IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2011-404-7392

UNDER	The Declaratory Judgments Act 1908
BETWEEN	BRADLEY CHRISTOPHER GEOFFREY AMBROSE Plaintiff
AND	THE ATTORNEY-GENERAL Defendant

Hearing: 22 November 2011

Counsel: D M Salmon, M Heard and K Simcock for the plaintiff
D B Collins QC and S Kinsler for the Attorney-General
A Caisley and M Piper for Hon John Key
No representation for John Banks, or APN New Zealand Limited
J Miles QC and C Bradley for TVWorks

Judgment: 23 November 2011

JUDGMENT OF WINKELMANN J

This judgment was delivered by me on 23 November 2011 at 2.30 pm pursuant to Rule 11.5 of the High Court Rules.

Registrar/ Deputy Registrar

[1] Mr Ambrose is a freelance photographer and camera operator. In the course of this work he recorded a conversation between the Prime Minister of New Zealand, the Right Hon. John Key, and the Act Party candidate for Epsom, John Banks, which occurred at a café in Newmarket on 11 November 2011. The meeting between these two men was a much anticipated event. In the weeks preceding it there had been widespread speculation in the media as to whether the Prime Minister would have a cup of tea with Mr Banks as a signal of his endorsement of the candidacy of Mr Banks for the Epsom seat. The Prime Minister's endorsement is significant because Act is a potential coalition partner for the National Party should it come to form a government following the general election scheduled for 26 November 2011.

[2] On 14 November 2011 the Prime Minister lodged a complaint with the police, alleging that the recording of the conversation was an unlawful interception of a private communication, an offence under s 216B of the Crimes Act 1961 punishable by up to two years imprisonment. Following receipt of that complaint, and on the same day, police issued an urgent media advisory confirming receipt of the Prime Minister's complaint, and advising media outlets that it is an offence to disclose private communications unlawfully intercepted. In light of these events neither the recording nor a transcript of it has been released to the public, although there has been some speculation as to the topics discussed.

[3] Mr Ambrose seeks a declaration from this Court under the Declaratory Judgments Act 1908 that the discussion between the Prime Minister and Mr Banks was not a "private communication" for the purposes of s 216B of the Crimes Act. He has sought this declaration on the grounds that statements made by the Prime Minister suggest that he has been guilty of criminal conduct, and that this is damaging to his reputation, and preventing him dealing with the recording, in respect of which he is the copyright owner. He brings this application to enable him to clear his name and to clarify his ability to deal with the tape.

[4] The proceeding was served on the Prime Minister and Mr Banks. Mr Banks has elected not to participate in this proceeding. Although the Prime Minister was represented by counsel at the hearing, he abides the decision of the Court.

[5] This proceeding was served upon the Attorney-General because the relief sought has an effect upon an on-going police investigation, and potentially if charges are laid, upon a criminal trial. The proceeding has also been served upon TVWorks Ltd (TV3), and APN New Zealand Ltd (Herald on Sunday), media organisations which have copies of the recording. TVWorks was represented at the hearing.

[6] On the application of Mr Ambrose the proceeding received an urgent hearing. Affidavits were filed by Mr Ambrose and by the Prime Minister's Chief of Staff, Mr Eagleson, describing events they were involved in. An affidavit was filed by Detective Inspector Grantham, the officer in charge of the investigation of the complaint, describing the police investigation to date. Mr Mark Jennings, Director of News for TVWorks, provided an affidavit in which he describes coverage of the "cup of tea" meeting, and the significance of the conversation as recorded by Mr Ambrose. I have also viewed TVWorks footage captured on four cameras they had present at the event.

Factual background

[7] The event at the café was arranged by the Prime Minister's Office. It was attended by a large media contingent, with approximately 40 media representatives present. It is common ground that it was organised to ensure coverage in the press and on television. The Prime Minister's Chief of Staff, Mr Eagleson, says in his affidavit that prior to the "cup of tea" meeting he and other members of the Prime Minister's staff spoke to the media people present. They explained that media would be provided with an opportunity to photograph and film the Prime Minister and Mr Banks and to record preliminary exchanges between them. The briefing covered that all media people would then be required to leave the vicinity where the Prime Minister and Mr Banks were seated. Mr Eagleson says that this was to enable the Prime Minister and Mr Banks to have a discussion to which others would not be privy. However, during this time, the media would be free to film and photograph the meeting from behind a solid glass window which he describes as soundproof.

