IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2021-485-195
[2021] NZHC 2268

UNDER	the Prisoners' and Victims' Claims Act 2005
BETWEEN	JOSHUA PERA VAN SILFHOUT Appellant
AND	UDAYA LAKSHMAN AGAS PATHIRANNEHELAGE Respondent

Hearing: 19 July 2021

Appearances: D A Ewen and A Hill for the Appellant
V Casey QC as Amicus

Judgment: 31 August 2021

JUDGMENT OF COOKE J

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[1] Mr Van Silfhout appeals against the decision of the Victims' Special Claims Tribunal (the Tribunal) which awarded the respondent $5,000 under the Prisoners' and Victims' Claims Act 2005 (the Act).

[2] The respondent abides by the decision of the Court. He attended earlier telephone conferences, and participated in the proceedings before the Tribunal, but he did not attend the substantive hearing of the appeal. At the earlier suggestion of counsel for the appellant amicus was appointed to act as a contradictor, and Ms Casey QC appeared on the appeal exercising that role.

[3] The key issue on appeal is whether the claim made by the respondent before the Tribunal was time barred under the Limitation Act 1950.[1] As will be explained in fuller detail below, the running of the limitation period is suspended under the Act during the period when the offender is serving the sentence of imprisonment for the offending that gives rise to the claim. In the present case the ultimate issue is whether a period of pre-sentence detention, which is treated as time served under the sentence, is included in the period of suspension. If it is, then Mr Pathirannehelage's claim was not time barred. If it is not, then Mr Pathirannehelage's claim would have been time barred.

Background facts

[4] The background facts are set out by the Judge in the decision of the Tribunal.[2]

[5] On 9 July 2010 Mr Van Silfhout entered a Mobil Service Station at which Mr Pathirannehelage was the sole worker. Mr Van Silfhout had a weapon and he threatened Mr Pathirannehelage, and robbed the premises of money and cigarettes. He was subsequently arrested and charged.

[6] On 30 January 2013 Mr Van Silfhout was remanded in custody. On 13 May 2014 he was sentenced to four years three months' imprisonment. At that stage he had served approximately one year and three and a half months in custody on remand. In accordance with s 90 of the Parole Act 2002 this period is counted as part of the time

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1 Limitation Act 2010, s 59; the 1950 Act applies to this claim.
2 *Pathirannehelage v Van Silfhout* [2021] NZVSC 3.

served for the purposes of assessing his parole eligibility and release dates. He was released on parole on 21 November 2016, but was recalled to prison on 1 March 2017. On 2 May 2017 he reached his sentence expiry date and he was released.

[7] Mr Pathirannehelage's claim was received by the Tribunal on 2 April 2020. That was just short of three years after Mr Van Silfhout was finally released from prison for this offending. There was also a period of three years and 10 months between the date of the offence and Mr Van Silfhout being sentenced. That total period is well over six years limitation period. But there was only approximately two years six months between the offence and the appellant being remanded in custody. The period between his first release and his recall (approximately three months) is included in the period when the limitation period ran, but that does not make a decisive difference. If the period of pre-sentence detention is also excluded from the running of the limitation period the claim was lodged in time.

[8] In addressing the claim the Judge turned his mind to the limitation period. He held:

> [8] … Although the offending occurred in July 2010 and, therefore, the normal limitation period, by which time a claim would need to have been filed, would have expired in July 2016 on account of the respondent having been sentenced to a period of imprisonment of four years and three months in 2014 and, indeed further sentences of imprisonment thereafter, the claimant was within the limitation period when his claim was received on 2 April 2020.

[9] The respondent sought $10,000 in damages before the Tribunal. The Judge considered his claim, but in light of similar cases that had been before the Tribunal, considered an award of $5,000 was appropriate.

[10] Under s 51 there is an appeal on questions of law to the High Court, and the appellant duly appeals from the Tribunal's decision.

The legislative scheme

[11] The Prisoners' and Victims' Claims Act was enacted following the awards of damages by the High Court for breaches of the New Zealand Bill of Rights Act 1990

to certain prisoners subject to the "Behavioural Management Regime" which had been operated in prison.[3]

[12] Part of the effect of the legislation involves intercepting the damages awarded to prisoners, and setting up a process under which the victims of their offending are able to make claims against the prisoner, and have access to the sum that would otherwise be payable to the prisoner to satisfy the victim's claim.

