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

**CA487/2014**
**[2015] NZCA 608**

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| BETWEEN | THE COMMISSIONER OF POLICE<br>Appellant |
| AND | KARL LESLIE RAYMOND MARWOOD<br>First Respondent |
| AND | ERANA KING<br>Second Respondent |
| AND | THE PERRIN TRUST<br>Third Respondent |
| AND | ANZ BANK<br>Fourth Respondent |

Hearing: 10 November 2015

Court: Harrison, Stevens and Wild JJ

Counsel: M D Downs and P D Marshall for Appellant
M W Ryan for First and Third Respondents
A G Speedy for Second Respondent
No appearance for Fourth Respondent

Judgment: 17 December 2015 at 10.30 am

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**JUDGMENT OF THE COURT**

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**A The appeal is allowed.**

**B The evidence obtained following execution of the search warrant at 12A Laughton St, Taupo on 6 July 2010 is admissible at the trial of the appellant's proceeding against the respondents.**

**C The first, second and third respondents are ordered jointly to pay the appellant one set of costs for a standard appeal on a band A basis together with usual disbursements.**

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**REASONS OF THE COURT**

(Given by Harrison J)

## Introduction

[1] This appeal by the Commissioner of Police raises the issue of whether a Court has jurisdiction to exclude at the trial of a civil proceeding evidence which has been obtained as a result of an unreasonable search of property in breach of s 21 of the New Zealand Bill of Rights Act 1990 (the NZBORA).

[2] The Commissioner has issued a proceeding in the High Court against Karl Marwood, Erana King and others, claiming profit forfeiture orders under the Criminal Proceeds (Recovery) Act 2009 (the CPRA). Both individuals and a trust associated with Mr Marwood are said to have benefited unlawfully from significant criminal activity, a sophisticated cannabis growing operation. The primary evidence available to support the Commissioner's claim was obtained by the police on execution of a search warrant of Mr Marwood's home. The District Court later held that the search was unlawful; that the evidence was improperly obtained; and that it should be excluded in a criminal proceeding which had been commenced against Mr Marwood.[1] He was consequently discharged on counts of cultivating and dealing in cannabis.

[3] The Commissioner wishes to adduce the same evidence at the trial of his claim under the CPRA. In a pre-trial determination of admissibility Cooper J found that the Court had jurisdiction to exclude the evidence; and that, in the exercise of his discretion, exclusion was appropriate.[2] The Commissioner now appeals.

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1 *R v Marwood* DC Rotorua CRI-2010-1318, 14 April 2011.
2 *Commissioner of Police v Marwood* [2014] NZHC 1866.

**Background**

[4] On 30 June 2010 a police officer swore an affidavit in support of an application for a search warrant of Mr Marwood's home. The officer deposed that a third party, Rex Kirby, had a week earlier received a call on his home phone line. Mr Kirby's phone number is similar to that of the Taupo Police Station. The caller inquired whether he was speaking with "the police". Mr Kirby replied in the affirmative, mistakenly thinking that the caller was from the police. The caller stated:

> For your information, I can't tell you who I am, at 12A Laughton Street, Karl has marijuana plants growing at the back of his property.

[5] Mr Kirby later reported the call to the police. Their inquiries established that Karl Marwood was living at 12A Laughton Street and had previous convictions for cultivating cannabis and possessing cannabis for supply. Based on this information the police were satisfied that Mr Marwood was likely to have cannabis plants growing in his yard and drug-related utensils within his house. A Justice of the Peace granted the Police application for a search warrant.

[6] Execution of the warrant at Mr Marwood's property on 6 July 2010 revealed over 2000 cannabis seeds, some germinating in a hot water cupboard; two three-level steel cabinets fitted out for cultivating seedlings; a main growing room containing 29 individually potted and named cannabis plants over one metre high; a cabinet adjacent to the main growing room containing mother plants; 2.85 kilograms of dry cannabis in a bin; a plastic zip lock bag containing an ounce of dried cannabis head; and precision weighing scales.

[7] Mr Marwood and Ms King, who were present during the search, were later arrested and interviewed. Both made incriminating admissions. Only Mr Marwood was subsequently charged with cultivation of cannabis, possessing cannabis for the purpose of sale, selling cannabis and theft of electricity.

[8] Before trial Mr Marwood successfully challenged the admissibility of the evidence on the basis that the search warrant was unlawful. Judge Bouchier concluded that the application for the warrant was flawed because it established a

suspicion of offending only. She also placed weight on the lack of any police inquiries about the reliability of the information.[3] In exercising her discretion to exclude the evidence the Judge recorded that while the police were not guilty of acting in bad faith their actions had been "sloppy".[4]

**Issue**

[9] The Commissioner contends that the evidence found by the police on searching Mr Marwood's property should be admissible at the trial of his proceeding under the CPRA, despite its exclusion in the criminal proceeding. That is the issue for determination on this appeal. Mr Downs advances the Commissioner's argument on the basis of the longstanding common law principle that in a civil proceeding relevant evidence is admissible even if improperly obtained. This rule is preserved by s 7 of the Evidence Act 2006 and is not excluded by other provisions in that Act or any other Act. The Judge erred in finding a jurisdiction to exclude, primarily based on the provisions of the NZBORA.

