

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**I TE KŌTI PĪRA O AOTEAROA**

**CA572/2018  
[2019] NZCA 446**

BETWEEN QUENTIN DYLAN WOODS  
Appellant

AND NEW ZEALAND POLICE  
Respondent

**CA108/2019**

BETWEEN QUENTIN DYLAN WOODS  
Appellant

AND NEW ZEALAND POLICE  
Respondent

Hearing: 4 April 2019  
Court: Williams, Simon France and Toogood JJ  
Counsel: M Starling and N R Wham for Appellant  
V McCall for Respondent  
Judgment: 20 September 2019 at 10.00 am

---

**JUDGMENT OF THE COURT**

---

- A The application for leave to bring the second appeals is granted.**
- B There is a right of appeal under s 244 of the Criminal Procedure Act 2011 against any decision on an application under s 94 of the Sentencing Act 2002 to vary a release condition imposed under s 93(1) of that Act.**
- C The appeals are dismissed.**
-

## REASONS

Simon France and Toogood JJ	[1]
Williams J (dissenting)	[76]

### SIMON FRANCE AND TOOGOOD JJ

(Given by Toogood J)

#### Table of Contents

	Para No
<b>Introduction</b> .....	[1]
<b>CA572/2018</b> .....	[6]
<i>The offending</i> .....	[6]
<i>The original special release conditions</i> .....	[8]
<i>The variation application</i> .....	[9]
<i>The appeal to the High Court</i> .....	[11]
<b>CA108/2019</b> .....	[13]
<i>The offending</i> .....	[13]
<i>The District Court</i> .....	[14]
<i>The High Court</i> .....	[16]
<b>These appeals</b> .....	[17]
<i>Leave to bring second appeals</i> .....	[17]
<b>Preliminary question in CA572/2018</b> .....	[19]
<i>Is there a right of appeal from a decision on an application under s 94(1) of the Sentencing Act to vary release conditions imposed on sentencing?</i> .....	[19]
<b>The terms of the District Court’s special release conditions</b> .....	[28]
<b>The legislative scheme for the imposition of release conditions following a short term of imprisonment</b> .....	[29]
<b>The appellant’s argument</b> .....	[38]
<b>The questions for decision</b> .....	[44]
<b>The nature of a sentencing court’s power to impose special conditions</b> .....	[47]
<i>Residential restrictions</i> .....	[55]
<i>Intensive monitoring</i> .....	[67]
<b>Conclusions</b> .....	[74]
<b>Result</b> .....	[75]

#### Introduction

[1] When sentencing an offender to imprisonment for a period of less than 24 months, a court may impose standard and special conditions to apply upon the offender’s release from prison.<sup>1</sup> The standard conditions are adopted from s 14(1)

---

<sup>1</sup> Sentencing Act 2002, s 93(2).

of the Parole Act 2002 (PA).<sup>2</sup> The sentencing court may also impose special release conditions designed to:<sup>3</sup>

- (a) reduce the risk of reoffending by the offender; or
- (b) facilitate or promote the rehabilitation and reintegration of the offender; or
- (c) provide for the reasonable concerns of victims of the offender.

[2] The special conditions may include, without limitation, conditions of a kind described in s 15(3) of the PA, with the important exception that the conditions may not include a residential restriction condition referred to in s 15(3)(ab) of that Act.<sup>4</sup>

[3] Quentin Dylan Woods has made two applications for leave to bring second appeals against sentences imposed in the District Court which, he says,<sup>5</sup> include residential restriction conditions that the court was prohibited from imposing.

[4] In responding to the leave application and proposed appeal in CA572/2018, the Crown has raised a preliminary question. It argues that, because the challenged special condition was imposed by the District Court on an application by a probation officer under s 94(1) of the Sentencing Act 2002 (SA) to vary the release condition imposed at the time of sentencing, Mr Woods did not have an available right of appeal to the High Court under s 244(1) of the Criminal Procedure Act 2011 (the CPA) against the variation. We address that issue below.

[5] Before addressing the relevant questions of law which lie at the heart of the proposed appeals, it is convenient to set out the background offending and the procedural history of the two appeals. The nature of the offending helps to explain why the District Court Judges considered it appropriate to impose standard and special

---

<sup>2</sup> Section 93(2B).

<sup>3</sup> Section 93(3).

<sup>4</sup> Section 93(2B).

<sup>5</sup> Criminal Procedure Act 2011, s 253.

release conditions to apply following the short sentences of imprisonment imposed in each case.

## **CA572/2018**

### *The offending*

[6] On 19 April 2018, Mr Woods appeared before Judge Rowe in the District Court at Palmerston North for sentence, having pleaded guilty to two charges of common assault, one of threatening behaviour and one of possession of an offensive weapon.<sup>6</sup> The assault and threatening charges arose from unprovoked attacks on unsuspecting members of the public that the Judge described as cowardly and unacceptable.

[7] Judge Rowe had a pre-sentence report that described Mr Woods, then aged only 18, as “mentally, cognitively and emotionally unprepared for a safe and meaningful life in the community”.<sup>7</sup> Mr Woods has had an extremely troubled life, having first been taken into welfare care aged two. The report writer suggested that Mr Woods needed to be in a contained environment for the duration of what would likely be complex treatment to ensure the intended rehabilitative result, and to reduce the likelihood of harm to his victims and other members of the public.

### *The original special release conditions*

[8] Accepting the recommendations, Judge Rowe sentenced Mr Woods to a total of eight months’ imprisonment. On one of the assault charges, the Judge imposed special release conditions that included attending psychological, alcohol and drug assessment and treatment; attending other counselling and programmes as directed by a probation officer; the imposition of electronic monitoring and a condition that he was not to enter Palmerston North City without the written consent of a probation officer.

---

<sup>6</sup> *Police v Woods* [2018] NZDC 7784 [Judge Rowe sentencing].

<sup>7</sup> At [12].

*The variation application*

[9] Mr Starling informed us that, while serving the sentence imposed by Judge Rowe, Mr Woods was transferred to the Whanganui Prison At Risk Unit. He had had psychotic episodes while in prison and the Department of Corrections assessed him as having a very high risk of re-offending due to his mental health and behavioural issues. Apparently, Mr Woods was waitlisted for a bed at the Forensic In-patient Mental Health Unit at Kenepuru Hospital, Porirua, but a bed was not available when his sentence was due to end on 20 June 2018. It was then that a probation officer made an application under s 94 of the SA to the District Court at Christchurch to vary the special release conditions. The variation sought was the addition of conditions that would require Mr Woods to reside for a short-term period at a facility in Christchurch providing supported accommodation and programmes designed to assist the residents to reintegrate with the community.

[10] In a Minute dated 19 June 2018,<sup>8</sup> the day before Mr Woods was due to be released, Judge Farish declined to impose a condition, requested by the probation officer, that would have required Mr Woods, between the hours of 8.00 am and 8.00 pm daily, to be in the care of an agency and accompanied and monitored by an agency staff member at all times, unless he had the prior written approval of a probation officer.<sup>9</sup> The Judge imposed additional conditions, however, that required Mr Woods to:<sup>10</sup>

- (a) undertake, engage in and complete a reintegration programme administered by a programme provider between the hours of 8.00 am and 8.00 pm each day of the week, as approved by a probation officer, and abide by the rules of the programme to the satisfaction of the probation officer;

---

<sup>8</sup> *Police v Woods* DC Christchurch CRI-2018-054-000288, 19 June 2018 [Judge Farish variation].

<sup>9</sup> At [9].

<sup>10</sup> At [11].

- (b) comply with the requirements of electronic monitoring; and
- (c) stay at his approved residence overnight between the hours of 8.00 pm and 8.00 am.

### *The appeal to the High Court*

[11] Mr Woods appealed to the High Court against the imposition of the additional conditions. It was argued for Mr Woods that the combination of the reintegration programme in which Mr Woods was required to engage and complete between the hours of 8.00 am and 8.00 pm daily, the electronic monitoring and the imposition of a curfew between 8.00 pm and 8.00 am amounted effectively to a residential restriction which the District Court was expressly prohibited from imposing by s 93(2B) of the SA.

[12] In a judgment dated 24 August 2018,<sup>11</sup> Gendall J held, however, that the conditions imposed on the variation application did not amount to a residential restriction; furthermore, they served the purpose of facilitating and promoting Mr Woods' rehabilitation and reintegration and fell, therefore, within the authorised purposes for the imposition of that special condition set out in s 93(3)(b) of the SA. He dismissed the appeal.