[13] Sub-part 2 of Part 2 of the Act provides that an award made to an offender is to be paid to the Secretary of Justice, who deducts money owed for reparation and other orders and then pays the surplus into an account. The Secretary then publishes a notice that money is available for claims, and serves this notice on people who are reasonably believed to be victims of the offending. The victims have six months to lodge a claim with the Tribunal. Those victims are exempted from the usual financial eligibility rules for legal aid, and incur no filing or hearing fee. They do not need to go to court to advance their claims given the Tribunal is empowered to so determine them on the papers.

[14] As part of the scheme Parliament also decided to extend the limitation period otherwise applicable to the claims the victims could bring. Parliament decided that the running of the limitation period would be suspended while the prisoner was serving the sentence of imprisonment for the offending involving the victim. The precise terms of this suspension of the limitation period is the focus of this appeal. Section 64 provides:

> **64 Limitation periods suspended while offender serving sentence of imprisonment**
>
> (1) The limitation periods to which this section applies cease to run while the offender is serving a sentence of imprisonment in a penal institution, prison, or service prison.
>
> (2) In this section, **serving a sentence of imprisonment in a penal institution, prison, or service prison**—
>
> (a) means serving in a penal institution, prison, or service prison—
>
> (i) the sentence of imprisonment for the offence (as defined in section 5(1)(a)(ii)); and

[3] *Taunoa v Attorney-General* (2004) 8 HRNZ 53.

(ii) any earlier sentence of imprisonment on which the sentence of imprisonment for the offence is directed to be served cumulatively; and

(iii) any later sentence that is directed to be served cumulatively on the sentence of imprisonment for the offence; and

(b) includes spending time in a penal institution or a prison following a related recall application (as defined in section 59 of the Parole Act 2002), but only if a final recall order (as defined in section 4(1) of that Act) is made following the recall application.

Tribunal's approach to limitation

[15] There are two preliminary points to address in relation to the Tribunal's consideration of the limitation period.

Does limitation need to be raised?

[16] First, Ms Casey referred to the fact that limitation is usually regarded as an affirmative defence, and that there was generally an onus on a defendant to plead this defence if they are seeking to rely upon it.[4] She points out that the appellant's then counsel did not refer to limitation in his written submissions to the Tribunal. Ms Casey raised a question whether, on appeal, the appellant can rightly challenge the decision of the Tribunal when the defence had not been raised.

[17] The requirement to raise affirmative defences can arise in tribunals as well as in civil proceedings before the Court.[5] But that will depend on the terms of the statutory scheme being applied by the tribunal. In my view in the present circumstances it is necessary for the Tribunal to consider the potential application of the limitation period as part of its statutory functions in assessing the claim, and irrespective of whether the respondent has raised the matter as a defence in the submissions filed.

[18] The Tribunal's decisions on claims are made under s 46(3) and (4). Section 47 then provides:

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4 See High Court Rules 2016, r 5.48; see also *G v G D Searle and Co* [1995] 1 NZLR 341 (HC).
5 See, for example, *Williams v New Zealand Police* [2021] NZHC 808 at [45]–[50].

> **47 Further provisions on determination of claims received**
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> …
>
> (2) In determining whether to order under section 46(3) or (4) that an amount be paid to a victim by way of damages or exemplary damages, and in quantifying that amount, the Tribunal must apply the general law relating to the awarding of damages.
>
> …

[19] The Tribunal is given certain statutory powers of an inquisitorial nature in order to make these decisions. It may determine claims on the papers under s 34, it may access relevant Court documents or records under s 35 and 36, it may hear submissions in exceptional cases under s 38, and also has a power to obtain further information under s 39.

