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### Law & Lai – Prosecution

1. The Court of Appeal today has issued a judgment granting the Laws leave to appeal against the decisions of Justice Harrison. The Court of Appeal's decision was unexpected, and is a major setback. However, just because leave to appeal has been granted does not mean that the appeal will be allowed.
2. In this report, I summarise the Court of Appeal's decision and explain its implications for the next round of this long-running saga.
3. The right of appeal from the High Court to the Court of Appeal in summary judgment proceedings is limited to questions of law. Leave is required and should only be granted in exceptional cases either because the question of law is of general or public importance, or there is some other reason which warrants a further level of appeal. The Court of Appeal found that this threshold had been passed although its reasoning is not particularly robust. Paragraph 47 concludes with the finding that:

"There are mixed questions of law of general or public importance, and other questions which, in combination, leads to the appropriately rare conclusion of 'any other reason' which justifies reference to this Court."
4. The Laws had contended that there were four questions of law, but the Court of Appeal only allowed leave in respect of only three. They are (in summary):
  - (a) The test for considering fresh evidence;
  - (b) The incompetence of counsel in the District Court;
  - (c) Whether costs should have been awarded on the basis that the case was of "special complexity".
5. A fourth question, namely whether the costs awarded amounted to a penalty, was rejected by the Court of Appeal.

## Test for fresh evidence

6. On the first question, namely the test for considering fresh evidence, the Court referred to a number of earlier judgments both in New Zealand and the United Kingdom, where the test for considering fresh evidence has been considered. In the High Court, Justice Harrison had concluded that the fresh evidence would not have made any difference to the District Court Judge's findings against the Laws. The Court of Appeal held that he applied the wrong test, and should instead have considered whether the fresh evidence made any difference to his own views about the guilt or innocence of the appellants, rather than to speculate on what difference it would have made to the District Court Judge.
7. The Court of Appeal judgment acknowledges at paragraph 45 that "the difference may sometimes be subtle, but nevertheless significant". It is hard to know in this case whether the difference will be regarded as significant when the appeal proper comes on for hearing.
8. It is ironic that the lawyer representing the Laws in the High Court did not put forward any test for Justice Harrison to apply when considering fresh evidence. When his first application for leave came before Justice Harrison, the Laws' counsel argued that he had applied the wrong test. In response to that, Justice Harrison said that if he had applied the test which the Laws were now contending for, the result would have been the same. The reasoning which the Court of Appeal has applied is different again, and was not argued by the Laws' counsel.
9. The Court of Appeal has criticised the Judge for his refusal to grant leave on the ground that if the appeal was allowed it would be remitted back to him and he would come to the same conclusion applying the correct test. The Court of Appeal says that the case will not go back to the High Court if the appeal is allowed. Exactly what is the consequence if the Court of Appeal allows the appeal, is a matter that I discuss later in this report.
10. When considering fresh evidence on a criminal appeal, the appellate court has three main options. The first is where the court considers that the evidence is both credible and conclusive, in which case it should acquit the appellant. The second is where the court is not satisfied that the evidence is conclusive, but thinks that it should have been considered by the court below, in which case the matter should be remitted back to the District Court for re-hearing. The third possibility is that the appellate court disbelieves the evidence or considers it worthless, in which case the evidence is rejected and the appeal dismissed.
11. The Court of Appeal's analysis of these points, at paragraphs 43 and 44 of the judgment, refers only to cases where the appeal was from a trial by jury. In the case of trial by Judge alone, the situation ought to be different. This is touched on, but not discussed further, at paragraph 46 of the judgment. In the case of appeals from a Judge alone, the Court hearing the appeal has before it all of the evidence that was before the District Court Judge. It would appear that the Court of Appeal considers that Justice Harrison should have formed his own view about the guilt or innocence of the Laws, based on evidence that was in the District Court and on the further evidence in the High Court. Otherwise, Justice Harrison would have had to remit the matter back to the District Court to re-hear all of the evidence.

12. It is the answer to this question which is really the main point of law of public or general importance. That is, the test which ought to be applied when fresh evidence is heard on an appeal after a Judge-alone trial, rather than after a trial by jury.

### **Incompetence of counsel**

13. In the High Court, Justice Harrison was particularly troubled by aspects of the trial transcript which demonstrated incompetence and language difficulties on the part of Mr Yeh, who represented the Laws in the District Court. His conclusion, however, was that competent counsel would have made no difference to the outcome.
14. The Court of Appeal was concerned that Justice Harrison might have applied the wrong test by focusing on the inevitability of the result, rather than on "the fundamental issue of a fair trial". This is a rather surprising extension of previous authority, in which the Court of Appeal has consistently held that complaints against the conduct of counsel (or the Judge) at first instance must be shown to have prejudiced the outcome. The Court has also overlooked the fact that in this case, the alleged inadequacies have been substantially put right by the opportunities given to the Laws in the High Court to completely revisit all of the evidence and reargue their case on appeal.
15. I find it very surprising that the Court of Appeal has opened the way for appeals based on counsel's incompetence per se. I argued strongly that this would have far-reaching effects, even encouraging defendants to seek out incompetent lawyers just so as to win an appeal.