### **CA108/2019**

#### *The offending*

[13] On 9 July 2018, about three weeks after the imposition of Judge Farish's release conditions and while he was at the Christchurch facility, Mr Woods re-offended against members of the staff who were employed to support the programme for his reintegration and the monitoring of the release conditions, including by threatening to kill and multiple assaults. On 23 September 2018, he offended again, in a similar manner.

---

<sup>11</sup> *Woods v Police* [2018] NZHC 2189 [First HC appeal].

### *The District Court*

[14] Mr Woods subsequently pleaded guilty to five charges of common assault; two charges of threatening to kill; one charge of behaving threateningly and one charge of breaching his release conditions by leaving the approved address during the curfew without the approval of a probation officer. On 28 November 2018, he was sentenced by Judge D J L Saunders in the District Court at Christchurch for all of the offending.<sup>12</sup> The Judge was satisfied on the basis of a comprehensive report from a clinical psychiatrist, Dr Maxwell Panckhurst, that Mr Woods was not suffering from a mental disorder that required him to be in a psychiatric hospital for treatment. The psychiatric report, however, described Mr Woods' mental health problems as a severe mixed personality disorder (with borderline and anti-social traits) and post-traumatic stress disorder. Dr Maxwell said that it has proved very difficult to establish and maintain helpful interventions, or safety plans, in the context of Mr Woods' complex psychological problems where risk behaviours are impulsive and unpredictable.

[15] Judge Saunders sentenced Mr Woods to further terms of imprisonment leading to a total effective end sentence of 12 months' imprisonment. The Judge imposed standard and special release conditions, the relevant terms of which are identical to the conditions previously imposed by Judge Farish, to run for a period of 12 months beyond the sentence expiry date.

### *The High Court*

[16] Mr Woods appealed against that sentence. On 4 March 2019, Gendall J dismissed the appeal, holding that the overall sentence of 12 months' imprisonment was not manifestly excessive and concluding that the special release conditions were lawfully imposed and appropriate.<sup>13</sup>

---

<sup>12</sup> *Police v Woods* [2018] NZDC 24797 [Judge Saunders sentencing].

<sup>13</sup> *Woods v Police* [2019] NZHC 335 [Second HC appeal].

## **These appeals**

### *Leave to bring second appeals*

[17] Mr Woods seeks leave to bring second appeals from Gendall J's judgments. Under s 253 of the CPA, this Court may grant leave to bring a second appeal from an appeal decision of the High Court only if it is satisfied that:

- (a) the appeal involves a matter of general or public importance; or
- (b) a miscarriage of justice may have occurred, or may occur unless the appeal is heard.

[18] We heard the leave applications and the substantive appeals together. The appeals raise questions of law, not previously addressed by this Court, affecting the ability of the courts to impose restrictive post-sentence release conditions on offenders serving short sentences. We are satisfied that they involve matters of general or public importance. Accordingly, we grant leave to Mr Woods to bring second appeals against each of the High Court's appeal decisions.

## **Preliminary question in CA572/2018**

*Is there a right of appeal from a decision on an application under s 94(1) of the Sentencing Act to vary release conditions imposed on sentencing?*

[19] We address first the preliminary point raised by Ms McCall for the Crown about the availability of a right of appeal to the High Court, under s 244 of the CPA, from the decision of a District Court given on an application under s 94 of the SA to vary release conditions made after the imposition of the original sentence.

[20] As Ms McCall noted, it was not strictly necessary for the Court to address that issue in order to deal with the central question of law about whether the special release conditions imposed by the District Court on the variation were lawful. That is because Mr Woods had an undeniable right of appeal under s 244 against the same special conditions imposed by Judge Saunders for the July 2018 and September 2018



offending. Nevertheless, because this Court has not previously addressed the Crown’s point about appeals from variations directly, we consider it is appropriate to do so.

[21] In *Patterson v R*,<sup>14</sup> Williams J held that a right of appeal from a variation order existed under s 244. We endorse the reasoning in that judgment and the conclusions reached, for the following reasons.

[22] The starting point for the consideration of the issue is that a person convicted of an offence has a right of appeal under s 244(1) of the CPA “against the sentence imposed for that offence, unless the sentence is one fixed by law”. Section 212 of the CPA defines “sentence” as including, subject to exceptions which do not apply, “any method of disposing of a case following conviction”. Sections 93(1) and (2) of the SA authorise the imposition of standard and special conditions by a court that sentences an offender to a term of imprisonment of 12 months or less, or of more than 12 months but not more than 24 months, respectively. Special conditions imposed at the time of the original sentencing form part of the sentence and are appealable under s 244 of the CPA.

[23] The term “sentence” as used in s 244(1) is widely and inclusively defined as any method of disposing of a case following conviction. A variation of release conditions imposed as part of a sentence must form part of the disposition of the case “following conviction”, notwithstanding that the variation necessarily occurs later.

[24] Reflecting the view that variations under s 94 form part of the sentencing process in disposing of a case, we accept that two elements of the regime under which variations may be made are that:

- (a) any variation of standard conditions must be in accordance with the purposes and principles of the SA;<sup>15</sup> and

---

<sup>14</sup> *Patterson v R* [2017] NZHC 49 at [25]–[30].

<sup>15</sup> Sentencing Act, ss 7 and 8.

- (b) any variation of a special condition (including a variation that imposes such a condition) must comply with the requirements of s 93(3) and the purposes for which special conditions may be imposed.

[25] There is no principled reason why an offender should have a right of appeal against the terms upon which the case is disposed of at the original sentencing, but not against a variation to the sentence simply because that occurred later. To limit the right of appeal to conditions imposed at the time of the original sentence would be inconsistent with considerations of access to justice.

[26] Moreover, confining any challenge to the lawfulness of a variation under s 94 to the judicial review procedure, as suggested by counsel for the Crown, would be an unwieldy and inadequate intrusion of civil procedure into a readily available and appropriate criminal process. Where the challenged decision was one made by the District Court, confining the challenge to the review procedure would not ensure that the substantive merits of the decision could be addressed as efficiently by the High Court on review as it would by an appellate court. As well, and importantly, judicial review would not be an available procedure for challenging a s 94 variation imposed when the High Court was the sentencing court.

[27] On appeal from *Patterson v R*,<sup>16</sup> this Court noted that the ruling of Williams J that the High Court had jurisdiction under the CPA to entertain the appeal was not challenged.<sup>17</sup> Having now considered the position directly, we confirm that there is a right of appeal under s 244 of the CPA against any decision on an application under s 94 of the SA to vary a release condition imposed under s 93 of the Act.

### **The terms of the District Court's special release conditions**

[28] The challenged special conditions imposed by Judge Farish in the June 2018 variation decision, and by Judge Saunders in the November 2018 sentencing decision, require Mr Woods to:

---

<sup>16</sup> *Patterson v R* [2017] NZCA 66.

<sup>17</sup> At [6].

- (a) submit to electronic monitoring in the form of global positioning system (GPS) technology as directed by a probation officer in order to monitor his compliance with any conditions relating to his whereabouts;
- (b) comply with the requirements of electronic monitoring, and provide access to the approved residence to the probation officer and representatives of the monitoring company, for the purpose of maintaining the electronic monitoring equipment as directed by the probation officer;
- (c) to reside at an address approved by a probation officer and not to move to any new residential address without the prior written approval of a probation officer;
- (d) to be at that address between the hours of 8.00 pm and 8.00 am unless there is the prior written approval of a probation officer; and
- (e) undertake, engage in and complete a reintegration programme administered by a programme provider between the hours of 8.00 am and 8.00 pm each day of the week, as approved by a probation officer and abide by the rules of the programme to the satisfaction of the probation officer.

**The legislative scheme for the imposition of release conditions following a short term of imprisonment**

[29] Whether any one or more of the release conditions, either individually or in combination, is or are unlawful must be determined against the background of the legislative scheme authorising the imposition of release conditions on offenders sentenced to 24 months' imprisonment or less. The legislative intent is to vest in a sentencing court the power to impose on offenders sentenced to short terms of imprisonment release conditions that may include conditions of a kind that the Parole Board may impose on offenders sentenced to terms of imprisonment longer than 24 months.