[8] Mr Eagleson said that it was intended that the media would again be given an opportunity for photographs and brief questions after the private conversation between the Prime Minister and Mr Banks.

[9] Mr Ambrose's account is that he received no briefing, nor was he aware of any statements suggesting that any aspect of the event was intended to be private.

[10] The film that I viewed revealed events as follows. As the Prime Minister arrived at the café there was some initial engagement between the media, the Prime Minister and Mr Banks, which then continued for a time inside the café. The two men sat at a table which is close to the end of the glass wall Mr Eagleson refers to. After a few minutes or so the media were asked to retire from the immediate area where the two men were seated. Mr Eagleson said to the media "thanks guys, why don't we just leave them to have a chat". Mr Key said "have a chat yeah, thank you. Get yourselves a cup of tea, enjoy the moment". Mr Ambrose accepts that he heard the instruction to leave. Mr Eagleson saw a microphone on the table and said "Ah, we're not leaving microphones here thank you".

[11] It seems that members of the diplomatic protection squad then positioned themselves around the inside of the café, possibly to create some sort of cordoned off space around the two men. Most members of the media were ushered out of the cafe by members of the Prime Minister's staff, although some remained inside the café. So too did members of the public (some at tables nearby) and café staff.

[12] After the media withdrew the Prime Minister and Mr Banks had a conversation over a cup of tea. Unknown to the Prime Minister's staff, the Prime Minister or Mr Banks, a small black pouch containing a microphone, the property of Mr Ambrose, remained on the table throughout their conversation, and that is visible on the film.

[13] Mr Ambrose's account in his affidavit is that the event was a "media scrum", and he was anxious that he would not capture sufficient film coverage of the event. In the confusion he left the pouch on the table, with the microphone in it. At some point – it is unclear from his affidavit quite when – he became aware it was still on

because of a light indicator on his camera. Mr Ambrose recovered the black pouch at the end of the event although the Prime Minister's staff were initially reluctant to hand it over. He subsequently provided a copy of the recording to the Herald on Sunday and TVWorks.

Statutory context

[14] Mr Ambrose brings the proceedings under ss 2 and 3 of the Declaratory Judgments Act 1908:

> **2 Declaratory judgments**
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> No action or proceeding in the High Court shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the said Court may make binding declarations of right, whether any consequential relief is or could be claimed or not.
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> **3 Declaratory orders on originating summons**
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> Where any person has done or desires to do any act the validity, legality, or effect of which depends on the construction or validity of any statute, or any regulation made by the Governor-General in Council under statutory authority, or any bylaw made by a local authority, or any deed, will, or document of title, or any agreement made or evidenced by writing, or any memorandum or articles of association of any company or body corporate, or any instrument prescribing the powers of any company or body corporate; or
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> Where any person claims to have acquired any right under any such statute, regulation, bylaw, deed, will, document of title, agreement, memorandum, articles, or instrument, or to be in any other manner interested in the construction or validity thereof,—
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> such person may apply to the High Court by originating summons for a declaratory order determining any question as to the construction or validity of such statute, regulation, bylaw, deed, will, document of title, agreement, memorandum, articles, or instrument, or of any part thereof.

[15] The grant of relief is discretionary:

> **10 Jurisdiction discretionary**
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> The jurisdiction hereby conferred upon the [High Court] to give or make a declaratory judgment or order shall be discretionary, and the said Court may, on any grounds which it deems sufficient, refuse to give or make any such judgment or order.

[16] The declaration sought is that "the discussion between the Prime Minister, the Hon John Key and the Act Party candidate for Epsom, John Banks, at the Urban Café on 11 November 2011 was not a "private communication" as defined in s 216 of the Crimes Act 1961". Section 216B(1) of the Crimes Act provides:

> **216B Prohibition on use of interception devices**
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> Subject to subsections (2) to (5), everyone is liable to imprisonment for a term not exceeding 2 years who intentionally intercepts any private communication by means of an interception device.