[20] In terms of the rights of the respondent to a claim there is no procedure for filing a statement of defence, but s 31 provides:

> **31 Offender to be given copy of claim and reasonable opportunity to make written submission on it**
>
> (1) Before determining a victim's claim, the Tribunal must—
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> (a) serve a copy of the claim on the offender; and
>
> (b) give him or her a reasonable opportunity to make written submissions on the claim.
>
> (2) A copy of the claim must be served on the offender as soon as practicable after it is filed under section 28.
>
> …

[21] This does not contemplate the respondent being required to file a statement of defence in the way that would be contemplated for civil claims in the District or High Courts. The process is more inquisitorial. In applying that process in accordance with the instruction under s 47(2), the Tribunal is required to assess claims in accordance with the general law, as modified by the Act. In terms of modification of the law, s 63 provides that s 64 will apply to every limitation period applicable to the relevant claims. Section 64 then provides for an extension to the limitation period. The wording of s 63 means that this extension operates generally, and not just for the purpose of claims made to the Tribunal under the Act. But it clearly applies to claims

made to the Tribunal. The Tribunal is required to apply the general principles of law when it assesses such claims. Considering limitation is clearly part of that exercise as the Act has squarely addressed limitation principles, and has altered their normal application. The short point is that the Tribunal must assess and apply limitation principles (and the alterations to them by the Act) as part of its statutory functions.

[22] It follows in my view that the Tribunal is obliged to consider and apply limitation periods when it is assessing the claim, and the Tribunal must seek information that allows it to make an assessment of whether the limitation period applies if that is necessary to make that assessment.

[23] I note that it is not an onerous task for the Tribunal to conduct enquiries into the amount of time a respondent has served under a sentence imposed for the offending in question. The Department of Corrections is required to keep records on those matters for the purpose of administering sentences. These can be made available on request.

Approach of the Tribunal here

[24] The second point is that the approach adopted by the Tribunal here, as demonstrated by paragraph [8] of its decision quoted above, did not address the application of the limitation period correctly.

[25] The Tribunal's approach appears to involve a conclusion that the total sentence imposed of four years and three months needed to be deducted from the limitation period. Further the Tribunal appears to have concluded that further periods of imprisonment imposed thereafter also needed to be so deducted. Ms Casey and Mr Ewen agreed that the Tribunal erred in adopting this approach. The period that is excluded from the running of the limitation period is only the period when the respondent to the claim is actually serving a sentence of imprisonment. The total length of the sentence imposed is not excluded. Moreover, it is only the period when the respondent is serving a sentence for the offending involving the claimant unless one of the exceptions set out in s 64 applies.

[26] Mr Ewen referred to other decisions of the Tribunal which suggest, from the wording of the decisions, that the Tribunal appears to recognise that the extension of the limitation period applies for a period that is less than the sentence imposed by the Court.[6] But no such assessment was made in the present case. Here there is a critical issue — whether the period of pre-sentence detention is included in the period where the limitation period does not run — that was not addressed by the Tribunal.

[27] The upshot of this is that the Tribunal's decision is wrong in law. The question then is whether this has resulted in the Tribunal upholding a claim that was time barred.

Is pre-sentence detention included?

[28] Whether or not Mr Pathirannehelage's claim was time barred depends on whether the period of pre-sentence detention is included within the period of time when the running of the limitation period is suspended. The ultimate issue is accordingly whether that is a period "while the offender is … serving in … prison … the sentence of imprisonment for the offence …" under s 64(2)(a)(i).

[29] It is axiomatic that the text of an enactment is interpreted in light of its purpose.[7] When the provision in issue forms part of an overall statutory scheme, the role of the Court is to make the statute work as Parliament must have intended.[8] In the present case a number of features are relevant to the ultimate interpretation exercise.

What is the statutory purpose?

[30] It is appropriate to identify the relevant statutory purpose. Here there is a purpose provision in the Act but the purposes so described do not provide much assistance.

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6 *Sampson v Palmer* [2020] NZVSC 19 at [4]; *Thompson v Palmer* [2020] NZVSC 20 at [4].

7 Interpretation Act 1999, s 5(1); see also *Commerce Commission v Fonterra Cooperative Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

8 *Northland Milk Vendors Association v Northland Milk Ltd* [1988] 1 NZLR 530 (CA) at 537–538.