**Statutory framework**

[10] Before addressing the substance of the Commissioner's appeal it is necessary to identify the relevant provisions of two statutes. One, the CPRA, is the legislative source of the Commissioner's power to claim relief. The other is the Evidence Act which, as its name suggests, provides rules of evidence governing both criminal and civil proceedings in New Zealand.

*(a) The CPRA*

[11] The CPRA came into force on 1 December 2009, replacing and repealing the Proceeds of Crimes Act 1991 (the PCA). Under the PCA the Solicitor-General was only empowered to apply for a forfeiture order after a person was "convicted on indictment for a serious offence".[5] While that phrase had an extended meaning to include cases where a person was discharged without conviction or absconded in connection with the offence, the PCA imposed the criminal threshold of proof

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3 At [42].
4 At [52].
5 Sections 15(1) and 3(1).

beyond reasonable doubt as the jurisdictional prerequisite to invoking the civil remedy of forfeiture. Proceedings under the PCA were treated as being quasi-criminal in nature.[6]

[12] The CPRA signalled a significant change of emphasis. Its primary purpose is to establish a regime which by s 4(1)(a):

> … provides for the restraint and forfeiture of property derived as a result of significant criminal activity *without the need for a conviction* …
>
> (Emphasis added.)

[13] In reinforcing this provision, s 6 provides:

> **6 Meaning of significant criminal activity**
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> (1) In this Act, unless the context otherwise requires, **significant criminal activity** means an activity engaged in by a person that if proceeded against as a criminal offence would amount to offending—
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> (a) that consists of, or includes, 1 or more offences punishable by a maximum term of imprisonment of 5 years or more; or
>
> (b) from which property, proceeds, or benefits of a value of $30,000 or more have, directly or indirectly, been acquired or derived.
>
> (2) A person is undertaking an activity of the kind described in subsection (1) whether or not—
>
> (a) the person has been charged with or convicted of an offence in connection with the activity; or
>
> (b) the person has been acquitted of an offence in connection with the activity; or
>
> (c) the person's conviction for an offence in connection with the activity has been quashed or set aside.
>
> …

[14] Significantly, also, s 10 provides:

> **10 Nature of proceedings**
>
> (1) Proceedings relating to any of the following *are civil proceedings*:

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6 *Black v R* (1997) 15 CRNZ 278 (CA) at 281; *Solicitor-General v Cheng* HC Auckland CIV-2005-404-3834, 19 September 2007 at [11].

…

*(d) a profit forfeiture order:*

…

(Emphasis added.)

[15] The Commissioner is the only party who may apply for a civil forfeiture order;[7] and the High Court has exclusive jurisdiction.[8] A copy of the application must be served on all persons who to the Commissioner's knowledge have an interest in the property.[9] In this proceeding the Commissioner seeks orders forfeiting the house at 12A Laughton Street, Taupo; bank accounts in Mr Marwood's name; and a motor vehicle registered to him. The ANZ Bank as mortgagee of the property is also joined as a party.

[16] If the Commissioner proves on the balance of probabilities that a person has benefitted unlawfully from significant criminal activity, the value of that benefit is presumed to be the value stated in the application.[10] The respondent may rebut that presumption on the balance of probabilities.[11] The Commissioner alleges that the value of the unlawful benefit here is $334,130.10. The Court must make an order where it is satisfied that the respondent has unlawfully benefited from significant criminal activity and has interests in property.[12] A profit forfeiture order must specify (a) the value of the unlawful benefit derived; (b) the maximum amount recoverable; and (c) the property to be disposed of.[13] Such an order is enforceable as an order made as a result of a civil proceeding instituted by the Crown against the person to recover a debt due to it.[14]

[17] As was pointed out to Mr Downs in argument, the Commissioner's application suffers a material deficiency. He has sued what is called "the Perrin Trust" as owner of the property. A trust is not a separate legal entity. While beneficiaries of the trust have an interest in assets settled on the trust, the registered

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7 Section 43.
8 Section 44.
9 Section 45.
10 Section 53(1).
11 Section 53(2).
12 Section 55(1).
13 Section 55(2). A profit forfeiture order is defined in this way by s 5.
14 Section 55(4).

proprietors are the owners of those assets. It will be necessary for the Commissioner to apply to amend his application by substituting the names of Mr Marwood and his mother, the registered proprietors of the Laughton Street property, in their capacities as trustees of what is known as the Perrin Trust.