### **Costs award**

16. At paragraph 52 the Court says that it is concerned about the "extraordinary level of costs" imposed on the Laws. No such sentiment was expressed at the hearing, so I did not get an opportunity to respond to it. Relative to the time and cost involved, and scales of costs in other proceedings, the award of \$20,000 was actually quite modest. The question which the Court of Appeal considers relevant is whether the Judge was correct in finding that because the appeal took longer than normal it was therefore so complex as to justify an award of costs beyond the usual scale. This is rather an oversimplification of the Judge's reasoning.

### **Where to next?**

17. The disturbing aspect of the Court's judgment is that although leave to appeal to the Court of Appeal can only be granted on questions of law, once the Court of Appeal is seized of the matter, it has the same power to adjudicate as did the High Court. Also, in its final paragraph 54 the Court's decision is that the Laws are granted special leave "to appeal against the convictions, sentences and the order for costs". There is no suggestion in that paragraph that the issues which will be dealt with by the Court of Appeal at the hearing of the appeal will be confined to the questions of law raised in the application for leave.
18. The next step is for the Court of Appeal to allocate a fixture for the hearing of the appeal itself. I may request clarification from the Court of Appeal in advance, as to exactly what issues will be heard and determined at that hearing.

19. The Court of Appeal has already indicated that it does not have power to remit the matter back to the High Court Judge if it decides that he applied wrong principles in respect of any or all of the three grounds of appeal. Presumably, therefore, the Court of Appeal will substitute its own findings both of fact and law to the evidence called in both the District Court and the High Court.
20. It is highly unlikely that the Court of Appeal would decide that the further evidence is so conclusive as to justify an acquittal. I would like to think that the Court will be persuaded (as was Justice Harrison) that taken with the evidence given at the District Court, the further evidence does not render the convictions unsatisfactory.
21. If the Court of Appeal have concerns, their only course will be to refer the case back to the District Court for a complete re-hearing. That is an outcome which neither party sought from Justice Harrison, but which based on the legal principles now advocated by the Laws, would seem to be the only outcome they can seriously contend for.
22. On the question of incompetence of counsel, again the only satisfactory outcome is for the matter to be referred back to the District Court for re-hearing if the Court of Appeal is persuaded that any miscarriage of justice has not been remedied by the rights of appeal and further evidence that have been extended to the Laws.
23. So far as the award of costs is concerned, the Court of Appeal can either reaffirm the Judge's order or reduce the amount awarded to the scale of costs provided for in the Regulations. Obviously, if the Court allows the Laws' main appeal, it will vacate any order of costs.

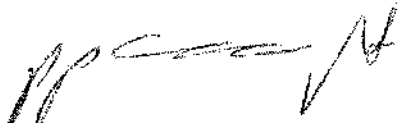
### Comments

24. What is particularly annoying about the Court of Appeal's decision is that very few of the reasons given by the Court of Appeal for granting leave were actually advanced by counsel for the Laws in their application. The discussion at paragraphs 43 to 45 arose out of points raised by the Court of Appeal during the hearing. When it was my turn to speak, I asked the Court to indicate if they wished to hear from me on these points and was told that they did not.
25. Nowhere in its judgment has the Court of Appeal even mentioned the several strong statements in earlier judgments about the need for exceptional circumstances before leave should be granted, or the requirement that counsel's incompetence is not a ground for appeal unless it has demonstrably resulted in a miscarriage of justice.
26. I am also disturbed by the absence of any acknowledgment by the Court of Appeal of the arguments I raised on behalf of Council as to why leave should not be given. Although in the time between the hearing (30 April) and delivery of judgment (17 June) the Court might have forgotten what was said at the hearing, my arguments were fully set out in written submissions.
27. Unfortunately, Council has no recourse against this decision other than to argue the substantive appeal when that is heard. We should meet to discuss whether there are any alternatives to the further time, cost and uncertainty of proceeding further. Council faces the prospect of a hearing lasting two or three days in the Court of Appeal, and the possibility that the Court will remit it back to the

District Court for a complete re-hearing. Presumably, by that stage, the Laws will have been granted legal aid. If they are again convicted in the District Court, there is nothing to stop them embarking on another round of appeals.

28. Please let me know when it would be convenient to get together and discuss what prospects there may be for settlement.

Yours faithfully



**Matthew Casey**