[30] The starting point is s 93 of the SA. It provides, so far as is relevant:

**93 Imposition of conditions on release of offender sentenced to imprisonment for short term**

(1) A court that sentences an offender to a term of imprisonment of 12 months or less may impose the standard conditions and any special conditions on the offender and, if it does so, must specify when the conditions expire.

(2) If a court sentences an offender to a term of imprisonment of more than 12 months but not more than 24 months,—

(a) the standard conditions apply to the offender until the sentence expiry date, unless the court specifies a different date; and sections 94, 95, and 96 apply as if the standard conditions had been imposed by order of the court; and

(b) the court may at the same time impose any special conditions on the offender and, if it does so, must specify when the conditions expire.

(2A) The court may specify that conditions imposed under this section expire on—

(a) the sentence expiry date; or

(b) the date that is a specified period before the sentence expiry date; or

(c) the date that is a specified period of up to 6 months after the sentence expiry date.

(2AB) If the court imposes special conditions on an offender, the special conditions may apply for as long as, but no longer than, the standard conditions apply to the offender.

(2B) In this section,—

**sentence expiry date** has the meaning given to it in section 4 of the Parole Act 2002

**special conditions** includes, without limitation, conditions of a kind described in section 15(3) of the Parole Act 2002, other than a residential restriction condition referred to in section 15(3)(ab) of that Act

**standard conditions** means the conditions set out in section 14(1) of the Parole Act 2002.

(3) A special condition must not be imposed unless it is designed to—

(a) reduce the risk of reoffending by the offender; or

- (b) facilitate or promote the rehabilitation and reintegration of the offender; or
  - (c) provide for the reasonable concerns of victims of the offender.
- (3A) The court must not impose an electronic monitoring condition described in section 15(3)(f) of the Parole Act 2002 unless it has had regard to the opinion of the chief executive of the Department of Corrections in a pre-sentence report provided under section 26.
- ...
- (5) If a court sentences an offender to a term of imprisonment of more than 24 months, it must not impose conditions on the offender's release from imprisonment (and section 18(2) of the Parole Act 2002 applies).
- (6) A court must not impose conditions on an offender's release from imprisonment if—
- (a) the court sentences an offender to an indeterminate sentence of imprisonment; or
  - (b) the court sentences an offender to imprisonment who is already subject to an indeterminate sentence of imprisonment.
- ...
- (8) If the court sentences the offender to more than 1 term of imprisonment on the same occasion,—
- (a) only 1 order under this section may be made; and
  - (b) that order applies in respect of all the sentences of imprisonment imposed on that occasion.

[31] For the purposes of the definition of “special conditions” in s 93(2B) of the SA, and to identify the nature of “a residential restriction condition”, s 15 of the PA provides:

**15 Special conditions**

- (1) The [Parole] Board may (subject to subsections (2) and (4)) impose any 1 or more special conditions on an offender.
- (2) A special condition must not be imposed unless it is designed to—
  - (a) reduce the risk of reoffending by the offender; or
  - (b) facilitate or promote the rehabilitation and reintegration of the offender; or

- (c) provide for the reasonable concerns of victims of the offender;  
or
  - (d) comply, in the case of an offender subject to an extended supervision order, with an order of the court, made under section 107IAC, to impose an intensive monitoring condition.
- (3) The kinds of conditions that may be imposed as special conditions include, without limitation,—
- (a) conditions relating to the offender's place of residence (which may include a condition that the offender reside at a particular place), or his or her finances or earnings:
    - (ab) residential restrictions:
    - (b) conditions requiring the offender to participate in a programme (as defined in section 16) to reduce the risk of further offending by the offender through the rehabilitation and reintegration of the offender:
    - (ba) conditions prohibiting the offender from doing 1 or more of the following:
      - (i) using (as defined in section 4(1)) a controlled drug:
      - (ii) using a psychoactive substance:
      - (iii) consuming alcohol:
    - (c) conditions that the offender not associate with any person, persons, or class of persons:
    - (d) conditions requiring the offender to take prescription medication.
    - (e) conditions prohibiting the offender from entering or remaining in specified places or areas, at specified times, or at all times:
    - (f) conditions requiring the offender to submit to the electronic monitoring of compliance with any release conditions or conditions of an extended supervision order, imposed under paragraph (ab) or (e), that relate to the whereabouts of the offender:
    - (g) an intensive monitoring condition, which must, and may only, be imposed if a court orders (under section 107IAC) the imposition of an intensive monitoring condition.
- (3A) If the Board imposes on an offender special conditions relating to residential restrictions (specified under subsection (3)(ab)),—
- (a) the offender's probation officer must define the area of the residence specified under section 33(2)(a) within which

the offender must remain and show that area to the offender and advise every relevant occupant (as defined in section 34(4)) of the residence of that area; and

- (b) the offender must remain within that area.

...

[32] For the purposes of s 15(3)(b) of the PA, a “programme” is defined in s 16 of the PA as:

## 16 Programmes

For the purposes of section 15, a **programme** means any of the following:

- (a) any psychiatric or other counselling or assessment:
- (b) attendance at any medical, psychological, social, therapeutic, cultural, educational, employment-related, rehabilitative, or reintegrative programme:
- (c) placement in the care of any appropriate person, persons, or agency, approved by the chief executive, such as (without limitation)—
  - (i) an iwi, hapu, or whanau:
  - (ii) a marae:
  - (iii) an ethnic or cultural group:
  - (iv) a religious group, such as a church or religious order:
  - (v) members or particular members of any of the above.

[33] Residential restrictions are the special conditions described in s 33 of the PA<sup>18</sup> as follows:

## 33 Residential restrictions

- (1) The Board may impose on an offender the special conditions referred to in section 15(3)(ab) (**residential restrictions**) if the residence in which it is proposed that the offender reside is in an area in which a residential restriction scheme is operated by the chief executive.

---

<sup>18</sup> Parole Act 2002, s 4.

- (2) An offender on whom residential restrictions are imposed is required—
- (a) to stay at a specified residence:
  - (b) to be under the supervision of a probation officer and to co-operate with, and comply with any lawful direction given by, that probation officer:
  - (c) to be at the residence—
    - (i) at times specified by the Board; or
    - (ii) at all times:
  - (d) to submit, in accordance with the directions of a probation officer, to the electronic monitoring of compliance with his or her residential restrictions:
  - (e) to keep in his or her possession the licence issued under section 53(3) and, if requested to do so by a constable or a probation officer, must produce the licence for inspection.
- (3) Any conditions imposed under subsection (2)(c)(ii) may not be imposed for longer than the shortest of the following periods:
- (a) the period for which the standard release conditions apply:
  - (b) 12 months:
  - (c) if those conditions have previously been imposed on the offender in respect of the same release from detention, 12 months less the time for which those conditions have previously been imposed.
- (4) An offender may, despite any conditions imposed under subsection (2)(c), leave the residence to which the residential restrictions relate—
- (a) to seek urgent medical or dental treatment; or
  - (b) to avoid or minimise a serious risk of death or injury to the offender or any other person; or
  - (c) for humanitarian reasons approved by a probation officer.
- (5) In any case where the conditions are of the kind specified in subsection (2)(c)(ii), the offender may, with the approval of a probation officer, leave the residence to which the residential restrictions relate—
- (a) to comply with any special conditions; or
  - (b) to seek or engage in employment; or
  - (c) to attend training or other rehabilitative or reintegrative activities or programmes; or



- (d) to attend a restorative justice conference or other process relating to the offender's offending; or
- (e) to carry out any undertaking arising from any restorative justice process; or
- (f) for any other purpose specifically approved by the probation officer.

[34] It is worth noting that, where the Parole Board imposes residential restrictions under s 15(3)(ab), the effect of s 33(2) is that the offender must adhere to *all* of the conditions set out in that subsection. If the Parole Board wished to impose only one or more, but not all, of those conditions — such as requiring the offender to stay at a particular residence and abide by an overnight curfew, but not to impose a monitoring condition — it could do so only in reliance on its general power to impose conditions under s 15(3), or in particular reliance on s 15(3)(a) and (e).