[31] More assistance can be found from considering the overall scheme of the legislation, and wider legislative materials. At the first reading of the bill the Minister of Justice, the Hon Phil Goff said:[9]

> Most people, including myself, have a deep sense that it is wrong that serious offenders can be awarded compensation for wrongful treatment without those offenders themselves being required to pay compensation to their victims for the serious wrongs inflicted on them. …

[32] On that basis the overall purpose of the legislation is to restrict the ability of prisoners to have access to damages awarded in their favour to allow victims of their offending to have access to these amounts to satisfy their own claims. This general purpose is confirmed by the report of the Justice and Electoral Committee on the proposed legislation. The Committee said:[10]

> The bill responds to public concern at the awarding of monetary compensation in damages to prison inmates, many of whom had been subject to the Department of Corrections' Behaviour Management Regime. The Government's policy objectives in introducing the bill were to strengthen the rights of victims to make civil claims against offenders, and to recognise that victims should have first claim against any compensation awards. The intention was to restrict access to compensation for persons under control or supervision, while not breaching international and domestic obligations to ensure an effective remedy and the right to equal protection under the law. …

[33] And later:[11]

> Some submissions called for the removal of all monetary compensation for prisoners. However we were advised that this would likely be inconsistent with New Zealand's international obligations. It could also be inconsistent with section 5 of the Crimes and Torture Act 1989, under which the Attorney-General has discretion to pay compensation to victims of torture. We also discussed separately whether the provision of non-monetary compensation would be sufficient to meet our international obligations, and we were advised that this would not meet the "effective remedy" test.

[34] The report went on to explain that other techniques that were considered — such as the diversion of awards in prisoners' favour to a trust in support of victims' organisations, introducing monetary limits, and deducting the cost of criminal legal aid — but which were also not included in the legislation because they were not consistent with human rights principles. This is consistent with an overall

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9 (14 December 2004) 622 NZPD 17986.
10 Prisoners' and Victims' Claims Bill (241-2) (commentary) at 1.
11 At 4.

Parliamentary purpose of restricting recovery by prisoners, and to give victims priority of access to amounts that would otherwise be recovered, but provided that this restriction was consistent with human rights principles.

[35] With respect to the limitation provisions the purpose provision in s 3 simply says:

> (3) The purpose of subpart 3 of Part 2 is to suspend the running of limitation periods for certain claims by victims.

[36] Ms Casey referred to the part of the speech of the Minister on the first reading directed to limitation. He said:

> The third main feature of the bill is that it makes changes to the limitation rules that apply to victims' claims. Although victims have always had the right to take civil claims against offenders for the loss or harm they have suffered, they generally do not do so. One of the main reasons for this is that such claims are usually futile if the offender has no assets and is in prison. By the time the offender is released, the normal limitation period of 6 years may have expired and the victim may be disadvantaged. Clearly, this puts victims at a particular disadvantage in enforcing their rights. The bill will address this by providing that, for victims' claims against offenders, the 6-year limitation period will be suspended during all periods that the offender is in prison. Changes to the limitation rules will extend the period in which victims can pursue claims against prisoners, either before a victims' special claims tribunal, if relevant, or in the ordinary courts. The new limitation provisions in the bill will benefit all victims of offences, whether the offence occurred before or after the bill takes effect, and irrespective of whether the offender has sought compensation, and even if the victim's action would previously have been statute barred under the Limitation Act.

[37] This suggests that the relevant reason for suspending the running of the limitation period while the offender is in prison was that it is generally futile for a victim to sue as the prisoner is unlikely to have assets to meet the claim. But as Ms Casey pointed out the legislation that Parliament enacted makes the position more complicated. Section 64(2) goes on to define what "serving a sentence of imprisonment in a penal institution prison or prison service" means, and it confines the suspension to the period of time when the prisoner is serving the sentence for the particular offence in question (subject to the detailed circumstances then addressed). This was the form of the legislation largely as introduced. There do not appear to have been material changes during the Select Committee or other legislative processes.

[38] The rationale is accordingly not based solely on the point that a prisoner cannot be effectively sued when in prison. Confining the suspension to the period arising from the offence itself suggests that the suspension is also directed to concepts of fairness, or justice. It is apparent that the Act introduced a scheme to allow victims of offending to have access to any damages that have been awarded to prisoners. That was perceived as fair to those victims. But this was balanced against advice received on the fundamental rights of the prisoners. So there was an element of compromise in the provisions as enacted. The provisions dealing with the limitation can be understood in that context. As Ms Casey suggested, s 64 involves another element of compromise much like other aspects of the Act. It is not all periods of imprisonment that are excluded from the running of the limitation period — it is only those that were a result of the offending itself.

