

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA333/04
CA335/04**

THE QUEEN

v

**WILLIAM SHANE CHILTON
SARAH ELIZABETH ARCHBOLD**

Hearing: 1 August 2005

Court: Anderson P, Glazebrook, Chambers, O'Regan and Robertson JJ

Counsel: T W Fournier for Appellants
B J Horsley for Crown

Judgment: 1 December 2005

JUDGMENT OF THE COURT

- A The appeal is allowed in part.**
- B Mr Chilton's conviction on Count 8 of the indictment is quashed and a judgment and verdict of acquittal is entered in respect of that count.**
- C Ms Archbold's conviction on Count 10 of the indictment is quashed and a judgment and verdict of acquittal is entered in respect of that count.**
- D The appeal is otherwise dismissed.**
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REASONS

(Given by Glazebrook J)

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Introduction

[1] Ms Archbold and Mr Chilton were tried together in the District Court at Christchurch in relation to alleged benefit fraud spanning the period from June 1994 to November 2000.

[2] Ms Archbold was charged with five specific counts of using a document pursuant to s 229A of the Crimes Act 1961. In addition, she faced two further charges pursuant to s 127 of the Social Security Act 1964 (SSA). The first charge under that section was that she wilfully omitted to tell the Department of Social Welfare that she was living in a relationship in the nature of marriage for the purpose of continuing to receive her benefit. The second charge under s 127 was of omitting to inform the Department of her relationship with Mr Chilton, for the purpose of enabling Mr Chilton to continue to receive a benefit. She was convicted of one of the specific counts under s 229A and also convicted of the two wilful omission charges pursuant to s 127 of the SSA.

[3] Mr Chilton faced two counts of using a document with intent to defraud pursuant to s 229A and a further two counts pursuant to s 127 of the SSA. Those latter two charges effectively mirrored Ms Archbold's charges. Mr Chilton was convicted on the two s 127 charges.

[4] Ms Archbold and Mr Chilton appeal against their convictions on all counts. With respect to two of the counts under s 127 of the SSA (Counts 8 and 10), relating to the other's benefit, they rely on the decision of this Court in *Nicholson v Department of Social Welfare* [1999] 3 NZLR 50. They submit that there was no legal duty or obligation for either of them to inform the Department of information that would affect the benefit entitlement of their respective partner.

[5] The Crown concedes that, if *Nicholson* was correctly decided, the convictions on Counts 8 and 10 cannot stand. It, however, submits that *Nicholson* was not correctly decided and that we should overrule it. This necessarily raises the question of when this Court should overrule its previous decisions, especially given the advent of the Supreme Court.

[6] With respect to the remaining convictions, Ms Archbold and Mr Chilton maintain that they are inconsistent with the not guilty verdicts on the other counts and/or unable to be supported on the evidence. The Crown says that there was ample evidence upon which a properly instructed jury could convict on those charges.

The legislation

[7] The relevant portion of s 127 of the SSA provides that:

Every person ... who wilfully does or says anything or omits to do or say anything for the purpose of misleading or attempting to mislead any officer concerned in the administration of this Act or any other person whomsoever, for the purpose of receiving or continuing to receive (for himself or any other person), or which results in himself or any other person receiving or continuing to receive –

(a) Any benefit under this Act ...

commits an offence and shall be liable on summary conviction to imprisonment for a term not exceeding 12 months or to a fine not exceeding \$5,000, or to both imprisonment and fine.

Background facts

[8] Ms Archbold has three children, A, B and C. C is the youngest and her father is Mr Chilton. For most of the period from 31 July 1988 to 10 September 2001, Ms Archbold received the domestic purposes benefit in respect of her first two children, A and B, who were from a previous relationship. At all material times she lived in Tuckers Road, in a house jointly purchased by her and Mr Chilton on 22 July 1998. Ms Archbold had gone off the benefit on 16 June 1998 when they were negotiating to buy that property. She went back on the benefit a year later.

[9] Mr Chilton was also paid a domestic purposes benefit during two periods, between 25 February 1995 and 22 November 1995, and between 12 January 1996 and 15 January 1997. He claimed the domestic purposes benefit in respect of C. During the period that he was claiming this benefit, Mr Chilton stated that he and C were living in Cashel Street with his mother and his brother.

[10] In September 2001, as a result of information received, a search warrant was executed at Tuckers Road. The search of the property revealed a wealth of documentary material relating to Mr Chilton, which the Crown alleged demonstrated that he had lived there on a continuous basis since at least 1993 or 1994 until the search warrant was executed on 11 September 2001.

[11] Among the documents were a number of hire purchase agreements in the name of Mr Chilton. Located in the master bedroom was a receipt for claiming a dog from a dog shelter in 1994. The owner of the dog was stated to be Mr Chilton and the receipt recorded Mr Chilton's address as Tuckers Road. Other documents relating to Mr Chilton were found in a cardboard box in a coat cupboard. In addition, there were documents relating to the joint purchase of the property at Tuckers Road in 1998. Ms Archbold and Mr Chilton also jointly owned a Nissan Bluebird vehicle. Letters were located that Ms Archbold had written to Mr Chilton when he was in prison in early 1994, the tenor of those letters being that Mr Chilton lived with Ms Archbold and that she could not wait until he got home. An analysis of Mr Chilton's bank statements showed that his supermarket shopping was

conducted at a location close to Tuckers Road and a considerable distance from his purported address in Cashel Street.

[12] Ms Watson, who was the Tenancy Manager for Housing New Zealand from 1995 to 1997, gave evidence at trial to the effect that she had visited Tuckers Road between six and eight times over that two year period and that, when she did the property inspections, Mr Chilton was there with the children and appeared to be part of the family not a visitor.

[13] The final piece of evidence at trial was the statement of Ms Archbold taken in September 2001. In the course of that interview Ms Archbold denied living in a relationship in the nature of marriage with Mr Chilton and claimed that they had in fact only been living together for the last two weeks. In explanation for the numerous hire purchase documents that were found in Mr Chilton's name at the address, she said that those items were bought on credit in his name because she had a bad credit rating. This appeared to be inconsistent with the joint loan application and mortgage they entered into in 1998.

[14] The Crown case was that there was overwhelming circumstantial evidence to support the position that Mr Chilton had been living at Tuckers Road from the time C was born in 1994 through until September 2001. There was also a financial intermingling that could be observed in the hire purchase agreements and, more particularly, the purchase of the house in 1998. The Crown thus alleged that Ms Archbold and Mr Chilton were living together in a relationship in the nature of marriage during the relevant periods.

Procedural history

[15] Counts 8 and 10 in the indictment originally charged each accused under s 66 of the Crimes Act as a party to the other's wilful omission of failing to advise the Department that they were living in a relationship in the nature of marriage. These counts were the subject of a s 347 application, which was heard pre-trial by Judge Erber. Unfortunately, Judge Erber was not referred to the decision of this Court in *Nicholson*.

[16] On 19 November 2003, Judge Erber held that the elements of the offence pursuant to s 127 were:

- (a) Wilfully to omit to do or say anything;
- (b) For the purpose of misleading a Departmental employee;
- (c) Where the purpose of doing the latter is for the purpose of receiving/continuing to receive a benefit for him/herself or for any other person.

[17] As a result of that finding, Judge Erber considered that there was no need for a reference to s 66 in the indictment, as s 127 creates the offence of wilful omission for the purpose of helping another to receive or to continue to receive a benefit. The Crown therefore proceeded on the basis of liability as principals under s 127 and not as parties.

Submissions for the appellants

[18] Mr Fournier, for Ms Chilton and Mr Archbold, turned first to the convictions on the s 127 counts (Counts 8 and 10) that related to the failure to advise the Department that each was living in a relationship in the nature of marriage with the other. He submitted that these convictions were inconsistent with this Court's decision in *Nicholson* and that that case was correctly decided.