[17] Section 216A is relevant because it contains definitions of the terms used in s 216B as follows:

> **intercept,** in relation to a private communication, includes hear, listen to, record, monitor, acquire, or receive the communication either –
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> (a) while it is taking place; or
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> (b) while it is in transit.
>
> **interception device -**
>
> (a) means any electronic, mechanical, electromagnetic, optical, or electro-optical instrument, apparatus, equipment, or other device that is used or is capable of being used to intercept a private communication; but
>
> (b) does not include –
>
> (i) a hearing aid or similar device used to correct subnormal hearing of the user to no better than normal hearing; or
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> (ii) a device exempted from the provisions of this Part by the Governor-General by Order in Council, either generally or in such places or circumstances or subject to such other conditions as may be specified in the order.
>
> **private communication –**
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> (a) means a communication (whether in oral or written form or otherwise) made under circumstances that may reasonably be taken to indicate that any party to the communication desires it to be confined to the parties to the communication; but
>
> (b) does not include such a communication occurring in circumstances in which any party ought reasonably to expect that the communication may be intercepted by some other person not having the express or implied consent of any party to do so.

[18] The police advisory to media outlets that it is a criminal offence to disclose private communications unlawfully intercepted was based on s 216C(1) which provides:

> **216C Prohibition on disclosure of private communications unlawfully intercepted**
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> (1) Subject to subsection (2), where a private communication has been intercepted in contravention of section 216B, everyone is liable to imprisonment for a term not exceeding 2 years who intentionally –
>
> (a) discloses the private communication, or the substance, meaning, or purport of the communication, or any part of it; or
>
> (b) discloses the existence of the private communication, -
>
> if he knows that it has come to his knowledge as a direct or indirect result of a contravention of s 216B.

Parties' contentions

[19] Mr Ambrose seeks this declaration because, although not a political player, he has found himself in the middle of a media firestorm focused on the lawfulness of his conduct in recording the conversation. Statements have been made and reported to the effect that he has engaged in criminal conduct. These statements are defamatory, unless the defences of truth or honest opinion are available. Mr Ambrose wishes to establish that the statements are not true. Moreover, he owns the copyright in the recording, but because of the uncertainty about the legality of the recording cannot allow it to be used by media outlets.

[20] It is accepted by Mr Ambrose that the recording was an interception of a communication, but not that it was a private communication. He acknowledges that there is a police investigation underway to investigate the circumstances in order to establish whether there are grounds to prosecute him under s 216B. The focus of that investigation will be whether there is evidence that the conversation was a private communication as defined in s 216A, and whether Mr Ambrose intentionally intercepted that communication knowing it was private. Notwithstanding this, Mr Ambrose contends that the facts are so clear cut and beyond dispute that a declaration that the conversation was not a private communication is appropriate at

this point. He says that the court has full and clear evidence of the relevant context from TVWorks' four cameras that recorded events from multiple angles, and Mr Ambrose's uncontested account of events. No further evidence is needed – the relevant tests are objective and thus subjective evidence is largely irrelevant. In short, the Court is unusually well placed to determine whether this was a private communication in terms of s 216A. Mr Ambrose's counsel submits:

> This is probably the best documented meeting of its type in New Zealand history. The extent of the footage means the objective facts are clear.

[21] The factual matters relied upon by Mr Ambrose are as follows. In the "pre tea phase" invited media participants were present. So too were members of the public who were customers at the café when the two men arrived. Other café attendee's conversations could be overheard as the media walked past them. Microphones and cameras were on. There were separate microphones on the table the two men were sitting at.

[22] During the "cup of tea phase" the media scrum moved away from in front of the table and media were asked to remove their microphones by Mr Eagleson, but the microphones and cameras remained on, some in close proximity to the table. It is common for media to use directional microphones. Mr Ambrose says such microphones could have been used here to pick up the conversation of the two men. Some media were close enough to the table to touch the Prime Minister. Although most media had moved away from standing directly in front of the table, some journalists remained inside the café and some were still filming. As to the glass wall, it ended not far from the end of the table at which the men were seated. Journalists were standing at just that point.

[23] Throughout this phase both the Prime Minister and Mr Banks knew they were being filmed, knew they were physically close to members of the public and the press, and knew that cameras and microphones would be on. Indeed they were so clearly visible that some media have recruited experts to lip read the conversation from the film record of it.