[35] Sections 34 and 35 of the PA contain relevant requirements to be met by the Parole Board before imposing residential restrictions:

**34 Prior report on suitability of residential restrictions**

- (1) Before the Board imposes residential restrictions on an offender, the Board must request and consider a report from the chief executive on the matters specified in subsection (2).
  - (1A) Nothing in subsection (1) prevents the chief executive from providing a report on the matters specified in subsection (2) without receiving a request from the Board.
  - (1B) Despite subsection (1), if the chief executive provides a report on the matters specified in subsection (2) without a request from the Board, the Board must consider that report as if it were a report requested by the Board under subsection (1).
- (2) The matters are as follows:
  - (a) the nature of the offence or offences for which the offender is currently serving a sentence of imprisonment or has previously been convicted:
  - (b) the likelihood that the residential restrictions will prevent further offending on the part of the offender:
  - (c) the likelihood that the offender's rehabilitation and reintegration will be assisted by residential restrictions:

- (d) the suitability of the proposed residence, including the safety and welfare of the occupants of the residence where the offender is to reside.
- (3) Before completing the report under this section, the chief executive must—
- (a) ensure that every relevant occupant of the residence where it is proposed that the offender reside is aware of the nature of the offender's past and current offending; and
  - (b) tell every relevant occupant that the reason for giving that information is to enable the occupant to make an informed decision about whether to consent to having the offender reside at the residence; and
  - (c) tell every relevant occupant that the information provided about the offender must not be used for any purpose other than that described in paragraph (b); and
  - (d) obtain the consent of every relevant occupant to having the offender reside at the residence; and
  - (e) inform every relevant occupant of their right to withdraw their consent, at any time, to having the offender reside at the residence.
- (4) In subsection (3), **relevant occupant** means, in relation to a residence that the chief executive is considering as a suitable residence for an offender subject to residential restrictions,—
- (a) in the case of a family residence, every person of or over the age of 16 who ordinarily lives there; and
  - (b) in the case of any other residence, every person whom the chief executive identifies as being a relevant occupant for the purpose of subsection (3).

**35 Residential restrictions only to be imposed if residence suitable and occupants consent**

The Board may impose residential restrictions only if satisfied on reasonable grounds that—

- (a) the residence in which it is proposed that the offender reside is suitable; and
- (b) the relevant occupants (as defined in section 34(4)) of the residence in which the offender will reside—
  - (i) understand the residential restrictions that will apply to the offender; and
  - (ii) consent to the offender residing in the residence in accordance with those conditions; and

- (iii) have been informed of their right to withdraw their consent, at any time, to having the offender reside in the residence; and
- (c) the offender has been made aware of and understands the residential restrictions, and he or she agrees to comply with them.

[36] For the purposes of s 15(3)(g) of the PA, an intensive monitoring condition may be imposed by the Parole Board only where it is ordered to do so pursuant to an order under s 107IAC of the PA made by a sentencing court when it makes an extended supervision order (ESO) under s 107I.

[37] The offender or a probation officer may apply to the sentencing court under s 94 of the SA for an order suspending, varying, adding to, or discharging and substituting any condition imposed under s 93 of the SA:

**94 Variation of release conditions**

- (1) An offender who is subject to conditions imposed under section 93, or a probation officer, may apply for an order under subsection (3) of this section.
- (2) Section 72 applies with any necessary modifications to an application under this section.
- (3) On an application under subsection (1), the court may, if it thinks fit,—
  - (a) suspend any condition or vary the duration of any condition, or impose additional conditions; or
  - (b) discharge a condition and substitute any other condition described in section 93 that could have been imposed on the offender at the time when the offender was convicted of the offence for which the sentence was imposed.
- ...
- (5) If an application is made under this section for the suspension, variation, or discharge of any condition, a probation officer may suspend the condition until the application has been heard and disposed of.

**The appellant's argument**

[38] In support of the appeal, Mr Starling accepts that, viewed individually, the conditions imposed by Judge Farish and Judge Saunders meet the requirements of

s 93(3)(a) and (b) of the SA in that they are designed to reduce the risk of re-offending by Mr Woods and facilitate or promote his rehabilitation and reintegration. He argues, however, that the combination of the conditions amounts to a residential restriction that is expressly excluded by s 93(2B) from the special conditions which the District Court was permitted to impose under s 93(1). That is because, as was proposed in the application of the probation officer referred to at [10] above, the condition requiring Mr Woods to engage in a reintegration programme between the hours of 8.00 am and 8.00 pm each day, and to abide by the rules of the programme, was being implemented (or so Mr Starling informed the Court from the Bar) by the programme provider having two persons from the agency accompanying him at all times during the 12 day-time hours of the programme.

[39] The residence to which Mr Woods is confined is a suburban dwelling of which it seems he is the only occupant. Although the curfew imposed on Mr Woods has effect only between 8.00 pm and 8.00 am, and he is entitled to be absent from the residence during the other 12 hours of the day, the conditions of the reintegration programme require him to be in the company of the persons at all times, whether he is in the dwelling or not.

[40] Mr Starling says that ordering Mr Woods to comply with a plan that requires him to be in the presence of persons at all times when he is not subject to a curfew effectively imposes a regime of intensive monitoring that the Parole Board may not impose under the PA unless it is approved by the High Court as a special condition of an ESO under s 107I of the PA.<sup>19</sup> For the purposes of considering the imposition of intensive monitoring as a condition of an ESO, an intensive monitoring condition is defined as:<sup>20</sup>

[A] condition requiring an offender to submit to being accompanied and monitored, for up to 24 hours a day, by an individual who has been approved ... to undertake person-to-person monitoring.

---

<sup>19</sup> Section 15(3)(g).

<sup>20</sup> Section 107IAC(2).

[41] Mr Starling's submission is that the way in which the reintegration programme has been implemented, therefore, is the imposition of "intensive monitoring by stealth".

[42] In an affidavit provided in support of the variation application, the probation officer described the plan for Mr Woods under the special release conditions in these terms:

Residents [subject to the programme] are supported by an external agency; to find permanent accommodation, engage in employment or further education, facilitate transport to and from appointments, and support residents in developing the life skills necessary [to live] independently in the future such as cooking, budgeting, safety planning, problem solving and managing high risk situations. External agency staff are available 24/7 to residents. Residents are expected to abide by the house rules which include abstinence from alcohol and drugs, having approved visitors only at the address, remaining at the address between 8.00 pm and 8.00 am daily, participating in reintegration activities and maintaining a tidy property. Individual reintegration plans are generated with each resident, and they transition out of supported accommodation at their own pace according to meeting the steps of their reintegration plan. To ensure consistency for residents ... to support them in their integration into the community and to ensure staff safety of both Department of Corrections and the external agency employees, the additional special conditions are considered necessary.

... The house is managed by Christchurch Residential Care (CRC) who are contracted by the Department. CRC ... provide two staff at all times to work with Mr Woods, support him, encourage his reintegration and keep him safe. Staff would develop a weekly plan with Mr Woods to support his reintegration and enhance his stability in the community. CRC staff are experienced in working with offenders with complex mental health needs and behavioural issues.

... It is expected that Mr Woods will be able to reside at the house for a minimum of six weeks and possibly up to several months. The Department and CRC, working with a community mental health team, would closely monitor and support Mr Woods during that time and reduce the hours of oversight if appropriate and safe. The Department will work with Mr Woods, Oranga Tamariki and other providers during this time to source longer-term accommodation and support at the level he requires at that time.

[43] Responding to Mr Starling's comments about the way the programme is being implemented, however, Ms McCall informed us from the Bar that it was the intention of the Department to reduce the extent to which Mr Woods is accompanied by staff during the day as the programme progresses. While we do not doubt that counsel faithfully reported their instructions, there is no evidence before the Court that would enable us to make any findings about how the District Court's orders are being

implemented. And in any event, if there is anything about the implementation that goes beyond the limitations that may be reasonably necessary to achieve the objectives for which the special conditions were designed, Mr Woods would be entitled to pursue a challenge to those elements by judicial review.

### **The questions for decision**

[44] The proposed plan which was presented to Judge Farish in support of the variation application appears to be a flexible and appropriate attempt to respond to Mr Woods' serious mental health problems in a manner that recognises the difficulties, identified by Dr Panckhurst, of finding an appropriate regime to address Mr Woods' particular needs. The arrangements appear to be designed to reduce the risk of reoffending by Mr Woods and to facilitate and promote his rehabilitation and reintegration.<sup>21</sup>

[45] But that does not answer Mr Starling's point which is founded on an argument that, while the plan meets the requirements of s 93(3) of the SA, it is the conditions imposed by the Court, or a combination of them, that are unlawful because they amount to:

- (a) a residential restriction condition, as defined in ss 4 and 33 of the PA, and/or
- (b) an intensive monitoring condition, as defined in ss 4 and 107IAC(2) of the PA,

both of which are outside the scope of special conditions which the District Court was authorised to impose in terms of s 93(1), (2) and (2B) of the SA.