[39] That seems to me to be the relevant purpose of the provisions concerning the limitation period — the limitation period is extended, and the running of limitation period suspended, whilst the prisoner is serving the sentence of imprisonment for the offending involving that victim. That is because it is usually futile to seek to sue prisoners whilst in prison, and there is also a nexus between the relevant imprisonment and offending against that victim.

[40] I observe that these two purposes would apply equally to pre-sentence and post-sentence detention. The prisoner would have been difficult to sue while in prison, and there is a nexus between that imprisonment and the particular offending because the offender has been detained in custody for that offending.

Ordinary meaning

[41] The text of the enactment then needs to be considered in light of this purpose. The statutory interpretation exercise involves considering the ordinary meaning of the words used by Parliament. But that ordinary meaning should be identified in light of the statutory purpose, and in the context in which the words are being used.

[42] Mr Ewen argued that applying the ordinary meaning to the words a prisoner could not be said to have been serving a sentence of imprisonment before it was

imposed by the Court. The natural meaning of the words would suggest it only covered the period of time the prisoner was in prison after they were sentenced.

[43] There is immediate attraction in this argument. But, as indicated, an ordinary meaning needs to be applied in the particular circumstances that the words of the legislation are used. The present context involves legislative provisions in a technical area. The relevant inquiry may focus more on what the words "while the offender is … serving in … prison … the sentence of imprisonment for the offence" mean to those familiar with the sentencing regime. Indeed there is authority for the proposition that words used in a technical context should be given their technical, rather than their ordinary meaning.[12] The word "serving" has a meaning for those that deal with sentencing on a regular basis (such as Judges, prosecutors and defence lawyers, prison officers, and the prisoners themselves) that it may not have to the ordinary member of the public. The legislation did not use more everyday language — for example, by referring to the time spent by the offender in prison after being sentenced by a Court.[13] It has used more technical words. The relevant inquiry may therefore involve assessing what these words would naturally mean when used it their more specialised context.

[44] Those who actually operate in this context are more likely to include pre-sentence detention within the period covered by the words "while the offender is … serving in … prison … the sentence of imprisonment for the offence". That is because those familiar with the way the sentencing system works know that pre-sentence detention is counted as part of the time served against the sentence. In my view, and subject to the further points addressed below, the ordinary meaning of the words to those more familiar with the context should prevail. Those familiar with the context understand that "time served" includes pre-sentence detention.

[45] This approach also coincides with the two aspects of apparent purpose that I have identified above. First, pre-sentence detention, just like post-sentence detention, involves a period where it may be futile for the victim to have tried to sue the prisoner. Secondly, this detention will normally be for the particular offending against the

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12 See Daniel Greenberg (ed) *Craies on Legislation* (12th ed, Thompson Reuters, London 2020) at 20.1.33–20.1.35.

13 Such words are used, perhaps by contrast, in s 64(2)(b).

victim, which involves the nexus to the offending that makes it fair or just for the suspension to the limitation period to be engaged.

[46] This does not mean that this interpretation prevails. There are other elements to consider in the interpretation exercise. But it seems to me that the ordinary meaning of the words, in the sense I have described, interpreted in light of the purpose favours pre-sentence detention being included.

Inappropriate adoption of defined meaning from another Act?

[47] Mr Ewen argued that the approach I have described above would be wrong in principle. That is because it would involve adopting the definitions set out by other legislation, here ss 90 and 91 of the Parole Act to identify the meaning of the statutory language used in s 64.