[24] It is argued for Mr Ambrose that the fact the declaration requires the Court to determine a mixed question of fact and law is no bar to the exercise of the discretion under s 2 of the Declaratory Judgments Act, nor is the fact that the declaration sought relates to conduct which is the subject of a current criminal investigation. The existence of an investigation and possible future prosecution is simply one factor to be weighed along with others. It is argued that weighing heavily in favour of the exercise of the discretion to grant the declaration are the following considerations:

(a) Because the issue for the Court is an objective one capable of being easily and accurately judged in light of the very full filmed coverage, the Court's answer will be as sound and appropriate a determination of the issue as might otherwise happen in a prosecution (if any) in the District Court at a later date.

(b) There is no prejudice or difficulty faced by the investigation that would flow from declaratory relief. If the declaration is granted, then police time is saved. If not, none is lost. Somewhat at odds with this submission, is the submission that the police, the Crown, and any subsequent criminal court will not be bound by the declaration so the declaration will not prejudice, in any meaningful sense, those processes.

(c) The declaration, if granted, will enable Mr Ambrose to take action to prevent further publication of defamatory statements, and deal with the recording of the conversation with confidence as to the legal effect of doing so.

(d) There is substantial third party interest in the clarity such a declaration will bring, including proper media coverage of the events prior to a general election. The free speech issues brought into play are exceptional and justify relief.

(e) This is Mr Ambrose's one opportunity to bring about the desired certainty for himself and the media. Although he is confident that ultimately no criminal charge will result, even so, without the declaration the defamatory statements may remain forever on the internet. The criminal investigation will not be concluded before the election, and this will mean that the release of the recording will be delayed past the point that it has value in terms of public debate.

[25] Counsel for Mr Ambrose notes that in other contexts the Courts do make determinations in exercise of the civil jurisdiction that have potential ramifications in criminal proceedings, citing by way of example proceedings under the Criminal Proceeds (Recovery) Act 2009. Moreover, it is submitted that the Courts' reluctance to grant declaratory relief in the criminal context is overstated in some of the case law.

[26] Mr Miles for TVWorks supports the submissions advanced for Mr Ambrose, but submits that there are wider interests at stake beyond those of the cameraman. There is public interest in the disclosure of the conversation because it occurred in the course of a general election campaign. He seeks a ruling that provides clarity as to whether it will be lawful to publish or distribute the recording or a report on its content. Uncertainty about the legality of the recording is inhibiting reporting of information which may be of value to voters.

[27] It is submitted for TVWorks that the Courts have in recent times been prepared to act to preserve the fundamental right of citizens in a democracy to be as well informed as possible before exercising their right to vote. Reference is made to the decision in *Dunne v CanWest TVWorks Ltd,*[1] a case about the selection of candidates to participate in a televised election debate. Reference is also made to *The Alliance Party v Electoral Commission and Ors,*[2] in which the construction of a scheme established under the Broadcasting Act 1989 for the allocation of time and funding for opening and closing addresses was at issue. The Electoral Commission

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1 *Dunne v CanWest TVWorks Ltd* [2005] NZAR 577 (HC).

2 *The Alliance Party v Electoral Commission and Ors* [2010] NZCA 4.

had provided some money, but not enough for the Alliance Party to fund the cost of both the opening and closing television programmes. The Court directed that in future the Commission should allocate time (and therefore sufficient funding) for both opening and closing addresses.

[28] While TVWorks acknowledges that this case involves very different facts to those in *Dunne* and *Alliance*, it is argued the cases provide insight into the manner in which the Courts are prepared to act within the context of an election. It is submitted that here the voters of New Zealand and particularly those in the Epsom electorate are entitled to have the information that publishing the conversation will provide. The declaration Mr Ambrose seeks will facilitate the discourse necessary in a democracy by allowing for free expression. In the electoral context, particularly with a general election a matter of days away, and the impossibility of criminal proceedings providing clarity within the time available, the Court should be prepared to exercise its judgment in determining this threshold issue. Like Mr Ambrose, TVWorks emphasises that given the manner in which events have unfolded, it is only this proceeding and a decision in favour of Mr Ambrose (or the media's own decision to publish despite the threat of criminal proceedings) which will allow voters to have the information that will be useful to them in exercising their right to vote.