[19] In his submission, the judgment of the majority in *Nicholson* was carefully reasoned, especially regarding the difficulties involved in imposing criminal liability for omissions. He submitted that the majority had worked through the legislation in the light of its legislative history in a principled manner, and that, even if this Court as presently constituted would have taken a different view from the majority in *Nicholson*, this case does not fit any of the established situations where it has been held to be appropriate to overrule decisions.

[20] As to the Crown's argument that there should be less reluctance on the part of this Court to reconsider earlier decisions in the criminal field because the Crown does not have a right of appeal to the Supreme Court, Mr Fournier submitted that the legislature must have made a considered choice not to give appeal rights to the Crown when it established the Supreme Court. It is therefore not a reason for this Court to relax the standard for departing from its own decisions. In any event, in his submission, this Court should only overrule decisions in the criminal field where it is necessary to avoid injustice to an accused or where the liberty of the subject is involved.

[21] Turning to the other count under s 127 faced by Mr Chilton, Mr Fournier submitted that the verdict on that count was unreasonable and that it could not be supported by the evidence in view of the not guilty verdicts on the two counts Mr Chilton faced under s 229A of the Crimes Act. The s 229A counts related to the filing of a benefit application on 6 March 1995 and 8 February 1996 respectively. Mr Fournier submitted that the not guilty verdicts on those counts mean that the offending period for the s 127 count could only have been between 9 February 1996 and 15 January 1997 when Mr Chilton went off the benefit. Further, he submitted

that the evidence relating to the period when the not guilty verdicts were returned could not be used in relation to the later period, as the not guilty verdicts must mean that that evidence had not been accepted by the jury.

[22] With regard to Ms Archbold, it was submitted that a conviction on Count 3 for the use of a document on a specific date of 26 May 1998 was inconsistent with the acquittal on the other counts, which related to benefit review applications on 7 June 1994, 6 June 1995 and 30 June 1999. In Mr Fournier's submission, the earlier evidence was insufficient to sustain a conviction on Count 3 and, while the purchase of the property in July 1998 shows a financial intermingling at that time, it does not do so for any earlier period.

[23] With regard to Count 7, the other s 127 count faced by Ms Archbold, similar considerations applied. In addition, Mr Fournier pointed out that Count 7 relates to a period from 7 June 1994 to 8 November 2000. In fact there were three discrete periods and it was submitted that these should have been isolated by separate counts. For example, from 17 June 1998 to 25 June 1999 and 22 August 1990 to 29 October 2000, Ms Archbold was not in receipt of a benefit and under no legal duty or obligation to disclose any information, yet those periods were included within the ambit of Count 7.

[24] It was submitted that no reasonable jury considering the admissible evidence in relation to Counts 3 and 7 could have found beyond reasonable doubt that Ms Archbold was living with Mr Chilton in a relationship in the nature of marriage at the relevant times.

Submissions for the Crown

[25] As indicated above, the Crown accepts that, if *Nicholson* represents the law in New Zealand, then the convictions on Counts 8 and 10 cannot stand. Mr Horsley, for the Crown, submitted, however, that *Nicholson* was wrongly decided. In his submission, the decision in *Nicholson* is inconsistent with Parliament's intention in creating s 127. He submitted that the terms of s 127 are clear: it goes beyond the specific duties created elsewhere in the SSA and imposes its own disclosure obligations, that are in turn limited by the specific intent provisions of s 127.

[26] In this regard, he submitted that any conduct or omission must be directly related to the obtaining or continued receipt of a specified benefit. Secondly, such conduct or omission must be for the specific purpose of misleading the Department in relation to that benefit. In Mr Horsley's submission, these requirements narrow and focus the offence in s 127. Although the words seem broad, the linking to the benefit and to the specific dishonest intent means that the section in fact has a narrow scope.

[27] Mr Horsley submitted that it is also relevant to consider the impact of the majority decision in *Nicholson*. This would seem to be that, if beneficiaries advise the Department of the relevant information, then that exhausts their responsibility. If they subsequently continue to receive a benefit they know they should not be receiving, then, regardless of the length of time this continues, no offence is committed.

[28] Further, the interpretation of the majority in *Nicholson* has significant consequences in the context of a non-beneficiary spouse or partner of a beneficiary. Under the majority's interpretation, no liability under s 127 would arise where the Department had not made any specific request for information to that partner. Mr Horsley submitted that it would be strange that there would be no liability under s 127, despite the partner wilfully omitting to inform the Department of the circumstances of his or her partner, with the express purpose of misleading the Department so that his or her partner retains that benefit.

[29] Mr Horsley submitted that this could not have been the intention of Parliament in creating s 127. Mr Horsley pointed out that, in a similar context, the Courts have found that there remains a more general obligation to act honestly in dealings with the Accident Compensation Corporation. He noted that this Court in *Nicholson* was not referred to the High Court decision of *Caverhill v Accident Rehabilitation and Compensation Insurance Corporation* HC ROT AP93/97 2 October 1998. Although Mr Horsley conceded that this Court expressed difficulties with the breadth of the legal propositions set out by Potter J in *Caverhill*, in *R v Donaldson* CA80/04 8 December 2004, he pointed out that this Court did say, at [80], “that the difference between the approach we prefer and that adopted by Potter J may not be particularly significant.”

[30] Mr Horsley submitted that there are five relevant factors that make it appropriate for this Court to review *Nicholson*:

- (a) The question of whether a prior decision of this Court should be overruled ought not be dealt with except by a full Bench, which is the case in this appeal.
- (b) A Bench of five should be somewhat less reluctant to depart from a prior decision of the Court than a Bench of three, especially if the prior decision was a majority of two to one. In *Nicholson* there was a strong dissenting judgment delivered by Blanchard J.
- (c) There are, albeit to a limited extent, conflicting dicta in this Court and a differing approach taken by the High Court and District Court to interpreting similar provisions in the context of the accident compensation legislation. There is therefore a need for some clarification of the law.
- (d) The issue of the extent of the duty on third parties to act was not fully argued in *Nicholson*. This issue is of sufficient importance to warrant a revisiting of the determination in *Nicholson* that no person can be

liable for a wilful omission unless there is a corresponding duty to act provided for in the SSA (outside of any duty implicit in s 127).

- (e) This is a criminal appeal following conviction. No question of law arose at trial. Accordingly, there is no ability for the Crown to challenge the decision in *Nicholson* in the Supreme Court. To all intents and purposes, this Court is the Court of final resort on this issue.

[31] In Mr Horsley’s submission, the advent of the Supreme Court should not make this Court more reluctant to overrule decisions than in the past, at least in the criminal jurisdiction, where this Court will remain to a large extent the final court of appeal. Only cases of true public importance will be heard in the Supreme Court and the ability of the Crown to appeal to the Supreme Court on questions of law in criminal cases is in any event limited. There are only two avenues of appeal: either a “leapfrog” appeal to the Supreme Court on a pre-trial issue, which requires exceptional circumstances pursuant to s 14 of the Supreme Court Act 2003; or the question of law must have been reserved during the trial pursuant to s 380 of the Crimes Act – a reasonably rare occurrence.

[32] With respect to the other counts on which Ms Archbold and Mr Chilton were convicted, Mr Horsley submitted that there was overwhelming evidence that Mr Chilton and Ms Archbold were living together in a relationship in the nature of marriage for the periods covered in the indictment and, more particularly, for the time periods encapsulated by the charges on which the jury returned guilty verdicts. Mr Horsley submitted that the test for overturning jury verdicts requires far more than a mere assertion of “inconsistency” of verdicts. It is necessary for an appellant to show that no reasonable jury applying its mind properly to the facts could have arrived at the conclusion that was reached (*R v H* [2000] 2 NZLR 581). This is a case where, in Mr Horsley’s submission, the comments of this Court in *R v Cornwall* CA 441/02 18 March 2003 at [31] (citing *R v H*) are directly applicable:

Even where a verdict might be said to be “inconsistent” in some way(s), a verdict may still be reasonable, and hence supportable. The innate sense of fairness and justice of the jury might have properly been applied to reach a

verdict of acquittal to avoid an unnecessary double conviction, or for other appropriate reasons.