---

<sup>21</sup> Sentencing Act, s 91(3)(a) and (b).

[46] The questions for determination by the Court, therefore, are:

- (a) Are the conditions for electronic monitoring lawful?
- (b) Are the conditions related to residence and the 8.00 pm to 8.00 am curfew lawful?
- (c) Is the condition requiring Mr Woods to attend a programme lawful?
- (d) Is the combined effect of any two or more of the conditions such that, read together, the conditions amount to the imposition by the Court of a residential restriction condition referred to in s 15(3)(ab) of the PA that is outside the conditions authorised under s 93 of the SA?

### **The nature of a sentencing court's power to impose special conditions**

[47] The District Court's power to impose special release conditions after Mr Woods completed his 12-month sentence is derived from both s 93(1) of the SA and the definition of "special conditions" in s 93(2B) of the SA. Subsection (2B) provides that the term "includes, without limitation, conditions of a kind described in s 15(3) of the Parole Act 2002 ....".

[48] The effect of the definition of "standard conditions" in subs (2B) is that, when a court imposes the standard conditions pursuant to the power to do so in subs (1) or (2) of s 93, the conditions are those prescribed in s 14(1) of the PA; they apply in their entirety. Where the court elects under subs (1) or (2) to impose special conditions, however, the nature of the conditions is left to the discretion of the court. The use of the word "includes" in the definition of "special condition" in subs (2B) indicates that the definition is not exhaustive, that indication being emphasised by the addition of the words "without limitation".

[49] The definition provides, therefore, that the special conditions may be (but are not required to be) "conditions of a kind described in s 15(3) of the Parole Act". We emphasise the words, "of a kind". The subsection does not *require* the sentencing court to make an order under s 15(3) of the PA; that power belongs to the Parole Board.

Nor does it mandate that the condition must be in identical terms to an order that may be made under s 15(3) of the PA. What is intended by the wording of the definition is that, in describing appropriate special conditions designed to meet the criteria in s 93(3) of the SA, the court may have regard to the kinds of special conditions made by the Parole Board under the PA.

[50] And it is not irrelevant that the Parole Board’s condition-making power under s 15(3) of the PA is described in broad discretionary terms similar to those used to describe the condition-making power vested in the courts under s 93 of the SA. Section 15(3) of the PA describes the “*kinds of conditions* that may be imposed as special conditions” by the Board. By using the expression “include[s], without limitation”, the subsection emphasises that the kinds of conditions that may be imposed include (but are not limited to) conditions listed in paragraphs (a) to (g) of the subsection.

[51] In our view, the text of s 93(2B) of the SA leads to the conclusion that the subsection describes but does not prescribe the kinds of conditions that may be imposed. It provides guidance to the court about the kinds of conditions that may be imposed in addition to or instead of the standard conditions, without limiting the discretion of the court to impose any condition that is designed to meet one or more of the criteria set out in s 93(3) of the SA. In other words, it is s 93(3) that limits the exercise of the Court’s discretion, not s 93(2B).

[52] Viewed in that way, special conditions imposed by a court under subs (1) and (2) of s 93 of the SA may be conditions of the same kind as (but not necessarily identical to) conditions referred to in s 15(3) of the PA, such as:

- (a) conditions relating to the offender’s place of residence;<sup>22</sup> or
- (b) conditions requiring the offender to participate in a programme to reduce the risk of further offending;<sup>23</sup> or

---

<sup>22</sup> Section 15(3)(a).

<sup>23</sup> Section 15(3)(b).



- (c) conditions requiring the offender to submit to the electronic monitoring of compliance with any release conditions.<sup>24</sup>

[53] It follows, importantly in this case, that a proper interpretation of s 93(2B) of the SA also authorises the court to impose a special condition of the same kind as an intensive monitoring condition that the Parole Board must make under s 15(3)(g) when ordered to do so by a court imposing an ESO under s 107I of the PA.

[54] Put simply, the reference to conditions made under the PA in the definition of special condition in s 93(2B) of the SA is indicative rather than restrictive of the kinds of conditions the court may impose.

#### *Residential restrictions*

[55] We recognise that, in reading subs (2B) in that way, it is necessary to give some effect to the meaning of the words “other than a residential restriction condition referred to in s 15(3)(ab) of [the Parole] Act”. Residential restrictions are defined in s 4 of the PA as meaning the special conditions described in s 33 of the PA, set out at [33] above.

[56] The point of release conditions, including those which may be imposed by the Parole Board, is to address the consequences of a sentence coming to an end in circumstances where the unrestricted release of the offender into the community would result in unacceptable risk to the community and to victims in particular through the prospect of reoffending. Also, conditions may be imposed to facilitate rehabilitation efforts if they are designed, for example, to increase the likelihood that the offender will co-operate with rehabilitation efforts.

[57] So, the question is: why should a court be prevented from imposing conditions, in compliance with s 93(3), that are no more restrictive than the terms of EM bail that a court can impose on someone merely charged with an offence, when the

---

<sup>24</sup> Section 15(3)(f).

Parole Board may impose such conditions on a prisoner who happens to have served a longer sentence? And why would the power to impose post-release conditions be expressed in very broad terms (to “include, without limitation, conditions of a kind...”) if the courts were to be limited in their ability to impose residence-related conditions?

[58] The answer may be that Parliament did not intend to limit the courts to imposing only some of the restrictions available under s 15(3)(ab), but that it wanted to allow the courts more flexibility than would be available to the Parole Board in deciding what residential restrictions should be imposed. It may be thought also that the legislature did not want the courts to be required to adopt the more comprehensive procedure involved for the imposition of a “residential restrictions condition” available to the Parole Board under s 33 where the conditions may be imposed for a longer period and have implications for the rehabilitation of a greater number of released offenders. The conditions imposed by a court under s 93 of the SA expire, at the latest, six months after the sentence expiry date. Residential restriction conditions imposed by the Parole Board, however, may be imposed for a period of up to 12 months from the sentence expiry date.

[59] Moreover, the regime for the imposition of residential restrictions by the Parole Board under s 33 of the PA is structured to accommodate the release and reintegration into the community of offenders who have served terms of imprisonment of longer than 24 months by placing them in a controlled environment outside prison, such as in what may be described as a “half-way house”. The process by which such offenders are released, either on parole or at their statutory release date, is interactive and designed to accommodate not only the Parole Board’s requirements, but also the interests of the community in which the residence is situated; the needs and rights of other occupants of the residence in which the offender is to live during the period of residential restrictions; and the likelihood that the offender will co-operate with the imposition and enforcement of restrictions that support a rehabilitative and reintegrative purpose.

[60] The Parole Board's power to impose the full suite of conditions comprising residential restrictions under s 33 of the PA is limited by the requirement that:<sup>25</sup>

... the residence in which it is proposed that the offender will reside [must be] in an area in which a residential restriction scheme is operated by the chief executive.

[61] Moreover, s 34(1) of the PA provides that the Board's power to impose residential restrictions is subject to the Board having requested and considered a report from the chief executive of the Department of Corrections on matters specified in s 34(2) of the PA going to the suitability of the offender and the proposed residence for the intended purpose of the restrictions.

[62] Significantly, s 35 of the PA permits the Parole Board to impose a residential restrictions condition under s 15(3)(ab) "only if satisfied on reasonable grounds" that a number of prerequisites are met, including that the other relevant occupants consent<sup>26</sup> and "the offender has been made aware of and understands the residential restrictions, and he or she agrees to comply with them".<sup>27</sup>

[63] The limitations on the Parole Board's powers under s 33 of the PA, therefore, reflect the possibility, if not the likelihood, that the offenders to whom the restrictions will be applied are those who have served lengthy terms of imprisonment. They do not sit comfortably with considerations that a court may take into account in determining what conditions should be imposed on an offender, without consent, following release from a short-term sentence.

[64] In our view, therefore, the limitation on the Court's discretion to impose special conditions under s 93(1), (2) and (2B) that is intended by the reference to a residential restriction referred to in s 15(3)(ab) of the PA means only that the court may not have recourse to the Parole Board's powers under s 33 of the PA and is not obliged to follow the highly prescriptive procedure for their use. What the court may do, however, is impose release conditions which are of a similar kind to residential restrictions under s 33.

---

<sup>25</sup> Parole Act, s 33(1).