[48] The relevant provisions of the Parole Act are:

> **89 Determining time served**
>
> (1) When determining how much of a sentence imposed on or after the commencement date an offender has served, the provisions of this subpart apply.
>
> …
>
> **90 Period spent in pre-sentence detention deemed to be time served**
>
> (1) For the purpose of calculating the key dates and non-parole period of a sentence of imprisonment (including a notional single sentence) and an offender's statutory release date and parole eligibility date, an offender is deemed to have been serving the sentence during any period that the offender has spent in pre-sentence detention.
>
> (2) When an offender is subject to 2 or more concurrent sentences,—
>
> (a) the amount of pre-sentence detention applicable to each sentence must be determined; and
>
> (b) the amount of pre-sentence detention that is deducted from each sentence must be the amount determined in relation to that sentence.
>
> (3) When an offender is subject to 2 or more cumulative sentences that make a notional single sentence, any pre-sentence detention that relates to the cumulative sentences may be deducted only once from the single notional sentence.

> **91 Meaning of pre-sentence detention**
>
> (1) Pre-sentence detention is detention of a type described in subsection (2) that occurs at any stage during the proceedings leading to the conviction or pending sentence of the person, whether that period (or any part of it) relates to—
>
> (a) any charge on which the person was eventually convicted; or
>
> (b) any other charge on which the person was originally arrested; or
>
> (c) any charge that the person faced at any time between his or her arrest and before conviction.

[49] As Mr Ewen pointed out these provisions are effectively determining the definition of the concept "served" and give it a particular meaning. Under s 90(1) the prisoner is "deemed" to have been serving the sentence of imprisonment for the offence for these periods. That deeming is specifically to only occur for the purposes of calculating the dates referred to. Under s 82 of the Sentencing Act 2002 the sentencing Court must then ignore this pre-sentence detention when determining a sentence. So the two Acts work in harmony.

[50] Mr Ewen referred to the proposition that defined terms in one piece of legislation should not be adopted in another. For example, in *Barrie v R* the Court of Appeal held:[14]

> [36]... Unless expressly adopted, the meaning given to a word in one piece of legislation is not affected by the meaning given to that same word in a different enactment.[15] The courts have warned against the dangers of reasoning by analogy in statutory interpretation, especially between statutes dealing with different subject-matter.[16] ...

[51] Ms Casey responded by arguing that the approach being applied did not involve adopting defined terms from the Parole Act. Rather it was a situation where it was necessary to know how sentence administration occurred in practice to understand the effect of s 64. She argued that this involved mixed questions of law and fact.

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14 *Barrie v R* [2012] NZCA 485, [2013] 1 NZLR 55 (CA).

15 J F Burrows and R I Carter *Statute Law in New Zealand* (LexisNexis, Wellington, 2009) at 423.

16 *Credit Services Investments Ltd v Carroll* [1973] 1 NZLR 246 (CA) at 259 per McCarthy J and at 262 per Turner P.

[52] Principles of statutory interpretation, such as the principle recognised in *Barrie*, are not intended to have absolute operation. They exist to provide guidance to the ultimate task of identifying Parliament's intent. So in applying these principles, or presumptions, the ultimate objective must still be kept squarely in mind. This is demonstrated by the decisions applying the principle referred to in *Barrie* which are influenced by the particular circumstances.[17]

[53] I agree with Ms Casey's submission that the present situation does not involve applying the definition of words from other legislation. The situation here involves a different form of interaction between separate legislation. Section 64, and the Act generally, is intended to operate against the background of the principles of sentencing administered under the Sentencing Act, and the Parole Act. It is recognising that there is an overall sentencing regime under that legislation, and the present Act overlays its own regime to apply against that background. How the sentencing regime operates as a matter of fact and law can be said to be the starting point for understanding the regime established by the present Act.

[54] Subject to the matters I next address, I accordingly do not accept that the appellant's argument, and the reliance on the principle referred to in *Barrie*, prevents pre-sentence detention being seen as part of the period while the offender is serving the sentence of imprisonment for the offence.

Conflict with defined term

[55] Mr Ewen also argued that the interpretation referred to above conflicted with the plain terms of the Act.

[56] Section 64 refers to the person serving the sentence of imprisonment for the offence "as defined in s 5(1)(a)(ii)". The relevant definition in s 5 is of "offender", but that definition also defines the words "the sentence of imprisonment for the offence" in the following way:

> **5 Offender**
>
> (1) In this Act, offender, in relation to a victim, means—

[17] See Ross Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington 2015) at 441–442.