[29] In relation to the issue of whether this was a private communication, TVWorks says that the request that the media move out of the immediate vicinity of the two men could not be seen as a serious attempt by those present to establish a private environment. No reasonable attendee would have taken the behaviour of these two men and their minders to indicate a genuine desire for the conversation to be confined to them. After all, the motivation for the meeting and the conversation was political. The event was, in its entirety, a piece of political theatre and would be understood as such by any reasonable observer. It was a staged event, designed to demonstrate symbolically National's support for Act, and the Prime Minister's endorsement of Mr Banks. Everything the two politicians said and did sent a deliberate message to those attending that the men wanted to be reported. When defining "circumstances" the political and theatrical motivation behind this event support the right of the public to know what was said.

[30] The Attorney-General says that although he is not the appropriate default contradictor in applications under the Declaratory Judgments Act 1908, in the context of this particular application the Attorney-General is properly named as the defendant. The relief sought, if granted, would on the case of the Attorney-General impinge upon the investigative and prosecutorial discretion of the police and the prerogative powers of the Crown. The Solicitor General appears for the Attorney-General and also to assist the Court in his capacity as a senior law officer of the Crown, and because of his responsibility for maintaining general oversight of the conduct of public prosecutions.

[31] The Attorney-General submits that it is recognised that civil declarations ought rarely to be granted in respect of arguably criminal conduct because of the inevitable prejudice to any resulting criminal trial and because issues of criminal liability are inherently fact sensitive. Any declaration in this case would have serious implications for the criminal justice process generally. In summary, the Attorney-General submits:

(i) There is presently an active criminal investigation into the matters to which the declaration relates, among others, the circumstances in which the recording of the conversation was made;

(ii) The facts and inferences to be drawn are contestable;

(iii) There is no question of law or statutory construction for the Court. The only question for determination involves finding and construing facts. For the Court to entertain that process would usurp the function of the fact finder in a criminal court, whether that fact finder be Judge alone or jury;

(iv) Any declaration in this case would risk prejudicing any future criminal proceedings;

(v) There are no exceptional circumstances that would justify the grant of a declaration.

[32] The Attorney-General contends that there is no jurisdiction to grant declaratory relief where there are factual issues to be resolved. He says that s 2 does not create a jurisdiction to grant declaratory relief additional to the jurisdiction conferred by s 3.

Relevant principles

[33] It is common ground, and properly so, that the Court has jurisdiction to make a declaratory order where the declarations sought relate to a matter which may be the subject of criminal proceedings.[3] There is however an issue between the parties as to whether the Court has jurisdiction to grant declaratory relief where to do so requires the Court to make factual determinations. Mr Ambrose faces the difficulty that the s 3 jurisdiction is not appropriate where the factual context for the declaration is contested. As the Chief Justice observed in *Mandic v The Cornwall Park Trust Board (Inc)*,[4] an "application for declaratory order is inappropriate when there are questions of fact to be determined (as is implicit in the terms of s 3)".

[34] Mr Ambrose therefore relies upon a jurisdiction to grant declaratory relief created by s 2. Mr Collins for the Attorney-General says s 2 creates no jurisdiction independently of that created by s 3. This issue has previously been considered. In *Re Chase,*[5] the Court of Appeal considered whether a declaration should be granted that certain torts had been committed, a declaration by its terms, plainly outside s 3 of the Declaratory Judgments Act. Although declining to exercise its discretion to grant a declaration, Cooke P said that s 2 of the Declaratory Judgments Act created a jurisdiction amply wide, and one that should not be restricted by interpretation.[6]

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3 *Auckland Area Health Board v Attorney-General* [1993] 1 NZLR 235 (HC), *R v Sloan* [1990] 1 NZLR 474 (HC).

4 *Mandic v The Cornwall Park Trust Board (Inc)* [2011] NZSC 135 at [5].

5 *Re Chase* [1989] 1 NZLR 325 (CA).

6 Subsequently followed in *Johnston v Johnston* [1991] 2 NZLR 608 (HC), and *Simpson v Whakatane District Court* [2006] NZAR 247 (HC).

[35] I do not see any reason in principle why that jurisdiction should not extend to declarations which require determination of mixed questions of fact and law, (which I consider this case to involve) although the extent of the factual contest will no doubt be relevant to the exercise of the discretion. However, the availability of the jurisdiction in such circumstance does not need to be determined in this case,[7] when for reasons I come to, the outcome of the application turns upon the exercise of the Court's discretion under s 10.