<sup>26</sup> Parole Act, 35(b)(ii).

<sup>27</sup> Section 35(c).

[65] Under s 15(3) of the PA the Parole Board may impose conditions relating to the offender's place of residence, including a condition that the offender must reside at a particular place, that do not amount to residential restrictions under s 33. It follows that, in imposing a similar kind of condition under s 93(1) or (2) of the SA, a court may impose restrictive residential conditions of a kind referred to in s 15(3) and s 33(2) of the PA, such as:

- (a) requiring the offender to stay at a specified residence,<sup>28</sup>
- (b) to be at the residence at specified times<sup>29</sup> or at all times,<sup>30</sup> and/or
- (c) to submit to electronic monitoring,<sup>31</sup>

that have a similar effect to that of a residential restriction under s 33 of the PA but do not incorporate the full set of requirements under the section.

[66] A fact-specific inquiry is required, therefore, to assess whether the court-imposed conditions offend against the limitation in s 93(2B) of the SA regarding s 15(3)(ab) of the PA. We are satisfied that the residence-related restrictions imposed in this case are similar to, but do not amount to, the imposition of "a residential condition referred to in section 15(3)(ab)" of the PA.

#### *Intensive monitoring*

[67] By referring to s 15(3) of the PA, s 93(2B) of the SA expressly authorises a court to order a special condition for electronic monitoring of a kind described at s 15(3)(f). Mr Starling does not argue otherwise but says that the combination of an electronic monitoring condition and the particular residence conditions imposed by the District Court amounts, in fact, to an intensive monitoring condition as defined in s 107IAC(2) of the PA, a condition which may only be imposed by the Parole Board if a Court orders the imposition of such a condition in the context of the making of an ESO.

---

<sup>28</sup> Sections 15(3)(a) and 33(2)(a).

<sup>29</sup> Section 33(2)(c)(i).

<sup>30</sup> Section 33(2)(c)(ii).

<sup>31</sup> Sections 15(3)(f) and 33(2)(d).

[68] Section 107IAC(2) defines an intensive monitoring condition as a condition:  
... requiring an offender to submit to being accompanied and monitored, for up to 24 hours a day, by an individual who has been approved, by a person authorised by the chief executive, to undertake person-to-person monitoring.

[69] The electronic monitoring conditions imposed by the District Court in this case are similar, but not identical, to that description. They provide that Mr Woods must:

- (a) submit to electronic monitoring in the form of GPS technology as directed by a probation officer in order to monitor his compliance with any conditions relating to his whereabouts; and
- (b) comply with the requirements of electronic monitoring and provide access to the approved residence to the probation officer and representatives of the monitoring company, for the purpose of maintaining the electronic monitoring equipment as directed by the probation officer.

[70] It is necessary to look also at the combined effect of the residence-related conditions and electronic monitoring conditions, as Mr Starling submitted. The residential conditions are that Mr Woods is required:

- (a) to reside at an address approved by a probation officer and not to move to any new residential address without the prior written approval of a probation officer; and
- (b) to be at that address between the hours of 8.00 pm and 8.00 am unless there is the prior written approval of a probation officer.

[71] Read together, the monitoring and residence conditions do not equate to intensive monitoring as defined in s 107IAC(2) as set out above at [68]. Nor do they amount to a residential restriction as defined in s 33 of the PA. Although it might be suggested that the combination of a requirement to stay at a particular residence, an overnight curfew and electronic monitoring come close to an unreasonable extension of his confinement after he has served a sentence of imprisonment, we make two points in response. First, such conditions are acknowledged by Parliament as being justified

if they are designed to meet the purposes specified in s 93(3). Second, they are no more coercive than the types of restrictions imposed on an alleged offender released on electronically monitored bail pending trial, who is entitled to a presumption of innocence.

[72] It is significant that the District Court's orders concerning the reintegration programme do not specify that Mr Woods shall be accompanied at all times between the hours of 8.00 am and 8.00 pm, when the curfew does not apply. That appears to be a requirement of the programme which has been put in place by the Department of Corrections, designed to implement the District Court's condition that Mr Woods must:

undertake, engage in and complete a reintegration programme administered by a programme provider between the hours of 8.00 am and 8.00 pm each day of the week, as approved by a probation officer and abide by the rules of the programme to the satisfaction of the probation officer.

[73] The plan proposed by the probation officer included what appear to be graduated steps towards greater autonomy for Mr Woods in terms of his freedom of movement but on a basis that recognises that his particular mental health problems require a close degree of supervision both for the protection of the community and the safety of Mr Woods.

## **Conclusions**

[74] We are satisfied that, although the conditions imposed by Judge Farish and Judge Saunders have similarities both to elements of intensive monitoring and residential restrictions, those Courts has not imposed residential restrictions or intensive monitoring in a manner that is not permitted by the broad discretion under s 93(1) of the SA to impose special conditions and that the conditions are lawful. That is sufficient to dispose of the appeals.

## **Result**

[75] The majority of the Court being satisfied that the District Court Judges did not err in the exercise of their discretion under s 93(1) of the SA, the appeals are dismissed.

**Table of Contents**

	Para No
<b>Introduction</b> .....	[76]
<b>Factual background</b> .....	[79]
<b>Appeals below</b> .....	[83]
<b>Intensive monitoring</b> .....	[88]
<b>Residential restrictions</b> .....	[97]
<i>The exclusion in s 93(2B) is limiting, and must be looked at in substance</i> .....	[102]
<i>“Substantially the same as” residential restrictions means the elements</i> <i>in s 33(2) of the Parole Act, save for two modifications</i> .....	[112]
<i>Conditions imposed on Mr Woods are substantially the same as residential</i> <i>restrictions</i> .....	[119]
<b>Conclusion</b> .....	[122]

**Introduction**

[76] I agree with the majority’s conclusion on the question of the right of appeal under s 244 of the CPA against a variation of release conditions.

[77] I also agree that Mr Woods is not subject to intensive monitoring, but for different reasons.

[78] As for residential restrictions, my view is that the conditions imposed on Mr Woods are, in substance, prohibited residential restrictions as defined in the PA. I would therefore have allowed the appeal on this point.

**Factual background**

[79] The majority has set out the facts in full and it is unnecessary for me to repeat them here. It is convenient, however, to set out in full the conditions imposed on Mr Woods as they are important to the reasoning I adopt.

[80] On 19 April 2018, when Judge Rowe sentenced Mr Woods, he imposed the following special conditions:<sup>32</sup>

- (a) to attend a psychological assessment and complete any recommended counselling or treatment as recommended;
- (b) to attend an alcohol and drug assessment and attend and complete any recommended treatment to the satisfaction of the probation officer and treatment provider;
- (c) to attend any counselling/programmes as directed to the satisfaction of the probation officer and provider;
- (d) to submit to electronic monitoring in the form of GPS technology as directed by a probation officer in order to monitor Mr Woods' compliance with any condition(s) relating to his whereabouts; and
- (e) not to enter Palmerston North City, as defined by the Council boundary map, without the written consent of a probation officer.

[81] On 19 June 2018, when Judge Farish granted the application to vary Mr Woods' release conditions, he added five further conditions to those initially imposed by Judge Rowe. These further conditions were:<sup>33</sup>

- (a) to reside at an address as approved by a probation officer and not to move address without the prior written approval of the probation officer;
- (b) to undertake, engage in and complete a reintegration programme administered by a programme provider between the hours of 8.00 am and 8.00 pm each day of the week, as approved by a probation officer and abide by the rules of the programme to the satisfaction of the probation officer;
- (c) to stay at that the approved residence overnight between the hours of 8.00 pm and 8.00 am;

---

<sup>32</sup> Judge Rowe sentencing, above n 6, at [22].

<sup>33</sup> Judge Farish variation, above n 8, at [11].



- (d) not to possess, consume or use any alcohol or drugs not prescribed; and
- (e) to comply with the requirements of electronic monitoring and provide access to the approved residence to the probation officer and representatives of the monitoring company, for the purposes of maintaining the electronic monitoring equipment as directed by the probation officer.