[33] It was submitted that Mr Chilton and Ms Archbold cannot demonstrate that no reasonable jury applying its mind properly to the facts could have arrived at these verdicts. In Mr Horsley's submission, it is, if anything, fortunate for the appellants, in the face of the evidence, that they were not convicted on all counts.

Issues

[34] The first issue for this appeal is whether *Nicholson* should be overruled. If *Nicholson* remains good law in New Zealand, it is common ground that the convictions on Counts 8 and 10 cannot stand. The next issue is whether the convictions on the other counts are able to be supported having regard to the evidence. We deal with these in reverse order.

Verdicts on the other counts

[35] We accept the Crown's submission that there was ample evidence to support convictions on the other counts (Counts 3 and 7 against Ms Archbold and Count 9 against Mr Chilton). We also accept the Crown submission that alleged inconsistency between verdicts on its own will rarely be enough to raise doubts about the verdict. In this case we do not, in any event, consider that there was any such inconsistency.

[36] In both cases there were acquittals on charges for the early periods. Mr Fournier submitted that this meant that the jury must have rejected the evidence that tended to show a relationship in the nature of marriage in that early period. That is not necessarily the case. The jury may have considered that the evidence was insufficient for them to be sure that the Crown had proved the earlier charges. Alternatively, the jury could legitimately have considered that the evidence relating to the later period, combined with the evidence from the earlier period, was sufficient to prove beyond reasonable doubt the commission of the later offences.

[37] Ms Archbold was also acquitted on a s 229A charge relating to the later date of 30 June 1999 (see above at [22]). This can also be easily explained - Ms Archbold had gone off the benefit in anticipation of the purchase of the Tucker Road property and she said that she and Mr Chilton had broken up before she went back on the benefit. The jury could have considered that this was a reasonable possibility, which would explain the acquittal on the later charge.

[38] With regard to Count 7, the other charge under s 127 of the SSA faced by Ms Archbold, we accept Mr Fournier's submission that three separate charges should ideally have been laid, given that there were two periods within the period specified in the indictment where Ms Archbold was not in receipt of the benefit. The failure to lay three different charges cannot, however, have affected the jury's verdict. There is no suggestion that faulty directions were given by the trial Judge, Judge Abbott, and the jury must therefore have realised that any conviction could only relate to the periods when Ms Archbold was in receipt of the benefit.

[39] The appeal, with regard to the other counts (Counts 3 and 7 against Ms Archbold and Count 9 against Mr Chilton), must therefore fail.

The *Nicholson* decision

[40] We begin our discussion of Counts 8 and 10 with an examination of this Court's decision in *Nicholson*. Ms Nicholson had been convicted in the District Court of an offence under s 127 of the SSA. She had been in receipt of a benefit but had obtained employment. She had informed the Department by telephone about her employment, but her benefit continued to be paid. She then wrote to the Department repeating the information. Notwithstanding, the Department continued to pay her the benefit for six months. During this time, Ms Nicholson at first kept the money in her bank account, but eventually spent some of it.

[41] By majority, this Court quashed her conviction. The majority judgment was delivered by Richardson P and Keith J. They began with a detailed discussion of the history of the disclosure obligations in social security legislation over the past 60 years. The legislation has imposed obligations on applicants, beneficiaries and

others to provide information at particular times, including information about changes of circumstances. It has also conferred powers on the Department to obtain information and created associated sanctions for failure to comply with Department requests. The majority defined the material issue as being whether s 127 imposes a continuing obligation on the beneficiary to communicate with the Department at further indeterminate times, an obligation which runs beyond the specific obligations. In particular, was there such an obligation in the event of a continuing overpayment? They held that, in the context of s 127, the relevant “omission” must consist of a failure to comply with some legal obligation. However, the majority did not find any relevant obligation in the case before them.

[42] First, the majority pointed to the general aversion of the law to criminalising omissions. This was supported in the particular context of the social security legislation by the creation over the period of specific obligations to provide information. Next the majority considered that there were two construction difficulties if s 127 itself created the obligation to disclose. The first was the description of the omission in s 127, which is the omission “to do or say anything”. The next set of words, “for the purpose of misleading” any officer concerned in the administration of the statute, did not, in the majority’s view, describe the quality of the act or the physical circumstances in which it was to be performed. Rather, those words were directed to the intention accompanying the omission. The majority considered that it was necessary to look elsewhere in the SSA to give adequate definition to any duty and to decide in what circumstances such a duty fastens.

[43] This led on to the second construction difficulty relating to the specific disclosure obligation in s 80A of the SSA. Section 80A imposes a duty on a beneficiary to “forthwith advise an officer of the Department of any change in circumstances” affecting the right to receive the benefit or the rate of benefit. The majority considered that, unless that section was no more than an empty exhortation unsupported by any sanction or repercussions for non-compliance, it must be read with s 127. Indeed, they thought it was logical that they should be read together, as both were concerned with disclosure obligations and neither was complete and self-contained. Read together, s 127, as an offence provision, supports the specific obligation imposed by s 80A. If the specific obligation imposed by s 80A was

discharged, the majority considered that there remained no obligation “to do or say anything” to which s 127 attached.

[44] The majority also considered that there were difficulties in determining the scope of any disclosure obligations in s 127 – when and to whom and what would the obligation apply? They pointed out that, by the express terms of s 127, the offence could be committed by an individual other than the beneficiary or applicant. The majority asked whether a friend of the beneficiary who knew of continued unjustified receipt of benefit in circumstances such as the present was obliged to inform the Department of that fact. The majority also considered it unclear, if s 127 created a stand-alone offence, what circumstances occurring at what time gave rise to the obligation to disclose.

[45] As it was before us, the Crown’s argument in *Nicholson* had been that the plain meaning of s 127 was that a person must not omit to say something to the Department about the ongoing receipt of a benefit when the person knew it should not be being received, and when that omission to say anything was intended to mislead the Department to ensure the benefit continued to be received. The majority rejected that analysis as mixing the actus reus and the intent and creating practical uncertainty as to when the offence was complete.

[46] The majority considered that their approach met the relevant statutory objectives of providing for the efficient administration of social welfare benefits and protecting the public purse. Those objects were reasonably met by the statutory powers to obtain information and investigate and review claims and benefits. These statutory powers were supported by the obligations on beneficiaries to comply with those requirements and, as well, to perform express obligations, such as those under s 80A, to advise of any change of circumstances.

[47] The majority also considered that an examination of other statutes tended against the existence of a general obligation to provide information of the relatively open-ended kind contended for by the Crown. They said that many disclosure provisions:

- (a) require accurate and complete provision of information, for instance when benefits are being sought or income returned, or when other officials are lawfully requesting information (notably for law enforcement or statistical purposes);
- (b) require the provision of accurate and complete information to consumers and others engaged in commerce (for instance consumer protection, companies, securities and secret commissions legislation), for preventive purposes when harm can be identified in advance;
- (c) require reporting of specific accidents and incidents after the event, for particular safety and law enforcement purposes; and
- (d) require the keeping of records for a wide range of particular purposes, which might then be inspected to check compliance for some public policy reason.

[48] In the present case the majority considered that no relevant distinct duty had been established and violated, and none of the listed features usually found in offences of omission existed.

[49] In his dissenting judgment, Blanchard J accepted that it is fundamental that there can be no omission in law in the absence of a duty to act. He, however, perceived such a duty in s 127. He considered that the s 127 duty went beyond the specific duty to be found in s 80A which, on the findings made by the District Court, had been discharged by Ms Nicholson.