[36] Courts have traditionally proceeded with great caution when exercising the discretion to issue declarations as to whether or not certain conduct amounts or will amount to the commission of a criminal office. This is because to make such a declaration risks usurping the function of the criminal court (including the function of a Judge or a jury to find the facts).[8] As Lord Lane put the matter in *Imperial Tobacco v Attorney-General*:[9]

> The criminal court would not be bound by the decision. In practical terms it would simply have the inevitable effect of prejudicing the criminal trial one way or another.

[37] In New Zealand the exercise of this discretion in the criminal context has been at issue in several cases, including *Auckland Area Health Board v Attorney-General*. In that case, an application was made by doctors of the intensive care unit of the Auckland Hospital and by their employer, the Auckland Area Health Board. A declaration was sought clarifying whether the doctors would be guilty of culpable homicide under s 151(1) or s 164 of the Crimes Act 1961, should they withdraw the ventilator-support system that maintained the breathing and heartbeat of a patient with an extreme case of Guillain-Barre syndrome. The application for a declaration was initially opposed by the Attorney-General, and the Court had before it numerous affidavits. Counsel for the Attorney-General cross-examined one of the deponents at length. Ultimately, however, counsel for the plaintiff and Attorney-General were

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7 To the extent there is an issue as to this, I prefer not to resolve it in the context of an application argued and determined under urgency, when it is an issue as to this Court's jurisdiction, and when it is not determinative of the proceeding.

8 *Imperial Tobacco v Attorney-General* [1981] A.C. 718 (HL).

9 Ibid at 752.

able to agree a statement of facts and a draft form of declaration for the Court to consider.

[38] The Judge, Thomas J accepted that the Court had jurisdiction to make a declaratory order as sought but said that the jurisdiction was one that should be exercised sparingly. He said:[10]

> To my mind, accepting this jurisdiction but stipulating that it will be used only rarely and with the greatest care, is the appropriate stance for the Court to adopt. Circumstances may arise where it is clear that the criminal process is being used vexatiously and the criminal proceeding amounts to an abuse of process. The Court must be prepared then to say so and to step in and bring the vexatious proceeding to an end. At other times, as illustrated by the cases referred to, the Court can properly and usefully resolve a legal issue in advance of a criminal proceeding.

[39] In exercising the discretion on the basis of the agreed facts the Judge said that there were a number of matters to be taken into account including that such a declaration would tend to have the effect of usurping the function of a criminal Court. In the particular case, however, the Judge came to the view that the unsatisfactory features were outweighed by the desirability of providing doctors, in the circumstances of the particular case, with a ruling as to the lawfulness of their actions.

[40] There is a suggestion in some of the cases, and in the Attorney-General's submissions, of a threshold for the exercise of the discretion, such as requiring a special or exceptional case. In my view it is unnecessary and undesirable to overlay the discretion conferred upon the Court by s 10 with any particular form of words or test. It is sufficient to say that it is appropriate to exercise the discretion with caution when a declaration is sought as to the criminality of conduct.

[41] Mr Salmon argued that the cautious approach articulated in *Imperial Tobacco* and *Auckland Area Health Board* is not reflected elsewhere in New Zealand case law. He pointed to a number of cases in which the Courts have ruled on issues which could have an effect upon a criminal investigation or a criminal proceeding. He

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10 *Auckland Area Health Board*, above n 3, at 243.

cited by way of example *Jaffe v Bradshaw,*[11] a case in which Mr Jaffe sought and obtained a declaration as to whether s 9 of the Serious Fraud Office Act required an interviewee's consent to the use of videotape equipment to record an interview conducted under s 9 of the Act. That case is readily distinguishable from the present in that the Court was ruling upon the legality of a investigative technique used in the investigation of a criminal offence.

[42] Mr Salmon also referred to the cases of *Attorney-General v L D Nathan & Co Ltd,*[12] *ADT Securitas Ltd v Geange,*[13] and *General Distributors Ltd v Hilliard.*[14] The latter two cases, *ADT Securitas* and *General Distributors*, are both cases concerned with the Court's jurisdiction to grant a stay of civil proceedings where the continuation of those proceedings could adversely affect the defendant's right to a fair trial. Again those cases are readily distinguishable. In each case the Court undertook a careful assessment of the risk to a fair trial should no stay be granted and, having done so, declined the grant of stay. That assessment occurred against the backdrop that if the matter proceeded to a civil hearing, the Court would not be called upon to determine whether the conduct of the defendant amounted to a criminal offence, but rather whether the conduct in question entitled the plaintiff to a civil remedy.

