearing in the High Court that led to the issuing of the second stay judgment in the High Court and was an exhibit in that proceeding. But, rather than dwell on cause and effect, we simply note the reality that we have had to consider the material for the first time in this Court and that that has meant the material has not been the subject of factual findings in the Courts below. So, if there had been a rebuttable presumption as Mr Mount argued, the Crown would not have had the chance to rebut it.

Remedies: two propositions

[148] We now turn to the two propositions advanced on Mr Beckham's behalf as to remedies.

Proposition 8

[149] Mr Mount's eighth proposition was:

> Convictions should be quashed for breach of the right to fair trial.

[150] We do not accept that proposition. First, for the reasons already given, we do not accept that the fairness of Mr Beckham's trial was compromised by what occurred. We do not adopt the presumptive abuse of process approach advocated by Mr Mount. Rather, we consider that the argument that the trial was an abuse of process fails on the facts. No privileged material was accessed by members of the prosecution team and no material that was seized by the police from Corrections was used in evidence against Mr Beckham. In the circumstances, we refuse leave to appeal against conviction.

Proposition 9

[151] Mr Mount's ninth proposition was:

> Alternatively, the Court of Appeal erred in declining to order a reduction in sentence:
>
> (a) The Court was wrong to hold there was 'no nexus' to this case.
>
> (b) The Court did not correctly state the test for sentence reduction.

(c) Sentence reduction should have been granted on the facts.

[152] Mr Mount argued that the Court of Appeal had been wrong to reject Mr Beckham's claim to a reduction in sentence as a remedy for the infringement of his right to respect for solicitor/client privilege and for the breach of his rights under the Bill of Rights Act.

[153] The Court of Appeal rejected this claim for two reasons. The first was there was "no nexus between any alleged police misconduct under Operation Valley and the sentencing exercise for the drug offending under Operation Jivaro". The second (described as a "fundamental flaw") was that Mr Beckham had suffered no prejudice as a result of the police obtaining privileged material.[72]

[154] It was common ground in this Court that a reduction in sentence can be a remedy for breaches of the Bill of Rights Act in appropriate cases. This Court's decision in *R v Williams* makes that clear.[73] In that case, Wilson J, delivering the judgment for the Court, said that in a case of undue delay in bringing an accused to trial, in breach of s 25(b) of the Bill of Rights Act, an appropriate remedy for a convicted person is likely to be a reduction in the term of imprisonment imposed on that person.[74] The Court emphasised that the remedy for undue delay in bringing an accused to trial "must provide a reasonable and proportionate response to that delay".[75] The Court did not make any general pronouncement on the appropriateness of sentence reduction as a remedy for other breaches of the Bill of Rights Act. We do not do so either.

[155] Mr Mount said that the Court of Appeal was wrong to refuse a sentence reduction because of the absence of any nexus between the police misconduct and the sentencing exercise for Mr Beckham's drug offending. He said that there was no requirement for such a nexus. He submitted that all that is required is that the misconduct relate to the circumstances of the offence or the offender or impact on the offender in some way, citing the decision of the Supreme Court of Canada in

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72 *Beckham* (CA), above n 1, at [18].
73 *R v Williams* [2009] NZSC 41, [2009] 2 NZLR 750.
74 At [18].
75 At [18].

R v Nasogaluak.[76] The comments of the Supreme Court of Canada in that case were made in the context of a ruling that where the misconduct relates to the circumstances of the offence or the offender, then it is a consideration to be taken into account under the sentencing legislation applying in Canada, rather than as a remedy under the remedies provision in the Canadian Charter. The Court said that if the Charter breach did not relate to the circumstances of the offence or the offender, then the victim of the breach would need to seek a remedy outside the sentencing process.[77]

[156] Both Mr Mount and Mr Boldt were content to adopt the formulation set out in *R v Nasogaluak*, notwithstanding the particular statutory provisions at play in that case. We see that as appropriate, and as consistent with the approach taken in relation to other remedies for breaches of the Bill of Rights Act, such as the exclusion of evidence.[78]

[157] Notwithstanding agreement between counsel on the test to be applied, there was a significant difference between them as to the appropriateness of a sentence reduction as a remedy in this case. Mr Mount said that the police misconduct in this case was connected to the sentencing process in six ways, which we now assess.

