

CASE NOTE: MARINO V THE CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS [2016] NZSC 127

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Core components of the rule of law include the accessibility of the law and its production of foreseeable results. Legislation sometimes seeks to pursue complex or conflicting policies, and its meaning may require discussion or even a ruling from a judge. But this should not be so when the aim is a simple one such as setting the length of time for which the Department of Corrections is entitled to detain a sentenced prisoner and indeed duty-bound to detain a prisoner to give effect to a court sentence. Whilst criminal sentencing may be factually complex in various situations, when a case has to go to the Supreme Court to confirm the proper interpretation of the length of a sentence, the legislative drafting may be marked down from a rule of law perspective. Fortunately, the solution adopted by the Supreme Court in *Marino v The Chief Executive of the Department of Corrections* leaves the matter easier to administer.¹ However, it has overturned an established approach and revealed that many prisoners have been detained for too long.

I. THE STATUTORY PROVISIONS DESCRIBED: SENTENCING AND EARLY RELEASE

The Sentencing Act 2002 outlines the various factors from which the courts construct a sentence of imprisonment. Sections 81-85 include rules that include the prohibition on taking into account pre-sentence detention (see s 82)² and, for multiple offending, allow cumulative and concurrent sentences (ss 83 and 84)³ but require that account be taken of totality principles (s 85). The existence of early release on parole (ie, the fact that sentences are not necessary served in full) is expressly noted: s 86 empowers the sentencing court to impose a minimum period before release on parole is possible which is longer than otherwise would arise under the early release provisions if that is necessary for accountability, denunciation, deterrence and public protection.⁴ This in turn means that sentencing courts have to be cognisant of the rules as to early release. These, and the regime as to sentence

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¹ *Marino v The Chief Executive of the Department of Corrections* [2016] NZSC 127 [*Marino – Supreme Court*]. There was a second appellant in a joined case, *Booth v R*, but that case fell away in light of the decision in *Marino*.

² It used to be the case that the judge could take this into account in sentence: but, as noted by William Young J in *Marino – Supreme Court*, above n 1, at [68], practice was uneven. As he then described at [70]–[77], the Criminal Justice Act 1985 alternated between an administrative process and judicial account being taken, but since 1993 the 1985 Act and then its successor has used an administrative process. This has the advantage from a public deterrent and denunciation purpose of involving a longer sentence being pronounced in court.

³ Section 83(3) notes that a person who has been released and recalled on an interim basis is not detained under that sentence (meaning that nothing can be cumulative or concurrent with that).

⁴ This period cannot be longer than the shorter of 10 years or two-thirds of the sentence. This may allow the judge to impose a shorter overall sentence and secure the same time in custody than under a longer sentence. However, the various features that justify a longer non-parole period should also justify a longer determinate sentence (which in turn would have a longer period in custody before eligibility for early release).

calculation, are found in the Parole Act 2002,⁵ which can be summarised as follows in relation to determinate sentences:⁶

- (i) sentences are short-term or long-term, the latter being more than 24 months (s 4);
- (ii) cumulative sentences are combined into a notional single sentence (ss 4 and 75);⁷
- (iii) a sentence has three key dates (according to the interpretation section, s 4), being the start date, expiry date and release date, each of which is to be determined by the Chief Executive of the Department of Corrections (s 88); a long-term sentence has an additional important date, the parole eligibility date, also to be calculated by Corrections (s 88);
- (iv) the start date of a sentence is generally the date it is imposed (or the date the first sentence was imposed in a series that form a notional single sentence) (ss 76 and 77);⁸
- (v) the sentence expiry date is the final date of the sentence (including of a notional single sentence) (s 82);
- (vi) the parole eligibility date for a long-term prisoner is the expiry of the non-parole period, which is one third of the sentence (or the term specified by the sentencing court, as noted above) (s 84); but if the sentence involves a notional single sentence, the non-parole period of each individual term – including short-term sentences which by themselves do not have non-parole period – is to be added together to determine the PED for the notional single sentence (ss 84(4) and (5));
- (vii) for a short-term sentence, the release date is the half-way point of the sentence (s 86);
- (viii) for a long-term sentence, the release date is the sentence expiry date (s 86);
- (ix) long-term prisoners who have been released on parole may be recalled on risk-based grounds (ss 59 and following); there is a statutory release date, defined in s 17 as the “release date of the sentence to which the offender is subject (including any notional single sentences) that has the latest release date”.