*(b) Evidence Act*

[18] The Evidence Act is a comprehensive codification of the laws of evidence applying to all proceedings commenced on or after 1 August 2007.[15] Among its purposes[16] are "to help secure the just determination of proceedings by providing for facts to be established by the application of logical rules", and "promoting fairness to parties and witnesses". Section 7 provides:

> **7 Fundamental principle that relevant evidence admissible**
>
> (1) All relevant evidence is admissible in a proceeding except evidence that is—
>
> (a) inadmissible under this Act or any other Act; or
>
> (b) *excluded under this Act or any other Act.*
>
> (2) Evidence that is not relevant is not admissible in a proceeding.
>
> (3) Evidence is relevant in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.
>
> (Emphasis added.)

[19] Nevertheless, the Act reserves a general exclusionary power in these terms:

> **8 General exclusion**
>
> (1) *In any proceeding*, the Judge must exclude evidence if its probative value is outweighed by the risk that the evidence will—
>
> (a) have an unfairly prejudicial effect on the proceeding; or
>
> (b) needlessly prolong the proceeding.
>
> (2) In determining whether the probative value of evidence is outweighed by the risk that the evidence will have an unfairly prejudicial effect on a criminal proceeding, the Judge must take into account the right of the defendant to offer an effective defence.

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15 Sections 2 and 5(3).
16 Section 6.

(Emphasis added.)

[20] Sections 11 and 12 provide:

> **11 Inherent and implied powers not affected**
>
> (1) The inherent and implied powers of a court are not affected by this Act, except to the extent that this Act provides otherwise.
>
> (2) Despite subsection (1), a court must have regard to the purpose and the principles set out in sections 6, 7, and 8 when exercising its inherent or implied powers.
>
> **12 Evidential matters not provided for**
>
> If there is no provision in this Act or any other enactment regulating the admission of any particular evidence or the relevant provisions deal with that question only in part, decisions about the admission of that evidence—
>
> (a) must be made having regard to the purpose and the principles set out in sections 6, 7, and 8; and
>
> (b) to the extent that the common law is consistent with the promotion of that purpose and those principles and is relevant to the decisions to be taken, must be made having regard to the common law.

[21] Also of direct relevance is s 30 which materially provides:

> **30 Improperly obtained evidence**
>
> (1) This section applies *to a criminal proceeding* in which the prosecution offers or proposes to offer evidence …
>
> (2) The Judge must [on application by the present prosecutor] —
>
> (a) find, on the balance of probabilities, whether or not the evidence was improperly obtained; and
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> (b) if the Judge finds that the evidence has been improperly obtained, determine whether or not the exclusion of the evidence is proportionate to the impropriety by means of a balancing process that gives appropriate weight to the impropriety but also takes proper account of the need for an effective and credible system of justice.
>
> (3) For the purposes of subsection (2), the court may, among any other matters, have regard to the following:
>
> (a) the importance of any right breached by the impropriety and the seriousness of the intrusion on it:
>
> (b) the nature of the impropriety, in particular, whether it was deliberate, reckless, or done in bad faith:

(c) the nature and quality of the improperly obtained evidence:

(d) the seriousness of the offence with which the defendant is charged:

(e) whether there were any other investigatory techniques not involving any breach of the rights that were known to be available but were not used:

(f) whether there are alternative remedies to exclusion of the evidence which can adequately provide redress to the defendant:

(g) whether the impropriety was necessary to avoid apprehended physical danger to the Police or others:

(h) whether there was any urgency in obtaining the improperly obtained evidence.

(4) The Judge must exclude any improperly obtained evidence if, in accordance with subsection (2), the Judge determines that its exclusion is proportionate to the impropriety.

(5) For the purposes of this section, evidence is improperly obtained if it is obtained—

(a) in consequence of a breach of any enactment or rule of law by a person to whom section 3 of the New Zealand Bill of Rights Act 1990 applies; or …

(c) unfairly.

…

(Emphasis added.)

[22] We shall now address the merits of the Commissioner's appeal.

## (1) Jurisdiction

[23] Counsel for the Commissioner (not Mr Downs) conceded before Cooper J that the Court had an inherent power to exclude at trial of the Commissioner's application under the CPRA the evidence excluded in the criminal proceeding. Without objection from Messrs Ryan and Speedy, Mr Downs withdrew that concession before us. Counsel's approach was correct. The Commissioner's concession was on a question of law only on which no further evidence could have

been called and there was no suggestion of prejudice to Mr Marwood.[17] Moreover, if the concession was wrongly made, it would not be in the interests of justice to require the Commissioner to create a jurisdiction which does not otherwise exist in law.[18] Nevertheless, the fact of the Commissioner's concession gives important explanatory context for the Judge's approach and we add that, unlike him, we have had the benefit of Mr Downs' comprehensive submissions on jurisdiction.