> (a) for the purposes only of subpart 3 of Part 2, a person—
>
> …
>
> (ii) on whom a court or the Court Martial has, because of the person's conviction for that offence, imposed a sentence of imprisonment (the sentence of imprisonment for the offence); and
>
> …

[57] Mr Ewen argued that this made it clear that it was only a period of imprisonment served after the Court had imposed a sentence of imprisonment that counted as a matter of definition. This reiterated the point that he had made about the ordinary meaning of these words I refer to at [42] above.

[58] I do not accept this argument. The definition that s 64(2)(a)(i) is referring to is the definition of the words "the sentence of imprisonment for the offence". So it must be a term of imprisonment imposed for this offending. It is not defining what is to be counted for the "serving" of that sentence. For that reason the cross-reference does not define the meaning of the words that are in issue.

No room for implied reference to Sentencing and Parole Acts

[59] This brings me to what I apprehend to be the key question involved in the statutory interpretation exercise.

[60] Section 64 goes on to make specific provision in relation to particular matters relating to cumulative sentences (s 64(2)(a)(ii) and (iii)), and time served following recall to prison (s 64(2)(b)). Mr Ewen argued that this made it clear when Parliament wished to apply the more complex provisions concerning sentencing under the Sentencing and Parole Acts. There would be no need for Parliament to do this if the principles under those Acts applied in any event. Another way of describing this argument is that s 64 is self-contained, or as Ms Casey put it, it sets out a codification for the application of provisions from the other legislation, and how the limitation period is suspended. Recourse to the general law of sentencing as set out in other legislation is not contemplated.

[61] But it seems to me that the complications that are addressed in s 64(2)(a)(ii), (iii) and s 64(2)(b) amount to *exceptions* to how the starting point set out in s 64(1) as interpreted by s 64(2)(a)(i) is to apply in light of the principles of sentencing set out in the other legislation. They do not involve Parliament choosing which principles from the other legislation are to apply. Indeed, if anything, the fact that they are exceptions to what the other legislation would otherwise contemplate confirms that the normal sentencing principles are expected to apply.

[62] That is most clearly demonstrated by s 64(2)(a)(ii) and (iii). Under s 64(2)(a)(ii) when the sentence is imposed cumulatively on an earlier term of imprisonment — which will be imprisonment for unrelated offending — this is included within the suspension period. This contemplates the Court imposing a cumulative sentence under ss 83 and 84 of the Sentencing Act. That is clearly an exception to the starting point that the suspension only operates when the prisoner is serving the sentence of imprisonment for the relevant offence. It extends the period that would otherwise apply.

[63] That is also so for s 64(2)(a)(iii). If a Court later imposes a sentence for unrelated offending, and directs that it be served cumulatively on the sentence for the offending in question, that also forms part of the suspended limitation period.[18] Once again this would be an exception to the starting point that the limitation period is only suspended for the period of time when the prisoner is serving a sentence for the offending involved. It suspends the running of the limitation period for a longer time.

[64] I accept that this is not so clearly so in relation to s 64(2)(b). This provides that the time spent in prison following a recall falls within the period of suspension of the limitation period. Parliament may not have needed to have said this if the normal principles of sentencing applied — it is well understood that the prisoner resumes the earlier sentence of imprisonment if they are recalled as s 66(1) of the Parole Act provides that a final recall order is made for "an offender to continue serving his or her sentence in prison". But the section does still modify what may arguably be thought to be the natural starting point by saying that this is so only when a final recall

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[18] This may contemplate further offending by the prisoner whilst in prison, or a circumstance where the prisoner is already serving a prison sentence when the new sentence for the offence is imposed.

order is made. The period of time the prisoner serves in prison under an interim recall order under s 62 of the Parole Act is not counted if no final order is made. So the section does alter, or at least clarify, what period in time is included within the suspension of the limitation period in the case of recalled prisoners.

[65] Perhaps more importantly it seems to me that the complications that s 64 are so addressing presume that the normal principles of sentencing apply. It is dealing with complications against that very background. That is clearly so in s 64(2)(a)(ii) and (iii) which presume the applicability of ss 83 and 84 of the Sentencing Act. So I do not accept that it shows a legislative intent to only apply some of the provisions of the Sentencing and Parole Acts. All principles which identify when a prisoner is serving a sentence of imprisonment for the offence would seem to apply unless otherwise modified by s 64.