[50] Blanchard J accepted that s 127 was inelegantly drafted but the conduct which it was intended by the legislature to encompass was, in his view, clear enough. He considered that the elements of the offence created by s 127 were:

- (a) wilfully doing or saying anything or wilfully omitting to do or say anything;

- (b) for the purpose of misleading or attempting to mislead an officer of the Department or other person;
- (c) where that act or omission is also for the purpose of enabling receipt or continued receipt of a benefit by the offender or another person; or
- (d) where that act or omission results in such receipt or continued receipt.

[51] Blanchard J accepted that s 127 does not spell out an obligation and then make it an offence not to discharge that obligation. But he said that the criminal law is not usually drafted in such a manner. It would, for example, be otiose for the Crimes Act to say that everyone has an obligation not to commit assault. Instead, s 196 of the Crimes Act simply prescribes a liability to imprisonment for everyone who assaults any other person.

[52] In *Nicholson*, in Blanchard J's view, the legislation explicitly extended to omissions. The relevant obligation in s 127 was an obligation not to omit to do or say anything where that act or omission is for the purpose of, or results in, the receipt or continued receipt of a benefit. The actus reus was the failure to do or say something which has that (non-guilty) purpose or produces that result. The mens rea was the dishonest purpose of misleading or attempting to mislead an officer of the department or another person.

[53] Blanchard J considered that Ms Nicholson had a general obligation under s 127 not to omit to say something to the Department where her omission would result in a continued receipt of a benefit to which she was no longer entitled. She had a specific obligation under s 80A to notify an officer of the Department of her change of circumstances. She discharged that specific obligation. But she remained under the general obligation and, when she found that she was continuing to receive payments notwithstanding her notice, she was obliged to take reasonable steps to try to ensure that further payments were not made into her bank account by the Department. In his view, this was not an absolute obligation, but one to do what was reasonable in the circumstances.

[54] Blanchard J recognised that the exact extent of the obligation is somewhat vague. What must be done to meet the obligation will depend on the particular circumstances. He emphasised, however, that a breach of the continuing obligation could not by itself constitute a criminal offence. The person concerned must also have a dishonest purpose – that is, misleading or attempting to mislead the Department. Blanchard J noted that it might be difficult to establish that the beneficiary had such a dishonest purpose if nothing more occurs than further receipt of benefit payments which the beneficiary knows he or she is not entitled to. However, in this case the beneficiary had received many payments to which she knew she was not entitled and she had used some of them for personal purchases. He concluded that the beneficiary’s conduct was an omission done with the requisite misleading purpose.

Was *Nicholson* correctly decided?

[55] In our view, *Nicholson* was correctly decided. We find the reasoning of the majority compelling. Mr Horsley put forward a number of reasons for his submission that we should prefer the judgment of Blanchard J. In fairness to his argument, we examine each in turn.

[56] Mr Horsley did not (and indeed could not) seek to have us depart from the fundamental principle that an omission cannot be operative at law unless there is a corresponding duty to act, a proposition that all of the judges in *Nicholson* accepted. Mr Horsley’s argument was that we should adopt Blanchard J’s conclusion that the plain words of s 127 of the SSA create an obligation to disclose. It is true that, with positive acts, offence provisions will often merely prescribe a penalty for the commission of the act in question and thus prohibit that act by implication. Conceptually, the same technique can be applied to omissions but it will be more difficult to achieve, given that there must be a positive duty imposed before the omission can be criminalised.

[57] We turn to examine s 127 in the light of these principles. In summary, that section makes it an offence to omit to do or say anything for the purpose of misleading the Department and for the purpose or with the result that a person

receives or continues to receive a benefit. Any implied duty to act under s 129 cannot sensibly be one to say or do something simpliciter, as there is no definition of what that something might be or when the duty arises or who it is imposed upon. Another possibility is that the duty to act arises only where the omission has the purpose of misleading the Department. We agree with the majority in *Nicholson* (see above at [45]) that this mixes the actus reus with the mens rea element. In our view, the existence of mens rea cannot create a positive duty to act in the absence of an antecedent duty.

[58] The same difficulty applies if the requirement that there be a purpose of receipt or continuing receipt of a benefit is a mens rea requirement. Blanchard J, however, suggested that it was rather part of the actus reus (see above at [52]). In his view, the actus reus under s 127 was the omission to say or do something that results or has the (non-guilty) purpose of someone continuing to receive a benefit. If that is the case, then the section must necessarily be seen as creating a positive duty to act where a failure to do or say something may result in someone continuing to receive a benefit. This would create a very wide duty of indeterminate effect on anyone who might (wittingly or unwittingly) hold some relevant information.

[59] In our view, it is inconceivable that there was any intention to create such a wide duty in the context of social security legislation, where there is no corresponding duty to report even the most heinous of crimes. Such a duty would have to be created positively, not by implication, and certainly it would not have been created by the backdoor. We do not consider that Blanchard J's implication of a reasonableness requirement (itself indeterminate) meets this objection (see above at [53]). In addition, while the mens rea requirement that there be a purpose of misleading the Department would limit prosecutions under the section, if there were a positive statutory duty to disclose of such breadth it would presumably be able to be enforced in other ways.

[60] We agree with the majority in *Nicholson* that the legislative history and the scheme of the Act also militate against there being such a duty. Richardson P and Keith J pointed out that, if s 127 creates a positive duty, then specific disclosure obligations such as s 80A create empty duties without penalty for breach. It is

common for statutes to create duties throughout, with a general offence provision to create penalties for breach of those duties. In our view, Richardson P and Keith J were correct, on the basis of the legislative history and the scheme of the SSA, to consider that s 127 is such a provision.

[61] Mr Horsley next submitted that the approach in *Nicholson* was inconsistent with the approach taken with regard to the accident compensation legislation. We do not consider this to be the case. The statutory context is obviously different and this Court in *Donaldson* stressed that any duties of disclosure must come from the statute. While the Court in *Donaldson* may have accepted that the result of its approach and that of Potter J in *Caverhill* may be similar, it expressed doubts over the breadth of the propositions set out in *Caverhill*. Further, at [81], the Court articulated propositions that are, in our view, entirely consistent with those put forward by the majority in *Nicholson*:

[81] We think that the obligations of disclosure on the appellant turn primarily on the statutory obligations in force at the relevant time and the extent to which he was required by the Corporation to provide information. Of course, to the extent that the appellant provided information, he was required to act honestly and not misrepresent his circumstances. Further, when the appellant sought continuation of payments (as he did when he submitted medical certificates) he was representing, at least by implication, that he believed he was entitled to the payments and that he was aware of no change of circumstances which affected that entitlement.

[62] Mr Horsley finally pointed to policy arguments in favour of s 127 imposing a positive duty to act. He said that there were good policy reasons for interpreting s 127 in this way: the ease with which the obligation can be discharged; the additional dishonest intents required to be proved; and the reliance of the system on the honesty of those dealing with it. Taking the case of Ms Nicholson, he said that the majority's decision meant that there was no continuing duty of disclosure, even if the benefit continued to be wrongly paid. He pointed out that it would also mean that there was no obligation on a de facto partner to disclose the fact of the relationship, even if he or she was benefiting from the continuation of the benefit.

[63] We do not consider that concerns of this nature justify implying a wide duty of the indeterminate nature set out above. In cases such as that of Ms Nicholson, the drafters may have assumed a degree of competence within the Department that

would ensure that information was acted upon promptly, or they may have considered it inappropriate for criminal sanctions to apply to someone who merely failed to correct what was a mistake of the Department. In any event, as soon as a person in Ms Nicholson's position spent the money to which they know they are not entitled, some offence may well have been committed (although not one under s 127 of the SSA).

[64] In cases involving third parties, the drafters may well have considered that the position should be the same as for any criminal offence where there is usually no duty to report. Mr Fournier acknowledged that there was an issue in relation to de facto partners of beneficiaries, in that it is usually the beneficiary (in most cases female) who is charged while the de facto partner is not. He pointed out, however, that the remedy for that was charging the de facto partner as a party – as was initially done in this case. Mr Horsley acknowledged that this would, in hindsight, have been the better course for the Crown to have pursued in this case.