(a) The interception of telephone calls between Mr Beckham and his lawyer was an impediment to his obtaining legal advice over the telephone

[158] We accept that this may have been a consequence of the police misconduct in this case, but the appropriate remedy for that situation was the granting of bail, and that remedy was provided to Mr Beckham.[79]

(b) The privileged calls were reviewed by officers investigating the drugs charges

[159] We have already pointed out that the privileged calls were not listened to, beyond identifying the fact that they were privileged calls, so this factor is not made out.

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76 *R v Nasogaluak* 2010 SCC 6, [2010] 1 SCR 2006 at [3]–[4] and [47]–[49].
77 At [4].
78 Evidence Act, s 30(5); and *R v Williams* [2007] NZCA 52 [2007] 3 NZLR 207 at [98]–[100].
79 As outlined above at [32]–[33].

(c) The privileged calls were provided to Detective Peat who was involved in the investigation of the charges and gave evidence

[160] We accept this occurred, but we also note that Detective Peat did not listen to the privileged calls and did not tell members of the Operation Jivaro team that he had the disks containing the recordings of the calls, so no privileged information became available to those responsible for the drugs prosecution.

(d) There was a connection in time and circumstance between the misconduct and the charges

[161] That is true, because the conduct occurred while Mr Beckham was in custody preparing for trial on the charges. However, we do not think it provides a sufficient link between the misconduct and the charges to be a telling factor in favour of a sentence reduction. And we see the fact that Mr Beckham was granted bail as having addressed the situation.

(e) The police used extracts from some of the seized calls to oppose bail

[162] Again, that is true but as just noted, bail was, notwithstanding those submissions, granted.

(f) The breaches of Mr Beckham's rights were relevant to his treatment by the justice system

[163] That is true, but it does not provide a sufficient link to be a telling factor in favour of a sentence reduction.

[164] We conclude that the argument that the breaches of Mr Beckham's rights related to the circumstances of the offence or the offender is not made out. To the extent that the police misconduct impacted on Mr Beckham, the impact was appropriately dealt with by the grant of bail.

[165] Mr Mount also challenged the Court of Appeal's finding that there was no prejudice to Mr Beckham. He argued that, in fact, no prejudice needed to be made out, citing the decision of the Appeal Court of the High Court of Justiciary in

Mills v HM Advocate (No 2).[80] In that case the appellant was granted a reduction in sentence on the basis of the delay in hearing his appeal, notwithstanding the fact that the appeal was found to have no merit. The decision was upheld by the Privy Council.[81]

[166] We do not think this case supports Mr Mount's argument. The Court found that, notwithstanding the fact that the appeal had no merit, the appellant had suffered detriment in the form of anxiety resulting from the prolongation of his proceedings and from the hardship to his family that would result from him having to return to prison. So Mr Mills did suffer real prejudice.

[167] Mr Boldt pointed out that the approach suggested by Mr Mount was inconsistent with the decision of the Court of Appeal in *R v Manawatu*, in which an application for a reduction in sentence was refused in circumstances where there was no identifiable prejudice to the appellant from the delay in the hearing of his appeal.[82] This Court refused leave to appeal in that case.[83] We agree.

[168] We do not think it is necessary to make a definitive ruling on the necessity for actual prejudice to be established before the remedy of sentence reduction can be granted. Rather, we simply note that the absence of prejudice counts against the grant of the remedy of reduction of sentence.

[169] We agree with Mr Boldt, however, that in the present case the prejudice that was suffered by Mr Beckham was adequately remedied by the grant of bail.

[170] Mr Mount said that there was a case for a reduction in sentence of between 30 per cent and 50 per cent in this case. He cited five factors in support of that submission. We evaluate each in turn.