II. THE PARTICULAR QUESTION IN MARINO: THE EFFECT OF PRE-SENTENCE DETENTION

An additional question for determination is the impact of detention prior to the start date of the sentence (ie, if the person is not on bail throughout). As noted, the

⁵ The Act did not change the approach to those sentenced before its commencement date, which remain governed by the Criminal Justice Act 1985: these “pre-cd” (pre-commencement date) sentences affect only a relatively small number of prisoners now, but provide some complexity to the statutory regime.

⁶ Sentences may also be indeterminate; and the account set out does not deal with what happens if a person is caught by the three-strikes provisions in ss 86A-I of the Sentencing Act 2002; nor does it deal with issues of compassionate release.

⁷ It is to be noted that s 75 refers most obviously to sentences passed on different occasions, since it refers to earlier and later sentences. William Young J in *Marino* comments that this is a quirk of drafting and that cumulative sentences passed on one single occasion will also be treated as a notional determinate term: *Marino – Supreme Court*, above n 1, at [52]. An alternative approach is to say that, as with concurrent sentences, cumulative sentences amount to a single sentence and the purpose of s 75 is to clarify that this single sentence approach applies also to cumulative sentences passed on different occasions.

⁸ There are rules in ss 78–81 for various situations, such as where a different sentence is imposed on appeal.

Sentencing Act precludes it being taken into account: but s 90(1) of the Parole Act indicates that the key dates, non-parole period, parole eligibility date and statutory release date should be calculated on the basis of the detainee being “deemed to have been serving the sentence during any period that the offender has spent in pre-sentence detention”. Section 91 defines what counts as “pre-sentence detention”. The proper meaning of these sections was the key question raised in *Marino*.

A. *The Facts*

Mr Marino’s offending involved family violence (a total of 10 charges)⁹ and attempting to pervert the course of justice (two charges). The former led to a sentence of 12 months’ imprisonment on each charge; the latter to 22 months’ imprisonment on each charge. The judge directed that the sentences be concurrent.¹⁰ Mr Marino had been remanded into custody on 11 February 2015 on the family violence charges. The charges of attempted perversion of the course of justice related to phone calls made from prison in late February and early March encouraging the complainant and a friend respectively to not give evidence and were laid on 18 March and 19 June 2015. When sentence was passed, in October 2015,¹¹ the judge referred to the sentence on the attempted perverting as the lead charge, but indicated that his understanding was that the release date was “fast approaching”.¹² As William Young J suggested in the Supreme Court, the judge seemingly assumed that there was a total sentence of 22 months, which would convert to 11 months in custody as a short-term sentence, would be counted back to the first remand into custody on the family violence charges and lead to release in January 2016.¹³ But the Department of Corrections determined that there were 12 sentences, that the approach was to deduct pre-sentence detention from each charge, and that the combined effect of all this was that the 11-month period was calculated from 19 June 2015, being the date that pre-trial detention started on the second of the matters for which a 22-month sentence was imposed (arising out of the phone call in March 2015).¹⁴

In habeas corpus proceedings, the issue was whether or not Mr Marino should have been released on 12 January 2016 (the apparent assumption of those participating in the sentencing) or was properly to be detained until 19 May 2016 (as Corrections calculated it). The difference, 127 days, is clearly significant. Counsel for Corrections argued that they had properly applied the statutory provisions to the several sentences imposed; for Mr Marino, the argument was that there was one

⁹ Assault and breaching a protection order: see *Marino v The Chief Executive of the Department of Corrections* [2016] NZCA 133 [*Marino – Court of Appeal*] at [4]. It seems that nine of these were charged at the outset, but a tenth was added in July 2015: see [10].

¹⁰ The judge specifically rejected an application from the prosecution to make the sentences cumulative in light of the totality principle: *Marino – Court of Appeal*, above n 9, at [5].

¹¹ Guilty pleas were entered in July 2015 on the basis of a sentence indication of 22 months: *Marino – Court of Appeal*, above n 9, at [5].

¹² *Marino – Court of Appeal*, above n 9, at [6].

¹³ *Marino – Supreme Court*, above n 1, at [55].