[65] In any event, policy considerations cannot prevail in the face of the wording of s 127 and the scheme and history of the SSA. If there are gaps in the disclosure regime these will have to be rectified by legislation. We understand that a review of the social security legislation is currently underway, where the need for any additional disclosure requirement can be examined.

In what circumstances should this Court reconsider its decisions?

[66] Even though we consider *Nicholson* to have been correctly decided, in deference to counsel's full argument on this point, it is appropriate that we say something on the topic of when this Court should reconsider its decisions. The issue is whether this Court's position on stare decisis should change now that New Zealand has a Supreme Court, making this Court more clearly an intermediate appellate court. We begin by examining the position of intermediate appellate courts in other jurisdictions. We then turn to the position in New Zealand before the creation of the Supreme Court and consider if there should now be a change to that position. We then consider whether this case would meet the tests for this Court to overrule its previous decision, had we been of the view that *Nicholson* was not correctly decided. Finally, for completeness, we address the issue of whether this Court continues to be bound by decisions of the Privy Council.

Position of the English Court of Appeal

[67] The English Court of Appeal regards itself as bound by its own prior decisions in civil cases, except in three circumstances. First, it is not bound where there are two conflicting decisions of the Court; secondly, where, although a decision has not been expressly overruled, it is inconsistent with a decision of the House of Lords; and thirdly, where a decision of its own was given *per incuriam* – meaning that a decision was wrongly decided, usually because it was made in ignorance of the applicable law. See *Young v Bristol Aeroplane Company Limited* [1944] KB 718 at 725 – 726 and at 729 – 730 per Lord Greene MR. This was expressly approved as a correct statement of the law by the House of Lords in the appeal from that decision - *Young v Bristol Aeroplane Company Limited* [1946] AC 163 at 169.

[68] The House of Lords in *Davis v Johnson* [1979] AC 264 at 328 (per Lord Diplock); 336 (per Viscount Dilhorne); 340 (per Lord Kilbrandon); 343 - 344 (per Lord Salmon); 349 (per Lord Scarman) resisted Lord Denning's attempt in the Court of Appeal ([1979] AC 264 at 270) to widen the exceptions. Lord Diplock at 326 explained that in an appellate court of last resort, a balance must be struck between the need for certainty and the avoidance of undue restriction of the proper

development of the law. However, in the case of an intermediate appellate court, the latter consideration can be taken care of by appeal to a superior appellate court. Expansion of the situations in which the Court of Appeal can overrule one of its previous civil decisions could not be justified.

[69] The Court takes a less rigid approach in criminal cases. In *R v Taylor* [1950] 2 KB 368, the Court of Criminal Appeal noted that in civil cases, the Court of Appeal normally regards itself as bound by its own decisions. It said that in civil matters this is essential to preserve the rule of stare decisis but that different considerations apply to revisiting decisions in the criminal context. At 371, Lord Goddard CJ said:

This court, however, has to deal with questions involving the liberty of the subject, and if it finds, on reconsideration, that, in the opinion of a full court assembled for that purpose, the law has been either misapplied or misunderstood in a decision which it has previously given, and that, on the strength of that decision, an accused person has been sentenced and imprisoned, it is the bounden duty of the court to reconsider the earlier decision with a view to seeing whether that person had been properly convicted. The exceptions which apply in civil cases ought not to be the only ones applied in such a case as the present...

[70] *Taylor* was cited by the Court of Appeal (Criminal Division) in *R v Gould* [1968] 2 QB 65. At 68 - 69, Diplock LJ said:

In its criminal jurisdiction, which it has inherited from the Court of Criminal Appeal, the Court of Appeal does not apply the doctrine of stare decisis with the same rigidity as in its civil jurisdiction. If upon due consideration we were to be of the opinion that the law had either been misapplied or misunderstood in an earlier decision of this court or its predecessor, the Court of Criminal Appeal, we should be entitled to depart from the view of the law expressed in the earlier decision notwithstanding that the case could not be brought within any of the exceptions laid down in *Young v Bristol Aeroplane Co. Ltd* as justifying the Court of Appeal in refusing to follow one of its own decisions in a civil case (*Rex v Taylor*).

[71] Diplock LJ qualified this statement in *R v Merriman* [1973] AC 584 at 605, where he said:

... although the Criminal Division of the Court of Appeal is not so strictly bound by its own previous decisions as is the Civil Division, its liberty to depart from a precedent which it is convinced was erroneous is restricted to cases where the departure is in favour of the accused.

[72] In *R v Spencer; R v Smalls* [1985] 1 QB 771, the Court of Appeal (Criminal Division) set out the general rule that the principles relating to the doctrine of stare decisis were the same in the civil and criminal divisions. This general rule was subject, however, to the Criminal Division's freedom to depart from precedent where the interests of justice to an appellant would require an earlier decision not to be followed (at 778 - 779). It seemed that the Court in this case was attempting to limit the potentially broad propositions put forward by Diplock LJ in *Gould*. May LJ said:

As a matter of principle we respectfully find it difficult to see why there should in general be any difference in the application of the principle of stare decisis between the Civil and Criminal Divisions of this Court, save that we must remember that in the latter we may be dealing with the liberty of the subject and if a departure from authority is necessary in the interests of justice to an appellant, then this court should not shrink from so acting.

[73] In *R v Simpson* [2004] QB 118 at [27], Lord Woolf CJ (for the Court) recognised the importance of the rules as to precedent in achieving consistency and certainty in the law. He emphasised, however, that the rules as to precedent should be applied with their objective in mind: the administration of justice. They should not be regarded as so rigid that they cannot develop in order to meet contemporary needs. He said that a degree of discretion remains in the Court of Appeal (Criminal Division) to decide whether or not a previous decision should be treated as binding precedent when there were grounds for saying that the decision was wrong (at [38]). It was recognised that there might be a case for restricting the discretion to cases where the departure from authority was in favour of an accused (see *Merriman*). That did not apply, however, where, as in the case at issue, a defendant wished to rely upon a wrongly decided case to provide a mere technical defence (which related to the service of a notice).

Position in Australia

[74] The High Court of Australia in *Nguyen v Nguyen* (1990) 169 CLR 245 held that the extent to which State intermediate appellate courts and the Federal Court regard themselves as free to depart from their own previous decisions is a matter of practice for the court to determine itself. The High Court noted that it has never regarded itself to be bound by its own decisions, a position which it said was “all the more appropriate now that it is a court of last resort for all purposes” (at 269). It also (referring to *Young v Bristol Aeroplane*) recognised that there is a point of view that the situation of an intermediate court of appeal should be different. The Court did not expressly reject or adopt that point of view, but said:

... even if that view were correct, now that appeals to the High Court are by special leave only, the appeal courts of the Supreme Courts of the States and of the Federal Court are in many instances courts of last resort for all practical purposes.

[75] The High Court also observed that there is no equivalent in Australia of s 12 of the Administration of Justice Act 1969 (UK), which authorises “leap-frog” appeals. The High Court said (at 270) that, in cases where an appeal is not available or is not taken to the High Court of Australia:

rigid adherence to precedent is likely on occasions to perpetuate error without, as experience has shown, significantly increasing the corresponding advantage of certainty.

[76] Prior to this decision the practice in the various States does not appear to have been uniform – see the discussion in Kidd, “Stare Decisis in Intermediate Appellate Courts: Practice in the English Court of Appeal, the Australian State Full Courts, and the New Zealand Court of Appeal” (1978) 52 ALJ 274. In that article, Mr Kidd reviewed the approaches of the Australian State Full Courts and concluded overall that the State Courts took a relatively flexible approach to when they will depart from their own previous decisions. He observed that the Full Courts of New South Wales, Victoria and South Australia had held that they were free to depart from their previous authority, in cases in which the Court was satisfied that the previous decision was clearly wrong. The position in Queensland and Western Australia was unclear and there were no reported decisions in Tasmania.