[82] When Mr Woods re-offended Judge Saunders sentenced Mr Woods to 12 months' imprisonment and imposed all eight of the release conditions recommended in the pre-sentence report.<sup>34</sup> They are largely the same as the conditions Mr Woods was previously under, including the additional conditions imposed by Judge Farish on variation. The conditions were:

- (a) to attend a psychological assessment with a departmental psychologist as directed by a probation officer and complete any treatment and/or counselling as recommended by the assessment to the satisfaction of a probation officer;
- (b) not to possess, consume or use any alcohol or drugs not prescribed;
- (c) to submit to electronic monitoring in the form of GPS technology as directed by a probation officer in order to monitor ... compliance with any condition(s) relating to Mr Woods' whereabouts;
- (d) to comply with the requirements of electronic monitoring, and provide access to the approved residence to the probation officer and representatives of the monitoring company, for the purpose of maintaining the electronic monitoring equipment as directed by the probation officer;
- (e) to be at that address between the hours of 08:00 pm and 08:00 am unless there is the prior written approval of a probation officer;

---

<sup>34</sup> Judge Saunders sentencing, above n 12, at [15].

- (f) to reside at an address approved by a probation officer and not move to any new residential address without the prior written approval of a probation officer;
- (g) not to enter the Manawatu or Horowhenua Districts unless with prior written approval of a probation officer; and
- (h) to undertake, engage in and complete a reintegration programme administered by a programme provider between the hours of 08:00 am and 08:00 pm each day of the week, as approved by a probation officer and abide by the rules of the programme to the satisfaction of the probation officer.

### **Appeals below**

[83] In separate appeals,<sup>35</sup> Mr Woods appealed both Judge Farish’s variation and Judge Saunders’ sentence, both times on the ground that the conditions imposed amounted to a residential restriction and intensive monitoring, which the Judges were not permitted to impose.

[84] Gendall J in the High Court heard both appeals. Both times the Judge dismissed the appeal.

[85] On the residential restriction argument, Gendall J cited *Whichman v Department of Corrections*,<sup>36</sup> in which Woolford J held that conditions imposed on an offender are “residential restrictions” if and only if all five of the requirements in s 33(2) of the PA are imposed.<sup>37</sup> So, because Mr Woods was only subject to three of the five requirements, the conditions imposed on Mr Woods did not amount to a residential restriction.<sup>38</sup>

[86] On the intensive monitoring argument, Gendall J merely noted that requiring an offender to participate in a programme is one of the conditions a court is permitted

---

<sup>35</sup> First HC appeal, above n 11; and Second HC appeal, above n 13.

<sup>36</sup> First HC appeal, above n 11, at [18].

<sup>37</sup> *Whichman v Department of Corrections* [2013] NZHC 3075, (2013) 27 CRNZ 292 at [33].

<sup>38</sup> First HC appeal, above n 11, at [20].

to impose.<sup>39</sup> His Honour then held that the requirement that Mr Woods attend a reintegration programme was “necessary and proportional” given the level of assistance Mr Woods needed, and therefore was appropriately imposed.<sup>40</sup> The Judge did not explain why the condition was not intensive monitoring.

[87] Mr Woods appeals both decisions.

### **Intensive monitoring**

[88] Intensive monitoring is a specific statutory supervision regime. It is not explicitly excluded from the definition of “special conditions” in s 93(2B) as residential restrictions are. But, under s 15(3)(g) of the PA, intensive monitoring “must, and may only be” imposed if a court orders it under s 107IAC of that Act. Section 107IAC provides that a court may impose an intensive monitoring condition on application by the chief executive, when the court makes an ESO.

[89] This limitation should logically be read into s 93 to prevent a court from imposing intensive monitoring on an offender on a short-term sentence who is not subject to an ESO; that is, to constrain a court in the same manner as the Parole Board is constrained. There are three reasons for this. First, s 93(2B) imports the list of special conditions in s 15(3), so the limitation in s 15(3)(g) must also be imported into s 93.

[90] Secondly, intensive monitoring (and s 15(3)(g)) was introduced into the PA in 2014, ten years after s 93(2B) was added to the SA in 2004. Thus it is not a case of Parliament deliberately omitting an exclusion from s 93(2B); rather, Parliament likely saw no need to amend s 93(2B) when it had already enacted the necessary safeguards in the PA.

[91] Thirdly, it would be highly anomalous if a court could impose intensive monitoring on an offender on a short-term sentence in circumstances where it could not impose it on an offender on a longer-term sentence.

---

<sup>39</sup> At [27].

<sup>40</sup> At [31].

[92] As no ESO could be imposed on Mr Woods, the District Court also had no power to impose an intensive monitoring condition. The question is therefore whether what was imposed on Mr Woods amounts to intensive monitoring.

[93] Counsel for Mr Woods submits that the reintegration programme that Mr Woods is subject to in fact has no rehabilitative or educational characteristics at all, and that Mr Woods is simply required to remain at his residence in the company of two employees from Christchurch Residential Care at all times. In other words, Mr Woods is being required to be accompanied and monitored for 12 hours a day. Counsel for Mr Woods submits that this is intensive monitoring by stealth. Counsel also submits that both the District and High Courts were aware that the appellant would be on conditions that were “functionally equivalent” to intensive monitoring.

[94] There is no evidence that the District Court knew the rehabilitative programme would simply result in Mr Woods being accompanied and monitored for 12 hours a day. Nor has any evidence been adduced that the programme is in fact being run in this way. Even if it were, such programme would not amount to intensive monitoring.

[95] Section 107IAC defines “intensive monitoring” as a condition that requires an offender “to submit to being accompanied and monitored, for up to 24 hours a day, by an individual who has been approved, by a person authorised by the chief executive, to undertake person-to-person monitoring”. This must be taken to mean full-time monitoring. It is not to be construed as covering accompaniment and monitoring for a shorter period than 24 hours a day. Such an interpretation would make the phrase “up to 24 hours a day” redundant. It would also mean that a condition requiring accompaniment and monitoring for three hours a day would qualify. There may be a question around whether substantially full-time monitoring (say, more than 20 hours a day) is covered. But that does not arise in this appeal, and I think in practical terms it is unlikely to arise at all.

[96] If counsel’s allegations are true, Mr Woods is only being accompanied and monitored for 12 hours a day. There is no allegation that Mr Woods is also accompanied between 8.00pm and 8.00am. This is not full-time accompaniment and

monitoring. I therefore agree that the programme condition is lawful and does not amount to intensive monitoring.

### **Residential restrictions**

[97] In my view, the combination of conditions imposed in this case amounts to residential restrictions.

[98] I acknowledge that Mr Woods poses a real risk to the safety of the public. As the majority has explained, Mr Woods suffers from complex psychological problems and treatment will be difficult. If an interpretation of the legislation were available that permitted the current set of conditions, I would adopt it. But such an interpretation is not, in my view, available; and to adopt it regardless would be contrary to what Parliament intended. Three steps lead me to this conclusion.

[99] First, the exclusion in s 93(2B) limits the power of sentencing courts. It does not liberate them from the safeguards in the PA. It means that courts may not impose conditions that are substantially the same as residential restrictions.

[100] Secondly, for conditions to be “substantially the same as” residential restrictions as described in s 33 of the PA, a proper interpretation requires that all the elements in s 33(2) be present, with the exception of s 33(2)(e) and a modification to s 33(2)(c)(i).

[101] Thirdly, all the relevant elements of residential restrictions have been satisfied in this case.

*The exclusion in s 93(2B) is limiting, and must be looked at in substance*

[102] Section 93(1) of the SA allows a court that sentences an offender to a term of imprisonment of 12 months or less to impose on that offender “any special conditions”. The purpose of this is to allow a court to impose on offenders on short-term sentences the kinds of conditions that the Parole Board can impose (under s 18(2)(b) of the PA) on offenders sentenced to longer terms of imprisonment.

[103] This power has limits. Section 93(2B) provides that “special conditions” “includes, without limitation, conditions of a kind described in section 15(3) of the Parole Act 2002, *other than a residential restriction condition referred to in section 15(3)(ab) of that Act*”.<sup>41</sup> The wording is loose, but the purpose is clear. A court has broad powers to impose on offenders on short term sentences the kinds of conditions the Parole Board may impose on offenders on longer-term sentences, but it may *not* impose a “residential restriction” referred to in s 15(3)(ab) of the PA.

[104] A residential restriction condition is not any restriction relating to an offender’s residence. “Residential restrictions” is defined by s 4 of the PA specifically to be “the special conditions described in section 33”, which has been set out in full at [33] above.