*(a) Fan v R*

[24] Cooper J's conclusion that the Court had jurisdiction to exclude the evidence was based on two separate grounds. First, he relied on this Court's decision in *Fan v R*.[19] While acknowledging that *Fan* was decided in a criminal proceeding, the Judge applied it as an example of the Court's ability to supplement the exclusionary provisions of the Evidence Act where necessary to do justice in cases which are not directly covered by the Act.[20]

[25] Mr Downs submitted that *Fan* does not support the Judge's conclusion. His written synopsis invited us to go further, and to find that *Fan* erroneously decided that a lacuna may exist where any pre-existing rule of common law is not preserved in the Evidence Act.[21] In argument, however, Mr Downs was content to retreat to his primary proposition that *Fan* did not apply.

[26] In *Fan* the issue was whether statements made by the defendants to police officers based on mistaken or erroneous legal advice were admissible. The Court accepted that the common law discretion to exclude evidence on the general ground of unfairness survived the Evidence Act and the specific provisions of s 30; and that it was arguably unfair to admit incriminating statements made in reliance on poor legal advice which the clients were entitled to expect was correct in fact and law.

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17 *New Zealand Meat Board v Paramount Export Ltd* [2004] UKPC 45, [2005] 2 NZLR 447 at [47] and [64].

18 *Patcroft Properties Ltd v Ingram* [2010] NZCA 275, [2010] 3 NZLR 681 at [12] (reversed by the Supreme Court but not on this issue: *Ingram v Patcroft Properties Ltd* [2011] NZSC 49, [2011] 3 NZLR 433); *Goodman Felder Wattie Agri-Products Ltd v Gibson* [1995] 2 ERNZ 323 (CA) at 327.

19 *Fan v R* [2012] NZCA 114, [2012] 3 NZLR 29.

20 At [23].

21 We note that the Supreme Court refused leave to appeal: *Sun v R* [2012] NZSC 40 at [3]–[4].

However, in the particular circumstances of *Fan* the Court was not satisfied that it would be unfair to admit the evidence.

[27] Our brief summary illustrates the difference between *Fan* and this case. *Fan* stands as authority for the survival of a common law discretion to exclude evidence for unfairness in a particular situation not addressed by s 30. It did not recognise or create a new exclusionary rule. The issue here is whether an exclusionary rule exists in civil proceedings.

*(b) New Zealand Bill of Rights Act 1990*

[28] Second, and more substantially, the Judge relied by analogy on certain provisions of the NZBORA in conjunction with ss 6, 7 and 12 of the Evidence Act. His starting point was that the search was unreasonable in breach of s 21 of the NZBORA. Accordingly the evidence was improperly obtained.[22] The NZBORA would be reduced to irrelevance by a decision to admit the evidence on the ground that the proceeding was civil in nature and the evidence was relevant.[23] The importance of the NZBORA lay in the Court's development of a range of remedies for its breach, including the exclusion of improperly obtained evidence.[24]

[29] Cooper J concluded that:

> [29] It would be odd in this context if the combination of ss 7 and 30 of the Evidence Act were held to have the result that evidence obtained in breach of s 21 of the Bill of Rights Act is admissible in a civil forfeiture proceeding, subject only to a relevance test. In my view, the drafting of s 7 of the Evidence Act does not indicate that it was intended to oust any relevant provisions of the Bill of Rights Act in the civil forfeiture context. In the absence of clear words, I consider the interpretative direction given by Parliament in s 6 of the Bill of Rights Act can and should be applied to overcome any such suggestion.
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> …
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> [31] I note also that s 12 of the Evidence Act deals with cases for which there is "no provision in this Act or any other enactment regulating the admission of any particular evidence or the relevant provisions deal with that question only in part…". In such cases, decisions about the admission of evidence must be made having regard to both the Act's purpose, and the

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22 Evidence Act 2006, s 30(5)(a).
23 At [26].
24 At [27] and [28].

> statutory principles set out in ss 6, 7 and 8. Regard must also be had to the common law to the extent that it is consistent with the promotion of that purpose. Confirming the existence of a discretion to exclude evidence that has been obtained in breach of the Bill of Rights Act in a case such as the present would be in accordance with s 12 on the basis that s 30 has dealt with the admission of improperly obtained evidence only in part, its provisions being limited to cases arising in the Court's criminal jurisdiction. A decision that has regard to the purpose of recognising the importance of the rights affirmed by the Bill of Rights Act would be consistent with s 12.
>
> [32] It would also be consistent with s 7 of the Evidence Act because, if the jurisdiction to exclude relevant evidence were exercised, the exclusion would occur as a remedy granted to vindicate the right affirmed in s 21 of the Bill of Rights Act. The evidence would in that case be excluded "under" the Bill of Rights Act. Since s 7(1)(b) of the Evidence Act contemplates the exclusion of evidence "under this Act or any other Act", that would be an outcome apparently contemplated by s 7(1)(b) and consequently no inconsistency with that section would arise.