[43] Mr Salmon also relied upon the Court's jurisdiction under the Criminal Proceeds (Recovery) Act to make civil orders forfeiting property derived directly or indirectly from crime, a jurisdiction he says can be exercised in advance of trial. That is a statutory jurisdiction. Although I am not aware of any such application proceeding to full hearing before a criminal trial, whether it is appropriate to do so in any given case will no doubt be the subject of argument at some future time. The possibility of that issue arising does not assist here.

[44] Of more relevance is the case of *Nathan.* In that case Nathan sought a declaration in the High Court that the giving away of wine as described in the

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11 (1998) 16 CRNZ 122 (HC).
12 [1990] 1 NZLR 129 (CA).
13 (1992) 6 PRNZ 100 (HC).
14 HC Auckland CIV 2008-404-1057, 16 July 2008.

pleadings was not a sale such as to constitute an offence under the provisions of s 262 of the Sale of Liquor Act 1962. The application for declaration was sought following charges being laid against Nathan that it was selling liquor without a licence contrary to the Sale of Liquor Act. In the High Court a declaration was granted that the transaction was not caught by the Act. The Attorney-General on behalf of the Police appealed that determination. The Court of Appeal ruled that the transaction did amount to a sale for the purposes of the Act, allowing the appeal, and recording that no point was raised by the Attorney-General as to whether the declaratory judgment procedure was appropriate when prosecutions were pending.

[45] In my view these cases do not signal any movement away from the general approach of the Court that there is a need for caution in exercising the discretion in cases such as this. As I have noted most of the cases relied upon by Mr Ambrose are readily distinguishable. Although *Nathan* does concern the issue of a declaration as to the criminality of conduct, that case had some particular features which reduce its precedential value. In the High Court, a declaration was issued that the conduct did not amount to a sale for the purposes of the Sale of Liquor Act. The decision of the Court of Appeal had the effect of reversing this finding. It is significant that the Court of Appeal did not discuss the concerns in relation to granting a declaration as to the criminality of conduct, beyond expressly recording that the Attorney-General did not take that point. It is also significant that the case concerned a simple undisputed set of facts.

Exercise of discretion in this case

[46] For the reasons identified by Thomas J in *Auckland Area Health Board* I consider that there is a need for caution in the exercise of the discretion to grant a declaration as to whether certain conduct amounts to criminal conduct. Because of the timing of this hearing I would add to the considerations identified in that case, the risk that such a declaration will have an inhibiting effect on an on-going police investigation, and eventually upon the exercise of the prosecutorial discretion, (should the matter proceed that far). This will occur in circumstances where there is no suggestion that police are motivated in their investigation by bad faith or any improper motive.

[47] Having considered the evidentiary material placed before me I have decided that I should exercise the discretion to decline to make a declaration. I am not satisfied that I have adequate evidence to enable me to properly determine whether this conversation was a "private communication" for the purposes of s 216B, or that I should in all the circumstances.

[48] The test as to what is a private communication contains two limbs, the first directed at ascertaining the subjective intent of each party to the communication, and the second directed at an objective assessment of the reasonable expectation that the parties' communication may be intercepted in all the circumstances. I consider that there are unresolved factual issues in relation to both parts of the definition. Part (a) of the definition provides in effect that the communication is private if any one party desires it to be confined to the parties. The desire of a single party is enough and it is sufficient if that desire is indicated by either words or conduct.[15] I have not heard from either Mr Banks or the Prime Minister on this issue. The Prime Minister has however filed an unsworn statement of position in which he says he believes that the portion of the conversation which was recorded was intended to be private.

[49] Part (b) of the definition excludes from the definition any communication which occurs in circumstances in which any party to it ought reasonably expect that the communication may be intercepted by a third person without the consent of the participants. An issue to be resolved is the circumstances relevant to the part (b) enquiry. Mr Salmon has urged upon me that I resolve this issue by reference to the footage of the events at the café and on the basis of the uncontested evidence of Mr Ambrose. But the footage provides only one type of evidence as to the events that occurred. There were people who were present on that day who no doubt could add further detail, and nuance to the events as they occurred. I am aware from viewing videotape footage of events in the course of criminal trials that the evidence of eye witnesses often adds considerably to an understanding of events recorded on film.