[77] Most of the State Courts have interpreted *Nguyen* as holding that a court undertaking intermediate appellate functions may depart from an earlier decision, but only in exceptional circumstances and only when the Court is satisfied that the previous decision is plainly wrong. For an example of the position in the Full Court of the Supreme Court of South Australia, see *Price Waterhouse (Reg) v Beneficial Finance Corporation and Ors* [1996] SASC 5964 at [7] and [254]. The Court of Appeal of Victoria applied *Nguyen* in *Farrar v Western Metropolitan College of TAFE* [1998] VCSA 25 at [15] – [16]. It held that the Court was free to depart from an earlier decision, but should do so only in exceptional circumstances and when compelled to the conclusion that the earlier decision was wrong. The Court of Appeal of Queensland has also taken this approach: see for example *R v Hood* [2005] QCA 159 at [44] – [45]. Similar comments were made by the Full Court of the Supreme Court of Western Australia in *Re the Full Board of the Guardianship and Administration Board* (2003) 27 WAR 475 at [32] – [33] and by the New South Wales Court of Appeal in *Tzaidas v Child & 3 Ors* [2004] NSWCA 252 at [29] - [33].

[78] The Full Court of the Federal Court has also confirmed it can depart from a previous Full Court decision if it concludes that the previous decision was clearly erroneous: *Transurban City Link Ltd v Allan* (1999) FCA 1723; 95 FCR 553 at [27] - [31]; *Rajanayake v Minister for Immigration and Multicultural Affairs* [2002] FCA 143 at [46].

Position in Canada

[79] In *Miller v Attorney General of Canada* (2002) 220 DLR (4th) 149 at [8] - [10], the Canadian Federal Court of Appeal held that there was no doubt it could overrule its own decisions. However, the values of certainty and consistency meant that one panel of the court ought not to depart from a decision of another panel merely because it considered that decision wrongly decided. The Supreme Court of Canada was normally the appropriate forum for correcting the errors of intermediate courts of appeal. A decision of another panel of the court would be overruled only if it was manifestly wrong, in the sense that the court overlooked a relevant statutory provision or a case that it ought to have followed. See also *H J Heinz Co of Canada Ltd v Canada (Attorney General)* (2004) 241 DLR (4th) 367 at [54].

[80] The position appears less rigid in the provincial Courts of Appeal. See *R v White* (1996) 29 OR (3d) 577 at 602 (Ontario), *R v Beaudry* (2000) 37 CR (5th) 1 (Alberta), *Canley Estate v Allied Signal Inc* CA022568 and CA022570 14 April 1997 at [9], *R v Grumbo* (1988) 159 DLR (4th) 577 (Saskatchewan) and *Thomson v Nova Scotia (Workers' Compensation Board)* (2003) 223 DLR (4th) 193 (Nova Scotia). The Court in the last case said at [12]:

However, it has been recognized by both the Supreme Court of Canada and by intermediate appellate courts in Canada that they must retain the authority, in exceptional and compelling circumstances, to revisit their earlier decisions... This is a jurisdiction which should be used with great restraint, particularly by an intermediate appellate court such as this one. But there is sufficient flexibility in the doctrine of stare decisis to properly accommodate sound developments in the law without encroaching unduly on its stability and predictability.

[81] Laskin JA, for the Court of Appeal for Ontario, in *David Polowin Real Estate Ltd v Dominion of Canada General Insurance Co* 2005 ON CA C40447 at [124] - [126] said that the factors formulated by the Supreme Court of Canada as to when it would overrule its previous decisions provide useful guidance for provincial appellate courts in Canada in deciding whether to overrule a previous decision. Those factors are: where a previous decision is inconsistent with or “attenuated” by a later decision of the Court; where the social, political or economic assumptions underlying a previous decision are no longer valid in contemporary society; where

the previous state of the law was uncertain or where a previous decision caused uncertainty; and, in criminal cases, where the result of overruling is to establish a rule favourable to the accused – see, for example, *R v Bernard* [1988] 2 SCR 833; *R v Chaulk* [1990] 3 SCR 1303 and *R v Salituro* [1991] 3 SCR 654.

[82] In Canada, as in Australia, it has been considered relevant that only a small minority of cases reach the Supreme Court of Canada. Appeal to the Supreme Court of Canada is by special leave only and leave requirements are onerous. This means that provincial appellate courts are the final courts in the vast majority of cases. See *David Polowin Real Estate Ltd* at [143].

Position in New Zealand before the creation of Supreme Court

[83] This Court has recognised that it is ordinarily bound by its earlier decisions but that it will, in rare cases, be prepared to review and affirm, modify or overrule an earlier decision. It has resisted outlining in detail the circumstances in which it will depart from previous decisions, but it is clear that the approach will be cautious because of the need for certainty and stability in the law. See for example *Collector of Customs v Lawrence Publishing Co Limited* [1986] 1 NZLR 404 and *Jones v Sky City Auckland Limited* [2004] 1 NZLR 192 at [9]. In *Collector of Customs* Richardson J said (at 414 - 5):

Clearly the Court would and should adopt a cautious approach to the review of earlier decisions. Adherence to past decisions promotes certainty and stability. People need to know where they stand, what the law expects of them. So do their legal advisers. And a Court which freely reviews its earlier decisions is likely to find not only that the Court lists are jammed by litigants seeking to find a chance majority for change, but also that the respect for the law on which our system of justice largely depends is eroded. However, any judicial development and change reflects an assessment that the obtaining of a socially just result outweighs the considerations of certainty and predictability in the particular case. This Court has the final responsibility within New Zealand for the administration of the laws of New Zealand and while its decisions are subject to review by the Privy Council few litigants, less than one percent of those unsuccessful in this Court, feel able to follow that path. It is I think unwise to try to formulate any absolute rule. I tend to the view that we should go no further than to indicate that this Court will ordinarily follow its earlier decisions but will be prepared to review and affirm, modify or overrule an earlier decision where it is satisfied it should do so, but without attempting to categorise in advance the classes of cases in which it will intervene. In the end and after weighing the considerations favouring and negating review in the particular case, the members of the

Court must make their own value judgments as to whether it is appropriate in the interests of justice to review and perhaps overrule an earlier decision.

[84] In *Dahya v Dahya* [1991] 2 NZLR 150 a number of the Judges made observations on the circumstances in which the Court might depart from its previous decisions. Cooke P in that case said (at 155 – 6):

Yet it could not be right for this Court to overrule a prior decision of its own, even when sitting on a later occasion with five Judges, merely on the ground that on a finely balanced point of statutory construction the later Bench preferred a different view. Some more cogent reason must be necessary to justify departure from such degree of certainty as the doctrine of stare decisis achieves. I do not think it would be wise to attempt in this case any exhaustive statement of the kind of reasons that may be sufficient, nor even any statement going beyond what is enough for deciding the present case. Obviously the length of time for which the earlier decision has stood (in this case six years, not a long period) is one relevant factor. Another must be the nature of the issue with which the decision is concerned.

[85] Cooke P then made three observations (at 156 – 157). First he stated that the question must be one of practice, in which the experience of this Court and its views of the values sought in the administration of justice in New Zealand have some part to play. Secondly this Court must be free, in a small country like New Zealand, to take account of decisions from elsewhere in the English speaking world, and thirdly that a bench of five should be somewhat less reluctant to depart from a prior decision of the Court than a bench of three, especially if the prior decision was of a majority of two to one.

[86] Richardson J, in *Dahya* at 160, endorsed two points made by the Australian High Court in *Nguyen v Nguyen* at 269 – 270 (discussed above at [74]). The first was that appeals to the High Court being by special leave only, it is inappropriate that the Federal and State Supreme Courts should regard themselves as strictly bound by their own decisions. The second was that rigid adherence to precedent may on occasions perpetuate error without significantly increasing the corresponding advantage of certainty.