[30] In evaluating this reasoning it is appropriate to start, like the Judge, with ss 7 and 30 of the Evidence Act. The "fundamental principle" of s 7 is that all relevant evidence is admissible in a civil or criminal proceeding except where in terms of s 7(1)(b) it is either inadmissible or excluded "under [the Evidence Act] or "any other Act". In a criminal proceeding, s 30(4) provides for exclusion where the Judge determines that the remedy of exclusion is proportionate to the impropriety.

[31] However, s 30 applies only to a criminal proceeding. By virtue of s 10(1) of the CPRA, the Commissioner's claim is a civil proceeding. As Mr Downs pointed out, this limitation was deliberate. The Law Commission advised Parliament before the Evidence Act was enacted that it was unnecessary to provide completely different laws for civil and criminal evidence. Instead there should be a common code for both within which distinctions should be made for criminal evidence.[25] The Commission proposed that the power to exclude unfairly prejudicial evidence should extend to all proceedings. Section 8 reflects legislative acceptance of this proposal, settling an issue which had been the subject of uncertainty at common law.[26] However, in contradistinction, the rule relating to unfairly obtained evidence, as it was enacted by s 30, was to be limited to criminal proceedings.[27]

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[25] Law Commission *Evidence Law: Principles for Reform* (NZLC PP13, 1991) at [23]–[24].
[26] See *Polycarpou v Australian Wire Industries Pty Ltd* (1995) 36 NSWLR 49 at 60–67.
[27] Law Commission *Evidence Law: Codification* (NZLC PP14, 1991) at 27.

[32] On this construction of the combined effect of ss 7 and 30, the evidence obtained by the police on execution of the search warrant of Mr Marwood's house is plainly admissible in the CPRA proceeding. The question then is whether the Judge was correct to find that these provisions were insufficient "to oust any relevant provisions of the [NZBORA] in the civil forfeiture context".[28] It was central to the Judge's reasoning that, properly construed, the NZBORA itself provides for exclusion, thereby satisfying the exception within s 7(1)(b) of the Evidence Act for evidence "excluded under any other Act".

[33] We part company with the Judge at this point in his analysis. The NZBORA is a codification of protected rights and freedoms including, by s 21, the right to be secure against unreasonable search. Courts in this country have long recognised a judicial discretion to exclude probative but unfairly obtained evidence in criminal cases.[29] This power originated in the common law, not according to statute, and preceded the NZBORA. The same discretion remained after the NZBORA's enactment, informed for example by s 21 but independently of it. In affirmation of the power of exclusion recognised by this Court in *Shaheed*,[30] the legislature has provided that one of the statutory prerequisites to exclusion is a finding that evidence is improperly obtained if it is obtained in breach of s 21 of the NZBORA.[31]

[34] In a criminal proceeding a judge is entitled to exercise the discretionary power of exclusion if satisfied that that remedy is proportionate to the breach after taking account of the factors specified in s 30(3). If granted, this remedy vindicates a breach of the s 21 NZBORA right. But that is not because in terms of s 7(1)(b) the evidence is excluded "under … any other Act" – the NZBORA. In order to meet that statutory criterion the NZBORA would have to provide expressly or by necessary implication that "evidence of a particular description is inadmissible in a court proceeding."[32] As *Shaheed* confirms, the NZBORA does not prescribe or provide for the consequences of a breach of its provisions.[33] The evidence is excluded

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28 At [29].
29 *R v Capner* [1975] 1 NZLR 411 (CA) at 413–414.
30 *R v Shaheed* [2002] 2 NZLR 377 (CA).
31 Section 30(5)(a).
32 *Slater v Police* HC Auckland CRI-2010-404-379, 10 May 2011 at [58].
33 *R v Shaheed*, above n 30, at [8] per Elias CJ, [111] per Richardson P, Blanchard and Tipping JJ and [170] and [173] per Gault J.

because of a judicial determination based on a discretionary evaluation of statutory criteria as they apply to the particular circumstances.

[35] In disagreement with the Judge we do not consider that this conclusion is inconsistent with ss 6 or 7(1)(b) of the Evidence Act. The rules of evidence prescribed by s 30 "recognise the importance of the rights affirmed by [NZBORA]" in the criminal context, in recognition of the statutory requirement to provide rules which "help secure the just determination of proceedings". The NZBORA does not independently provide a foundation for an exclusionary rule in a civil proceeding where the legislature has chosen not to provide one.