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15 *R v Mitchell* [1988] 2 NZLR 208 (CA) at 214; *Moreton v Police* [2002] 2 NZLR 234 (HC).

[50] Mr Salmon placed emphasis upon the failure of anyone to challenge Mr Ambrose's evidence through cross-examination, but I do not attach weight to that in the particular circumstances of the case. In particular, this proceeding was given a hearing only two full workings days after filing, at the plaintiff's request. The was little time for any party to compile evidence, or to prepare for such a cross-examination. Moreover I think the characterisation of Mr Ambrose's evidence as uncontested is an overstatement. Although Mr Ambrose deposes that "no briefing was given to the media by the political organisers as to what they wanted to happen and what was/was not permitted", Mr Jennings from TVWorks deposes that:

> Arrangements for the "cup of tea" meeting had been with the Prime Minister's office and it was agreed that we would film inside the café for a short period then leave. This is pretty standard operating procedure when we are invited to cover organised events.

This is consistent with Mr Eagleson's description of a media briefing which included a period where the two men would be left alone to talk.

[51] This is not a case like *Auckland Area Health Board*, or *Nathan*, where there is an agreed or uncontested set of facts. In effect, what I am asked to do is conduct a mini trial to resolve factual issues. I am asked to do this in advance of a police investigation which is designed to collect relevant facts, and in advance of any trial which may result. For these reasons in circumstances where the declaration sought is as to the criminality of conduct, the existence of disputed facts weighs heavily against the grant of a declaration.

[52] Mr Salmon has suggested I resolve this difficulty by confining myself to the facts before me, and being clear that the declaration is so confined. The police he says, would then be free to carry on their task of gathering facts, and any Judge or jury would feel unconstrained in reaching a different view on different facts.

[53] I do not see this is a solution to the difficulty. Were I to accept this invitation and declare that this was not a private communication, this would be based upon factual findings, based in turn upon the drawing of inferences in relation to a complex scene, taking into account distances that people were from others, activities they were involved in, the presence of cameras and sound recording equipment, and

the volume of conversation - to mention but a few relevant considerations. Given the nature of the factual determination it is hard to see how the police would know what is a new fact, or whether I would have regarded that new fact as significant in the reasoning process. It is difficult to escape the conclusion that the police would be deterred from pursuing not only the investigation but also any potential prosecution by the existence of such a declaration. There is therefore a real risk that the Court will be influencing a police investigation, and any subsequent prosecutorial decisions. This will be interfering in areas into which the Courts do not normally stray.

[54] Mr Miles has urged upon me that the electoral backdrop to this issue (and in particular the public interest in hearing the unvarnished communication that occurred within a piece of political theatre), justifies me in doing something that would otherwise be objectionable.[16] Whatever significance I might be inclined to attach to the electoral context, the issues I am presented with by the plaintiff (and in particular the fact finding exercise I am asked to embark upon) are such that to accede to the request would not serve the purposes for which Mr Ambrose seeks the declaration. Any such declaration would have to be so qualified that it is unlikely to bring the clarity required to assist him in resolving his present situation. Instead such a declaration will likely disrupt and confuse the conduct of the police investigation, and perhaps prejudice the administration of justice, should the matter ultimately proceed to the laying of a charge.

[55] In declining to exercise the discretion to make a declaratory order, I make clear that I have not reached any view on whether this was a private communication, and whether Mr Ambrose's actions engage s 216B. Indeed my decision turns upon the inadequacy of the evidentiary material before me to reach such a view, and in any event, the inappropriateness of my undertaking a mini trial as to whether certain conduct constituted a criminal offence, when exercising the Court's civil jurisdiction, and in advance of a police investigation or trial.

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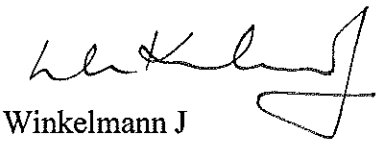
[16] Citing the approach of Ronald Young J in *Dunne*, above n 1.

Result

[56] The plaintiff's application, for a declaration that the discussion between the Prime Minister, the Hon. John Key, and the Act Party candidate for Epsom, John Banks, at the Urban Café on 11 November 2011 was not a "private conversation" as defined in s 216A of the Crimes Act 1961, is declined.



Winkelmann J

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