[87] Richardson J then went on to set out four reasons the Court may depart from previous authority. The first was that any judicial change reflects an assessment that the obtaining of a socially just result outweighs the considerations of certainty and predictability in a particular case. The second was that the pressures of

Parliamentary time can preclude reliance on the development and review of legislation covering all areas of the law. The third was that the right of appeal, with leave, to the Privy Council was for practical purposes exercisable in only a minute fraction of New Zealand decisions. Richardson J also referred to the natural hesitation on the part of the Privy Council to differ from this Court on matters of local practice or on social issues. The fourth reason was that, in as much as the laws are designed to meet conditions and values in our society, this Court must accept responsibility for the administration of the laws of New Zealand.

[88] Hardie Boys J, in *Dahya* at 168, agreed that this Court must be free to depart from its own previous decision in an appropriate case – if there has been an error then the Court should correct it, rather than simply allow the error to be perpetuated, or hope that the error will be corrected on appeal or by Parliament. He stressed, however, that there must be a good reason to depart from that decision and an approach of “cautious willingness” should be adopted. He gave as examples a case where there is a conflicting decision of this Court, one where the law has clearly developed differently in other highly persuasive jurisdictions, or one where social attitudes or practices in this country have changed. Even without such factors, he considered this Court could depart from its previous decisions in cases where the view that the earlier decision was wrong was shared by a substantial majority of the current membership of the Court.

[89] Keith J, for the Court, in *Jones* at [15], mentioned a number of other factors that can also be of relevance. Critical commentary of a decision can be taken into account, but is of course not decisive. He noted that, when a statute is involved, any change might need to be a legislative one. It can also be inferred from Keith J’s comments that the Court may be more inclined (although still taking a cautious approach) to revisit decisions involving fundamental human rights or changes in economic and social conditions. Adapting the law to take into account changed conditions is consistent with the court’s role in the development of the common law and with the principle of statutory interpretation which gives statutes a “dynamic” or “ambulatory” interpretation and treats them as applying to circumstances as they arise – see s 6 of the Interpretation Act and the discussion in Burrows *Statute Law in*

New Zealand (3ed 2003) at 263 – 278. See also the approach of the Supreme Court of Canada in this regard, discussed at [80] above.

[90] Before the creation of the Supreme Court, this Court occupied a position as a “de facto” final appellate court. This factor has been highlighted as of importance in a number of the decisions of this Court – see, for example, above at [83] and [87]. In *R v Hines* [1997] 3 NZLR 529 at 587, Blanchard J said that this Court was “in practice the final decision maker for nearly all cases”. This was an important factor when considering the treatment of previous decisions. Blanchard J said at 587:

The appropriate policy on precedent for a (de facto) final appellate Court should mix caution and flexibility. This Court must not gain a reputation for easily being persuaded to depart from its earlier decisions. It has not done so over the past decade. That position must not change. On the other hand, when sitting as a Full Court it must have the freedom of action to be able to restate the law of New Zealand as changes in social conditions and legal developments in this country and elsewhere require. It ought not to fetter itself with rules about when earlier decisions may be departed from, as the English Court of Appeal, a truly intermediate court, did in *Young v Bristol Aeroplanes Company Limited* [1944] KB 718.

[91] The cases dealing with this Court’s position on stare decisis before the advent of the Supreme Court are dealt with in more detail in Scragg “The New Zealand Court of Appeal and the Doctrine of Stare Decisis” (2003) 9 Cant L Rev 294.

What should the position in New Zealand now be?

[92] Some of the reasons given for retaining the ability to depart from previous decisions have now disappeared with the creation of the Supreme Court. This Court no longer occupies the position of a de facto final appellate court. We now have an indigenous final court that will have no difficulty in taking its own view on the appropriate direction for the common law in the light of local practice and social and economic conditions in New Zealand (see above at [87]).

[93] Nevertheless, we see no reason to move to the very restrictive position of the English Court of Appeal with regard to overruling prior decisions in civil cases. Not all of the reasons given for this Court being able to depart from its decisions in a less restricted manner than the English Court of Appeal have disappeared. For example, New Zealand is still a small country where developments in the wider common (and

civil) law world and in international law should remain influential. This Court is also small, in contrast with the English Court of Appeal. The risks of successive overrulings by different panels (and consequent uncertainty) is thus diminished.

[94] In addition, any change to this Court's position as to overruling its previous decisions would in itself be a departure from the long line of cases which have held that this Court may depart from its previous decisions in rare cases.

[95] There have also been decisions of this Court, since the advent of the Supreme Court, where we have overruled prior decisions – see for example in *ANZCO Foods Waitara Limited & Ors v AFFCO New Zealand Limited* (2005) 11 TCLR 278 at [76] where *Staples & Co Ltd v Corby* (1899) 17 NZLR 734 was overruled. This Court in *Staples* had reluctantly followed earlier decisions in England. These had been overruled soon after *Staples* was decided, with the consequence that the New Zealand position was different from that in England and Australia. It thus fitted into the category of cases where developments elsewhere in the world made it appropriate to revisit a prior decision.

[96] In *Lai v Chamberlains* [2005] 3 NZLR 291 the Court also departed from (but did not overrule) a previous decision on the question of barristerial immunity. The Court (by majority) departed from the obiter comments in *Rees v Sinclair* [1974] 1 NZLR 180, which were applied in *Biggar v McLeod* [1978] 2 NZLR 9. *Lai v Chamberlains* concerned a judge-made rule where changes to policy factors suggested to the majority that a different rule was appropriate. It was also a case where there had been relevant developments in other jurisdictions. The House of Lords had overturned the equivalent rule in England in *Arthur J S Hall & Co v Simons* [2002] 1 AC 615, a decision which O'Regan J (for himself and McGrath and Glazebrook JJ) called compelling. It was also significant that the rule related to a matter of litigation practice. Hammond J, in a separate judgment, noted that final appellate courts have emphasised the primary role of intermediate appellate courts in regard to this area (at [203]):

I would have thought that a final appellate court would find it useful to have the views of an intermediate court as to the way in which a given legal doctrine is working in practice, or is likely to work under a changed scenario.

[97] The requirements that must be satisfied for an appeal to be heard by the Supreme Court are also relevant to whether this Court's approach to overruling its own decisions should be modified. Appeals to the Supreme Court are by special leave of that Court and the leave requirements in civil appeals to the Supreme Court are more restrictive than were the equivalent requirements in civil appeals to the Privy Council. There was an appeal as of right to the Privy Council from any decision of this Court concerning a civil matter where the dispute concerned an amount greater than \$5000 (reg 2(a) of the New Zealand (Appeals to the Privy Council) (Amendment) Order 1972). Section 13 of the Supreme Court Act 2003 sets out the criteria that the Supreme Court must apply when considering an application for leave to appeal. It provides that the Supreme Court may grant leave to hear an appeal only if it is satisfied that it is necessary in the interests of justice to hear and determine the appeal. It is necessary in the interests of justice if the appeal involves a matter of general or public importance; a substantial miscarriage of justice; a matter of general commercial significance; or a significant issue relating to the Treaty of Waitangi. The Supreme Court also has no, or restricted, jurisdiction in certain cases.

[98] It has been observed (see above, at [74], for the position in Australia and above, at [82], for the position in Canada) that restrictive leave requirements have the effect of rendering intermediate appellate courts the court of last resort in most cases. There is clear potential for injustice if an intermediate appellate court is bound to follow an obviously incorrect precedent, particularly in cases where an appeal is not available or is not taken to the final appellate court. Although any case where a prior decision of this Court was to be challenged would likely meet the leave criteria of the Supreme Court, we think that it would be imprudent for this Court to assume that a party will seek leave to appeal to the Supreme Court or, if so, that that Court will grant leave.