[36] Nor do we regard s 12 of the Evidence Act as dispositive. It simply deals with cases for which there is "no provision in this Act or any other enactment regulating the admission of any particular evidence or the relevant provisions deal with that question only in part". The Judge reasoned that s 30 of the Evidence Act has dealt with the admission of improperly obtained evidence only in part because of its limitation to criminal proceedings. For the reasons which we have set out, we are satisfied that the limitation was deliberate. Admissibility generally, including in a civil proceeding, is expressly addressed by ss 7 and 8. The situation is not one where it is necessary to invoke the NZBORA to fill a lacuna of the type envisaged by s 12.

[37] Accordingly, for these reasons, we must disagree with Cooper J that the relevant provisions of the NZBORA provide a jurisdictional basis for excluding at trial of the Commissioner's claim under the CPRA evidence which was excluded in the criminal proceeding.

*(c) Common law*

[38] Our interpretation of the relevant statutory provisions reflects the settled position at common law. Mr Downs surveyed the leading Commonwealth authorities which establish the common law principle that the manner in which evidence is obtained, even if improper or illegal, does not bar its admission at trial. Its authority is well established in the United Kingdom. The fact that evidence may

have been unlawfully obtained does not allow a discretionary power of exclusion:[34] "if the evidence is relevant it is admissible and the court is not concerned with how it is obtained:"[35] The same rule applied in New Zealand.[36]

[39] There is a recognised exception to the inclusionary rule in civil proceedings. A stay or a related remedy may be justified where evidence has been obtained through violence, deception or bad faith, amounting to a contempt or abuse of process.[37] The discretion, which has the effect of excluding evidence obtained by means of deliberate misconduct, is based on public interest grounds of policy.[38] A lesser remedy may be more appropriate depending on the nature of the impropriety. For example, in *Jones v University of Warwick*[39] an employer improperly obtained photographic evidence by a trespass for use in defending a personal injury claim. In ruling that the evidence was admissible, the Court of Appeal nevertheless made a costs order against the employer.

[40] At one stage in argument Mr Ryan sought to invoke the authorities on this exception to the inclusionary rule. However, he later acknowledged that Mr Marwood was not asserting an abuse of process or analogous misconduct; instead Mr Ryan drew support for the High Court judgment from three decisions of this Court, originally cited by Mr Downs, which he contended were authority for the proposition that the exclusionary rule extended to civil proceedings.

[41] First, in *Queen Street Backpackers Ltd v Commerce Commission,*[40] the Commerce Commission instituted penalty proceedings against owners of a group of backpacker hostels on the ground that they were engaged in price fixing, contrary to s 27 of the Commerce Act 1986. Proof of a breach would render the owners liable to a substantial financial penalty. On the premise that an action to enforce a penalty

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34 *R v Leatham* (1861) 8 Cox CC 498 (QB) at 501, *Ibrahim v R* [1914] AC 599, *Helliwell v Piggott-Sims* [1980] FSR 356 (CA) at 356–357.

35 *Kuruma v R* [1995] AC 197 (PC) at 204.

36 D L Mathieson (ed) *Cross on Evidence* (7th ed, Butterworths, Wellington, 2001) at [1.73] and [11.34].

37 See the leading authorities discussed in *Mazinski v Bakka* (1979) 20 SASR 350 (SC) at 361, 381 and 383: including *Metropolitan Bank v Pooley* (1885) 10 AC 210 (HL) at 214; *Willis v Earl Beauchamp* (1886) 11 PD 59 (CA); and *Lawrance v Norreys* (1890) 15 AC 210 (HL) at 216.

38 *Pearce v Button* (1985) 50 ALR 537 (FCA) at 551–552.

39 *Jones v University of Warwick* [2003] EWCA Civ 151, [2003] 1WLR 954 (CA).

40 *Queen Street Backpackers Ltd v Commerce Commission* (1994) 2 HRNZ 94 (CA).

was quasi-criminal in nature, the Court noted that "there was a sufficient analogy with criminal proceedings to enable [it] to exclude improperly obtained evidence".[41] Implicit in this observation is an acceptance of the inclusionary rule applying in civil proceedings. By contrast with *Queen Street Backpackers,* the Commissioner's claim is a civil proceeding, as s 10(1) of the CPRA confirms.

[42] In *Attorney-General v Equiticorp Industries Group Ltd*[42] this Court acknowledged "an ultimate discretion in borderline [civil] cases" to exclude expert evidence if the Judge considers that the witness would usurp the function of judge or jury.[43] Admissibility of opinion evidence is now governed by s 25 of the Evidence Act and the principle is plainly irrelevant in this case. The Court also recognised that "the Judge has a discretion to exclude prosecution evidence if he or she considers that its prejudicial effect exceeds its probative value".[44] The same discretion is now reflected in s 8 of the Evidence Act. The principle is not engaged in this case.