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80 *Mills v HM Advocate (No 2)* 2001 SLT 1359 (HCJAC).
81 *Mills v HM Advocate* [2002] UKPC D2, [2004] 1 AC 441.
82 *R v Manawatu* (2006) 23 CRNZ 833 (CA) at [50].
83 *Manawatu v R* [2007] NZSC 13.

(a) The seriousness of the breaches of the Bill of Rights Act

[171] The unlawful seizure of the call data was a clear breach of the Bill of Rights Act. We accept this favours the provision of a remedy, but the question is whether a reduction in sentence is an appropriate remedy for the breach.

(b) The breaches were reckless

[172] As noted earlier, we do not agree with the High Court Judge and the Court of Appeal that the failure by Detective Sergeant Lunjevich to exclude Mr Gibson's number from the applications for search warrants and to ensure that provision was made to deal with privileged material was an oversight. We accept Mr Mount's submission that, in the circumstances, it was reprehensible and that it would not be correct to describe the officer as having acted in good faith.

(c) The effects of the breaches were significant and involved prejudice to the appellant

[173] The first part of this factor duplicates factor (a) above, and we do not accept the second aspect, namely the question of prejudice. To the extent that prejudice was caused, it was adequately dealt with by the grant of bail.

(d) No steps were taken to remedy the breaches or to make prompt disclosure

[174] Mr Mount said that the Crown knew of the seizure of privileged material from June 2010, when it filed the affidavit of Detective Inspector Good. He said it should have promptly ensured full disclosure regarding the seizure and treatment of privileged material, but instead disclosure was resisted on the grounds of irrelevance. That meant that disclosure was ultimately made only after an application was made for a stay in November 2010, and even then the process of disclosure continued until March 2011. In addition to this, the police did not disclose the schedule of call summaries until after the verdicts at trial, and the supplementary schedule more than three years after the trial. He described this as revealing "a distinctly unflattering lack of candour on the part of the prosecution" in the present case.

[175] We have dealt with the allegation of delayed disclosure earlier.[84] It was rejected by Andrews J and we have upheld that finding. In any event, the remedy that is sought in the present case is a remedy for the breach of s 21 of the Bill of Rights Act occasioned by the seizure of privileged call data. Even if we had found there was delayed disclosure it would not have made the case for a reduction in sentence stronger. The fact that the police did not disclose the existence of the call summaries before Mr Beckham's trial did not have any effect on the trial, and the fact that the call summaries were disclosed during the High Court stay hearing meant that they could be taken into account by the Judge when she was considering whether a stay was an appropriate remedy.

(e) There are no other effective remedies for the appellant

[176] Mr Mount said that a reduction in sentence was the only available remedy, if a stay were not granted. In particular he said damages for a breach of the Bill of Rights Act would be a hollow remedy, and a declaration would fail to vindicate rights. As no admissible evidence was obtained, exclusion of evidence would not be an available remedy. Mr Mount said that the appellant, a 66-year old man (at the time the submission was made) with two young children and currently suffering from cancer and a heart condition, could obtain real benefit from a reduction in his sentence, which would provide him with a meaningful and tangible vindication of his rights.

[177] While we do not underestimate the seriousness of the misconduct of the police officers involved in this case, the reality is that the interference with Mr Beckham's rights was relatively minor, given that the privileged information that was obtained pursuant to the unlawful seizures of call data from Corrections was not listened to and did not come into the hands of those involved in prosecuting him. We see a sentence reduction as being a disproportionate remedy in those circumstances, given the lack of impact of the misconduct on Mr Beckham's trial and the lack of connection between the misconduct and the sentencing exercise for his drug offending. The reality is that he has not suffered any prejudice in practical terms,

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[84] Above at [119]–[122].

and in those circumstances a reduction in sentence would be something of a windfall to him, rather than a vindication of his rights.

[178] In those circumstances we uphold the decision of the Court of Appeal to refuse a reduction in sentence.

Result

[179] The application for leave to appeal against conviction is dismissed. The appeal against sentence is dismissed.

Solicitors:
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