[99] There may also be an advantage, even if the Supreme Court is to hear a case, for it to have a fully reasoned decision from this Court as to why it considers a particular decision wrong. It would be artificial to do this if the impugned decision was not then to be overruled. The Court would appear to be perpetuating clear error and this could bring the administration of justice into disrepute. It may also give

(possibly false) expectations to the losing party as to its prospects of success in the Supreme Court and thus perhaps unduly influence any settlement discussions.

[100] For the above reasons, we do not consider that the creation of the Supreme Court as our final court of appeal should lead to any change in the way in which this Court approaches its own earlier decisions. The position elucidated in the decisions and dicta discussed at [83] - [90] above remains appropriate.

[101] Section 14 of the Supreme Court Act is a “leap frog” provision which enables parties in suitable cases to apply for leave to bypass this Court and go straight to the Supreme Court. Where a party wishes to challenge the correctness of an earlier decision of this Court, he or she may, however, find it more appropriate to utilise s 14 and to apply to bypass this Court.

Should there be a different rule for criminal cases?

[102] It was argued by Mr Horsley, for the Crown, that there should be a more liberal approach to revisiting prior decisions in criminal cases because the ability of the Crown to appeal to the Supreme Court is limited. Mr Fournier agreed that there should be a more liberal approach but submitted that this should be limited to cases where the liberty of the subject and fair trial rights for an accused are at issue, relying in this regard on the comments of the English Court of Appeal in *Simpson* (discussed above at Error: Reference source not found). See also the other cases discussed above at [69] - [72].

[103] We accept that there may be a mandate for a slightly less restrictive approach in criminal cases, particularly where the liberty of the subject or fair trial rights are at stake. This less restrictive approach may, because of the limited appeal rights, also apply in some cases to the Crown, although the Crown should usually reserve a question of law and apply to leapfrog to the Supreme Court if it wishes to challenge a decision of this Court.

[104] There is also another very important qualification. This arises because s 10A of the Crimes Act prohibits the retrospective creation of criminal offences. It states that:

Notwithstanding any other enactment or rule of law to the contrary, no person shall be liable in any criminal proceedings in respect of an act or omission by him if, at the time of the act or omission, the act or omission by him did not constitute an offence.

[105] Equally, s 26(1) of the New Zealand Bill of Rights Act 1990 (BORA) provides that:

No one should be liable to conviction of any offence on account of any act or omission which did not constitute an offence by such person under the law of New Zealand at the time it occurred.

[106] These statutory provisions confirm longstanding common law prohibitions against the retrospective application of statutes establishing substantive criminal liability. They also reflect the rule in art 15(1) of the International Covenant on Civil and Political Rights. See the discussion in Rishworth and others *The New Zealand Bill of Rights* (2003) at 743 - 744.

How would the principles have applied in this case?

[107] Even had we had considered that *Nicholson* may have been incorrectly decided, we would have accepted Mr Fournier's submission that this case would not have met the tests for overruling previous decisions. *Nicholson* may have been a majority decision but it was carefully reasoned and had an equally carefully reasoned dissenting judgment so that the alternative viewpoint had been clearly articulated. The case related to a fine point of statutory interpretation. We were pointed to no criticism, academic or otherwise, of the majority's decision, there have been no relevant developments in other jurisdictions and there is no suggestion of social or economic change necessitating a revised approach.

[108] Significantly, too, *Nicholson* does not concern a matter of judge-made law but the interpretation of a statute and one that Parliament had not seen fit to amend after the decision – see the comments of Lord Cooke in *Dahya* on issues of statutory interpretation set out at [84] and those of Keith J in *Jones* referred to at [89]. The

Federal Court of Australia in *Telstra Corp Ltd v Trelor* [2000] FCA 1170 at [22] - [28] was of the view that, unless an error in construction is patent or has produced unintended and perhaps irrational consequences not foreseen by the Court, a decision relating to statutory interpretation should stand.

[109] Most importantly, however, overruling *Nicholson* and applying a new rule to Mr Chilton and Ms Archbold would have breached s 10A of the Crimes Act and s 26(1) of BORA. In accordance with the decision in *Nicholson*, there was no positive obligation under s 127 of the SSA on Ms Archbold and Mr Chilton to disclose to the Department information regarding the other. There is no suggestion that a positive obligation to disclose arose under any other provision of the SSA. As there was no positive obligation to disclose, the omission to do so cannot have constituted any offence under s 127 at the time of the omission. Case law as to the meaning of a statute is as much part of the law as the legislation itself. Thus, the principle against retroactivity would be engaged.

[110] If *Nicholson* had been reversed, therefore, Mr Chilton and Ms Archbold's convictions on Counts 8 and 10 would still have had to have been set aside. Any reversal of *Nicholson* could only have been prospective (if this is allowable) and could only have applied to offences committed after the date of reversal and not before. We are not to be taken as making any comment on whether prospective overruling would have been available - see the discussions in the recent House of Lords case of *National Westminster Bank plc v Spectrum Plus Limited* [2005] UKHL 41 on the issues that could arise if courts decide they may, in exceptional cases, overrule decisions prospectively, including concerns about improper judicial usurpation of the legislative function - see at [28] - [38] per Lord Nicholls of Birkenhead; at [71] - [72] per Lord Hope of Craighead; and at [125] - [126] per Lord Scott of Foscote. For their Lordships' general discussion on the issue of prospective overruling, see at [4] - [43] per Lord Nicholls; at [65] - [74] per Lord Hope; at [121] - [127] per Lord Scott; at [161] per Lord Walker of Gestingthorpe; and at [165] per Lord Brown of Eaton-Under-Heywood.

Is this Court still bound by Privy Council decisions?

[111] For completeness, we make some comments on the related topic of the application of stare decisis to decisions of the Privy Council. In our view, this Court is still bound by existing Privy Council decisions made in respect of appeals from New Zealand (including the transitional phase) unless and until the Supreme Court overrules them – see *Shannon v Shannon* (2005) 17 PRNZ 587 at [40] where this Court considered that it was not free to depart from a recent decision of the Privy Council as it was clearly binding on this Court at the time that it was made. It would be totally inappropriate for this Court to ignore a decision of the Privy Council and return to its own (overturned) decision or to overturn one of its decisions that had been expressly approved by a higher court.

[112] The status of Privy Council decisions on appeals from other jurisdictions is not so clear. In *Breur v Wright* [1982] 2 NZLR 77, Woodhouse P made a clear statement as to the binding effect of the Privy Council’s decisions on appeals from other jurisdictions. He said (at 83):

...we do not think it can be doubted that, subject only to the exceptional need to take account of the local development of some aspect of law which otherwise is common to sister Commonwealth countries, a decision of the Privy Council given in respect of an appeal from the one would be binding upon the Courts of the others.

[113] However, despite this apparently clear statement, there may be some doubt on the issue. In *McCormack v Foley* [1983] NZLR 57, this Court referred to *Breur v Wright* but declined to make comment on the precedent issue (at 62 per Cooke J; at 67 per Richardson J). Speaking extra-judicially in 1983, Lord Cooke said that this Court is “naturally bound by decisions of their Lordships in New Zealand cases - there is a grey area as to non-New Zealand cases” – see [1983] NZLJ 297. See also Professor Taggart’s article, “The Binding Effect of Decisions of the Privy Council” (1984) 11 NZULR 66 and the comments of Chambers J in *United States of America v Wong* [2001] 2 NZLR 472.

[114] Any decisions of the Privy Council with regard to other jurisdictions made after the advent of the Supreme Court will of course be of persuasive value only.

Result

[115] The appeal is allowed in part. We consider *Nicholson* to have been correctly decided. This means that Mr Chilton's conviction on Count 8 and Ms Archbold's conviction on Count 10 must be quashed. The appeal is otherwise dismissed.

[116] Mr Chilton and Ms Archbold accept that the quashing of the convictions on Counts 8 and 10 would have no effect on their overall sentences which they have, in any event, served.

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