[43] In *Talbot v Air New Zealand Ltd*[45] this Court allowed an appeal from an Employment Court ruling that evidence of a transcribed telephone conversation was inadmissible because it had been obtained unfairly. This Court essentially reversed the Employment Court on a question of fact. Again, the decision is not material to the issue in this case.

[44] On analysis, none of these judgments derogates from the settled common law principle confirmed by the Evidence Act, that there is no jurisdiction to exclude evidence in civil proceedings on the ground that it would be unfair to admit it because it was unlawfully obtained. Thus, we are satisfied that Cooper J erred in finding that the High Court had jurisdiction to exclude at trial of the Commissioner's claim under the CPRA evidence obtained by the police following their unreasonable search of Mr Marwood's property.

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41 At 96–97.

42 *Attorney-General v Equiticorp Industries Group Ltd (in Statutory Management)* [1995] 2 NZLR 135 (CA) at 140.

43 At 140.

44 At 140.

45 *Talbot v Air New Zealand Ltd* [1996] 1 NZLR 414 (CA).

**(2) Discretion**

[45] However, in the event that we are wrong on jurisdiction, we must determine whether Cooper J erred in exercising his discretion to exclude the evidence.

[46] In exercising his discretion in Mr Marwood's favour, the Judge relied on two grounds. First, the Commissioner, who is empowered to make applications under the CPRA as the head of a body which is an instrument of the Crown, would be seeking to rely on evidence obtained as a result of unlawful acts of the New Zealand Police.[46] That factor cannot be ignored simply because the proceedings are civil in nature. Mr Marwood would not have a remedy in trespass.[47] Exclusion would not be contrary to the primary purpose of the CPRA as set out in s 3(1).

[47] Second, and more importantly, the Judge applied s 30 of the Evidence Act by analogy. He undertook a discretionary balancing exercise by reference to the specified factors, concluding that exclusion of the evidence would be a proportionate response to the breach of s 21 of the NZBORA. He was particularly influenced by the fact that the alternative remedy postulated by s 30(3)(f), of a claim for compensatory damages under the NZBORA, would be inherently problematic,[48] and contrary to the decision of Blanchard J in *Taunoa v Attorney-General.*[49]

[48] Cooper J concluded:

> [61] I add that I have found unattractive the suggestion made by Mr Macklin that because the remedy of exclusion had been applied in the criminal proceeding, the right had been sufficiently vindicated. Such an approach seems to me wrong in principle. I consider it more appropriate to focus on the fact that there was a breach of rights. The fact that it is once vindicated should not have the consequence that the breach is able to be set on one side for subsequent purposes. In my view, that would diminish the importance of the right. It would also be contrary to the rule in s 6 of the Interpretation Act 1999 that enactments apply to circumstances as they arise. Section 21 of the Bill of Rights Act should not cease to have effect merely because it has been applied in one relevant context when the same facts are relied on for a second time.

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46 At [44] and [45].
47 At [47].
48 At [56].
49 *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [256].

> [62] I consider that to allow the evidence to be relied on for the purposes of the Commissioner's application for forfeiture orders when it has already been excluded for good reason in the criminal proceeding would not take proper account of the need for an effective and credible system of justice.
>
> (Emphasis added.)

[49] In our view this approach was wrong in principle. Our starting point is with the purpose reflected in s 3 of the CPRA – to establish a regime for forfeiture of property that is derived from significant criminal activity or represents the value of a person's unlawfully derived income. According to s 3(2), the CPRA's objective is to eliminate the chance for persons to profit from undertaking or being associated with significant criminal activity or to deter that activity. The relevant evidence would, if admitted at trial, tend to prove Mr Marwood's participation in significant criminal activity – that is, conduct which if proceeded against as a criminal offence would be punishable by a term of five years or more or from which property, proceeds or benefits of a value of $30,000 or more had been acquired.[50]

[50] Why then should evidence which is highly probative of this proscribed conduct be excluded? Is exclusion justified because the evidence was found in the criminal proceeding to have been improperly obtained by virtue of a defective application for a search warrant, leading to an unreasonable search?

[51] In our judgment Cooper J erred primarily in his analogous application of the factors relevant to the s 30 balancing exercise. The District Court finding that the search of Mr Marwood's house was unreasonable stands for all purposes. However, the s 30 test for determining whether exclusion is proportionate to the breach of that right is tailored to a criminal proceeding. The particular factors relevant to the balancing exercise derive from Judge-made principles fashioned by this Court in *Shaheed* when deciding on a challenge to the admissibility of evidence obtained from an unlawful search in a criminal trial.

[52] Adherence to process has much greater significance for criminal than civil proceedings. The liberty of an individual is at issue and the state is required to comply with basic requirements to ensure a fair trial, as affirmed by ss 23–25 of the

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[50] Section 6.