[105] The Parole Board’s power to impose residential restrictions is controlled by safeguards. Under s 33(1), a residential restriction scheme must be in operation in the area of the specified residence. There are also procedural safeguards. Section 34 requires the Board to request and consider a report from the chief executive of the Board before it imposes residential restrictions.<sup>42</sup> That report must consider the nature of the offender’s offending, the likelihood that residential restrictions will prevent further offending and assist in reintegration, and the safety of the other occupants of that residence.<sup>43</sup>

[106] Furthermore, before the chief executive prepares such a report, she must also obtain the prior informed consent of every “relevant occupant” of the proposed residence. That is, she must:<sup>44</sup>

- (a) ensure that every relevant occupant of the residence where it is proposed that the offender reside is aware of the nature of the offender’s past and current offending; and
- (b) tell every relevant occupant that the reason for giving that information is to enable the occupant to make an informed decision about whether to consent to having the offender reside at the residence; and

---

<sup>41</sup> Emphasis added.

<sup>42</sup> Parole Act, s 34(1).

<sup>43</sup> Section 34(2).

<sup>44</sup> Section 34(3).

- (c) tell every relevant occupant that the information provided about the offender must not be used for any purpose other than that described in paragraph (b); and
- (d) obtain the consent of every relevant occupant to having the offender reside at the residence; and
- (e) inform every relevant occupant of their right to withdraw their consent, at any time, to having the offender reside at the residence.

[107] It follows from all this, then, that the obvious purpose of the explicit exclusion in s 93(2B) is to prevent courts from effectively exercising without safeguards the same power that the Parole Board can only exercise *with* safeguards. Parliament cannot have intended to liberate sentencing courts from these safeguards in a roundabout way by intending “residential restriction” to cover conditions imposed only after a court has complied with all these safeguards but not otherwise. Such reasoning is circular. It would mean the court could lawfully avoid the safeguards simply by not following them.

[108] The legislative history of s 93(2B) supports this interpretation. Prior to 2016, the definition of “special conditions” excluded both residential restrictions *and* electronic monitoring.<sup>45</sup> In 2016, however, Parliament removed electronic monitoring from the exclusion and left only residential restrictions.<sup>46</sup> It did this to enable sentencing courts to impose electronic monitoring. Parliament clearly saw the s 93(2B) exclusions as limiting courts’ powers. Indeed, in introducing the third reading of the Sentencing (Electronic Monitoring of Offenders) Amendment Bill, the then Minister of Corrections said that the Bill:<sup>47</sup>

removes a legislative barrier to the use of electronic monitoring for offenders released after serving a short term of imprisonment and offenders sentenced to intensive supervision. ... The Sentencing Act explicitly states that electronic monitoring may not be imposed by a court ... as a release condition for an offender sentenced to prison for 2 years or less. This bill removes that barrier.

---

<sup>45</sup> The full text of the definition was: “**special conditions** includes, without limitation, conditions of a kind described in section 15(3) of the Parole Act 2002, other than an electronic monitoring condition as referred to in section 15(3)(f) of that Act, or a residential restriction condition as referred to in section 15(3)(ab) of that Act”.

<sup>46</sup> Sentencing (Electronic Monitoring of Offenders) Amendment Act 2016, s 9(1).

<sup>47</sup> (20 September 2016) 717 NZPD 13877.

[109] If in 2016 Parliament thought that s 93(2B) was a barrier to a court imposing electronic monitoring under s 93, then s 93(2B) must have also been (and indeed must still be) a barrier to a court imposing residential restrictions. So, whether a set of conditions imposed by a court amounts to residential restrictions must be looked at in substance, not form. The introductory words in s 93(2B), “without limitation” and “of a kind”, while broad, should not be read so as to undermine the purpose of the carve-out.

[110] Finally, s 93(2B) should be read consistently with the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 where such interpretation is available. That Act affirms the right to freedom of movement<sup>48</sup> and the right not to be arbitrarily detained.<sup>49</sup> To allow s 93(2B) to be read as empowering comprehensive detention of Mr Woods without compliance with the same safeguards that would have protected those who have committed more serious offences would be to render this form of detention arbitrary, and to restrict freedom of movement without a proper statutory basis.

[111] The next question is what it means for conditions to be in substance the same as residential restrictions.

*“Substantially the same as” residential restrictions means the elements in s 33(2) of the Parole Act, save for two modifications*

[112] Section 33(2) lists five requirements for offenders on whom residential restrictions are imposed. To recap, these are to:

- (a) stay at a specified residence within a residential restriction scheme area;  
and
- (b) be under the supervision of a probation officer and to co-operate with,  
and comply with any lawful direction given by, that probation officer;  
and

---

<sup>48</sup> New Zealand Bill of Rights Act 1990, s 18(1).

<sup>49</sup> Section 22.



- (c) be at the residence either at times specified by the Board or at all times; and
- (d) submit, in accordance with the directions of a probation officer, to the electronic monitoring of compliance with his or her residential restrictions; and
- (e) keep in possession the licence issued under section 53(3) of the PA and, if requested to do so by a constable or a probation officer, to produce the licence for inspection.

[113] To avoid frustrating the purpose of the s 93(2B) exclusion, two modifications are required to the statutory language in the transposition to the sentencing context. First, requirement (e), that the offender carry a licence issued under s 53(3) of the PA, can be disregarded. This is because licences issued under s 53(3) of the PA are only issued to offenders who are *already* subject to residential restrictions.<sup>50</sup> They are merely evidence of the restrictions.

[114] The respondent argues that since s 15 of the PA permits some individual components of residential restrictions to be separately imposed as special conditions (including a condition “relating to the offender’s place of residence”<sup>51</sup> and conditions requiring electronic monitoring<sup>52</sup>), Parliament must have intended that all five of the s 33(2) components are required before a residential restriction is created.

[115] This is unconvincing. As I have said, the assessment must be substantial rather than formalistic or the interests protected by the exclusion will be sacrificed. Certainly not *all* residence-related or electronic monitoring restrictions will amount to a “residential restriction”. But “conditions relating to the offender’s place of residence” is a broader and less precise category. Many such conditions, alone or in combination with other conditions, will not amount to the combination of substantive restrictions in “residential restrictions”.

---

<sup>50</sup> Parole Act, s 53(3). The section reads: “An offender *subject to residential restrictions* must, *before the restrictions come into force*, be issued with a licence that sets out ...” (emphasis added).

<sup>51</sup> Section 15(3)(a).

<sup>52</sup> Section 15(3)(f).

[116] It therefore follows in my view that *Whichman* was incorrect insofar as it held that all five requirements in s 33(2) must be met before conditions amount to a residential restriction.

[117] The second necessary modification to s 33(2) is to the requirement that the offender be at the defined residence at times specified by the Parole Board. In the context of s 93, that should logically be read as times specified by the Court.

[118] A set of conditions is therefore substantially the same as residential restrictions if it requires the offender to:

- (a) to stay at a specified residence; *and*
- (b) to stay there at all times or at times specified by the Court; *and*
- (c) to submit to electronic monitoring; *and*
- (d) to be under the supervision of a probation officer.

*Conditions imposed on Mr Woods are substantially the same as residential restrictions*

[119] The question, then, is whether Mr Woods was required to comply with all of the above. The answer is yes. Mr Woods is electronically monitored and required to be at a specific residence for a time specified by the court unless a probation officer determines otherwise. Six of the conditions also subject him to the supervision of a probation officer.

[120] “Supervision” is not defined in the PA. The term should accordingly be read in its ordinary and natural meaning. The Oxford English Dictionary defines “supervision” as “The action or function of overseeing, directing, or taking charge of a person, organization, activity, etc”.<sup>53</sup> Here, the combination of conditions imposed on Mr Woods plainly puts him under the oversight, direction, or charge of a probation officer. A probation officer controls when he is to attend a psychological assessment;

---

<sup>53</sup> *Oxford English Dictionary* (3rd ed, 2012, online ed) at [supervision, n.].

whether he has completed it satisfactorily; whether he can move to a different address; whether he can leave the address between 8.00 pm and 8.00 am; whether he can enter certain regions; what reintegration programme he is to undertake; and whether he has obeyed the rules of that programme satisfactorily.

[121] This level of supervision is also broader and more comprehensive than that to be expected in relation to EM bail supervision, which is separately provided for in ss 30A–30S of the Bail Act 2000.

### **Conclusion**

[122] For these reasons, I consider the conditions imposed on Mr Woods do amount to a “residential restriction”. I therefore would allow the appeal in respect of this issue.

Solicitors:  
Crown Law Office, Wellington for Respondent