[66] A further illustration of this point demonstrated by other matters that s 64 does not directly address. Sentences imposed *concurrently* under ss 83–85 of the Sentencing Act frequently involve a particular offence being taken as the lead offence, with any other offending then resulting in uplifts on the period of imprisonment imposed. So an offender convicted and sentenced for aggravated robbery may have the sentence for that offending uplifted for other offending committed during the course of the aggravated robbery — say an assault on a person shortly after the robbery took place.[19] If the victim of the aggravated robbery brings a claim before the Tribunal, then the fact that the sentence was uplifted for the assault would be immaterial. The amount of time served by the offender under the sentence imposed would be all that was relevant. In the same way, however, a victim of the assault would not benefit from any suspension of the limitation period, as it seems to me that the period of imprisonment served could not be said to have been imposed for that offence.

[67] It is only possible to apply s 64 to such situations with a proper understanding of how the principles of sentencing operate under the provisions in the Sentencing Act. The section contemplates the application of the provisions relating to sentencing set out by other legislation as applied by the Courts. This further demonstrates that the

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[19] A period of imprisonment will be imposed for the assault, but to be served concurrently with the sentence for the lead aggravated robbery offence (as uplifted).

regime introduced by the Act overlays the sentencing regime established by the other legislation, and that it is contemplated it will be interpreted and applied consistently with that regime.

[68] I accept that pre-sentence detention can arise, in some circumstances, for offending unrelated to the offending giving rise to the claim. Under s 91 of the Parole Act it can arise because of other matters, such as separate offending for which the offender was originally arrested. But this period is still treated as part of the time served on the sentence subsequently imposed, and accordingly is within the period for which the limitation period is suspended under s 64. The legislation is still expected to work together.

[69] For these reasons I reject the appellant's argument.

Is this a sensible interpretation?

[70] There is a final point that can be considered as a cross-check on the proposed interpretation.

[71] If an interpretation makes sense — particularly when interpreted in its context, and in light of its purpose — it is more likely to be the correct one. An interpretation that leads to an unusual outcome is not. Based on the appellant's suggested approach two prisoners who committed exactly the same offence, sentenced to exactly the same period of imprisonment, and released having served exactly the same period of time under that sentence would nevertheless be treated differently. If prior to sentencing one of them had been released on bail but the other remanded in custody, the period of suspension of the limitation period would be different. For the person remanded in custody the suspension of the limitation period would operate for a shorter period because the pre-sentence detention would be excluded. In my view this peculiarity counts against this interpretation being the correct one.

[72] There are other considerations of a similar kind that suggest that the appellant's interpretation is not the correct one. For example, it is not unusual for there to be a period of time between the entry of a conviction and the imposition of a sentence. The actual sentencing date may be influenced by practical factors — for example, the

period of time required to obtain reports needed for sentencing, or counsel's other commitments. The prisoner may well have been remanded in custody in the meantime given s 13 of the Bail Act 2000. On the appellant's approach that period would not be included in the period when the limitation period is suspended even though the prisoner has been convicted for the relevant offence and has been remanded in custody for that offence as a consequence. Again that makes little sense given the scheme and purpose of the provisions.

[73] These considerations do not, by themselves, demonstrate that the appellant's arguments should not be accepted. But they are further points that illustrate why the interpretation contended for is not the correct one.

Conclusion

[74] My key conclusions are that: the ordinary or natural meaning of the legislation suggests that pre-sentence detention is included in the period of time while the limitation period is extended as it forms part of the period when the prisoner is serving a sentence of imprisonment for the offending; that this is consistent with the apparent purpose of the provisions; that the provisions contemplate that the normal principles of sentencing will apply for the purposes of making the assessment; and that this appears to give the legislation an interpretation that makes sense. I accept that pre-sentence detention is included in the period contemplated by s 64.

[75] For the above reasons I accept that the Tribunal erred in law in failing to properly address the limitation period, but having done so in accordance with the correct interpretation of the Act I accept that the respondent's claim was lodged in time. For those reasons the appeal will be dismissed.

[76] As requested the question of costs is reserved. Memoranda may be filed.

Cooke J