NZBORA. So, for example, factors such as the seriousness of the offence (s 30(3)(d)), the availability of other investigatory techniques (s 30(3)(e)), the availability of alternative remedies to provide adequate redress to a defendant (s 30(3)(f)) and the apprehension of physical danger to police or others (s 30(3)(g)) are directly relevant in that context. They are inapt for a discretionary inquiry in civil proceedings.

[53] The one statutory factor which may be relevant in a civil proceeding is the nature of the impropriety and in particular whether it was deliberate, reckless or done in bad faith (s 30(3)(b)). A finding that the police acted with that degree of consciousness or deliberation is likely to be decisive for exclusion in both the criminal and civil jurisdiction. In a criminal proceeding exclusion on this ground may lead to a discharge; in a civil proceeding proof of bad faith may constitute an abuse of process, sufficient to justify a stay or an analogous remedy, as noted above.

[54] We agree with Mr Downs that Blanchard J's decision in *Taunoa* does not assist. The Supreme Court considered a claim by prisoners for damages as compensation for breaches of the NZBORA and in that context Blanchard J emphasised that any inquiry into remedies should start with non-monetary relief, such as the availability of a declaration. *Taunoa* is not authority for the proposition that exclusion could be the primary remedy in a civil proceeding where a breach of the NZBORA results in evidence being improperly obtained.

[55] Cooper J rejected a submission in the High Court that to exclude the evidence in this proceeding, and allow Mr Marwood to escape liability under CPRA, would be an affront to common sense and justice.[51] He found "unattractive" the proposition that prior exclusion of the disputed evidence had sufficiently vindicated Mr Marwood's right. He characterised this approach as wrong in principle.[52]

[56] It appears, however, that the Judge's attention was not drawn to this Court's decision in *Clark v R*.[53] In *Clark* the Court was satisfied within the meaning of s 30(3)(f) that the previous exclusion of evidence was relevant in a later and

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51 At [42].
52 At [61].
53 *Clark v R* [2013] NZCA 143, (2013) 26 CRNZ 214.

unrelated prosecution where the same evidence was tendered for propensity purposes.[54] This Court held that the earlier exclusion was a significant alternative remedy, given that it ensured that Mr Clark never faced trial and so avoided the possibility of conviction and a prison sentence.

[57] In the criminal context exclusion is the only realistic remedy for a person facing prosecution[55] and the risk of conviction leading to a term of imprisonment if improperly obtained evidence is admitted.[56] Exclusion is the appropriate vindication of a breach of a NZBORA right. Mr Marwood has already enjoyed that vindication. Exclusion of the evidence in the criminal proceeding, with the inevitable consequence of a discharge, has returned him to the position he would have enjoyed but for the unreasonable search.

[58] It must not be overlooked that the breach was solely one of process in applying for a search warrant without adequate inquiry. But the accuracy of the information originally received by the police was proved by discovery of the cannabis cultivation operation at Mr Marwood's home. Further police inquiries would not have changed the result. Mr Marwood was discharged from criminal liability for breach of process, despite highly probative evidence of his guilt.

[59] We are satisfied that, if a discretion exists, the evidence should be admitted in this proceeding. The right to a forfeiture order under the CPRA is not dependent upon proof of criminal liability. The statutory regime stands on its own. So, for example, the fact that a criminal proceeding is quashed, or a conviction has been set aside, does not affect the right to apply for a profit forfeiture order.[57] Furthermore, the statutory objective is not punitive or compensatory, but is intended to deprive somebody of the amount by which he or she has unlawfully benefited from significant criminal activity.

[60] The CRPA regime is designed to ensure that a person is not enriched by criminal activities. A forfeiture order would simply return Mr Marwood to the same

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54 At [26].
55 *Solicitor-General v Cheng*, above n 6, at [93].
56 *R v Shaheed*, above n 30, at [153]–[154] per Richardson P, Blanchard and Tipping JJ.
57 Section 16.

financially neutral position he would have been in but for his participation in significant criminal activity.[58] It would be contrary to public policy to allow Mr Marwood to retain the financial fruits of his crime where the evidence, even though improperly obtained, is nevertheless highly probative, not only of his participation in significant criminal activity but also of his receipt of an unlawful benefit.

[61] In our judgment Cooper J erred in principle in exercising his discretion to exclude the evidence obtained from an unreasonable search of Mr Marwood's home.

**Result**

[62] The appeal is allowed.

[63] The evidence obtained following execution of the search warrant at 12A Laughton St, Taupo on 6 July 2010 is admissible at the trial of the appellant's proceeding against the respondents.

[64] The first, second and third respondents are ordered jointly to pay the appellant one set of costs for a standard appeal on a band A basis together with usual disbursements.

Solicitors:
Crown Law Office, Wellington for Appellant

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58 *Solicitor-General v Cheng*, above n 6, at [96].