¹⁴ *Marino – Court of Appeal*, above n 9, at [10].

consolidated sentence and that pre-trial detention in relation to any of the charges comprising that sentence counted.¹⁵

B. The High Court and Court of Appeal Ruling for Corrections

Simon France J dismissed the application for habeas corpus,¹⁶ finding that previous authority arising under the Criminal Justice Act 1985, *Taylor v Superintendent of Auckland Prison*,¹⁷ governed. Mr Taylor received a total of 15 years' imprisonment from cumulative terms imposed on four different sentencing dates (which extended over five years). The first two were key to the dispute and involved a robbery and an aggravated burglary. He was arrested on the former on 30 August 1991 and on the latter on 2 June 1993; he was sentenced on the former on 16 July 1993 and had by then spent 361 days on remand (having also spent some time on bail or serving another sentence). The judge imposed a sentence of nine years' imprisonment, expressly reducing it from 10 years to take into account time on remand: the statutory regime then applicable (s 81 of the Criminal Justice Act 1985 as amended)¹⁸ required the judge to make this calculation and adjustment to the sentence.

Mr Taylor was already in custody on the second matter at the date of sentence; it led to a sentence of two years' cumulative on 19 July 1994. He later received an additional year and an additional three years' for the other offending, all cumulative to the original sentence of nine years. By the time of these cumulative sentences, the statutory regime had changed and the prison was required to calculate and deduct the pre-sentence detention. The effect of transitional provisions was that this occurred even if credit had already been given by the judge, and so the sentence was reduced by a further 361 days,¹⁹ and Mr Taylor argued that the effect of the statutory language was that the 361 days should also count towards the second sentence as he had been in custody on that before sentence on the first matter.

The statutory language on which he relied required the prison to calculate and deduct:²⁰

... the total period during which the person is detained ... on remand at any stage of the proceedings leading to the person's conviction or pending sentence, whether that period or any part of it relates to any charge on which the person was eventually convicted or any other charge on which the person was originally arrested or that the person faced at any time subsequent to his or her arrest and prior to conviction.

¹⁵ In the High Court, it seems that there was a slightly less expansive argument, at least in the alternative, arguing that the release date should be based on 11 months from the first remand into custody on the first charge relating to the phones calls, 18 March 2015: see *Marino v The Chief Executive of the Department of Corrections* [2016] NZHC 459 [*Marino – High Court*] at [4]–[6].

¹⁶ *Marino – High Court*, above n 15.

¹⁷ *Taylor v Superintendent of Auckland Prison* [2003] 3 NZLR 752 (CA). His Honour was counsel for the prison superintendent.

¹⁸ The different regimes arising during the time-frame of the facts are described by William Young J: *Marino – Supreme Court*, above n 1, at [70]–[75].

¹⁹ *Taylor v Superintendent of Auckland Prison*, above n 17, at [4].

²⁰ Criminal Justice Act 1985, s 81(1), as amended in 1993.

The Court of Appeal held that this language meant that when a person was already in custody on a charge and then was remanded into custody on unrelated charges, the pre-trial detention period on the second set of charges commenced only when he or she was charged with the latter and did not count back to the remand on the first charges.²¹ The core reasoning was that “the proceedings” in question were those relating to the particular charge.²²

Simon France J in *Marino* held that the effect of *Taylor* was maintained under the Parole Act 2002:²³

Unless the new charge is truly an amended or substituted charge for the one on which the offender was originally charged, it does not come within s 91. Rather, it is governed by the provisions of s 90(2) which makes it plain the Chief Executive’s task, in relation to concurrent sentences, is to calculate the amount of pre-detention sentence applicable to *each* sentence and then to deduct only the amount determined in relation to that sentence.

Section 91, as noted above, is the provision that defines what counts as pre-trial detention. According to section 91(1), it is detention in prison (or various other places, such as a hospital):

... that occurs at any stage during the proceedings leading to the conviction or pending sentence of the person, whether that period (or any part of it) relates to—
(a) any charge on which the person was eventually convicted; or
(b) any other charge on which the person was originally arrested; or
(c) any charge that the person faced at any time between his or her arrest and before conviction.

This language is, it can be seen, substantively the same as was construed in *Taylor*, but merely put into a numbered list. The period within this definition is applied towards the sentence in accordance with s 90, also noted above and which in full provides:

90 Period spent in pre-sentence detention deemed to be time served

(1) For the purpose of calculating the key dates and non-parole period of a sentence of imprisonment (including a notional single sentence) and an offender’s statutory release date and parole eligibility date, an offender is deemed to have been serving the sentence during any period that the offender has spent in presentence detention.

(2) When an offender is subject to 2 or more concurrent sentences,—

- (a) the amount of pre-sentence detention applicable to each sentence must be determined; and
- (b) the amount of pre-sentence detention that is deducted from each sentence must be the amount determined in relation to that sentence.

(3) When an offender is subject to 2 or more cumulative sentences that make a notional single sentence, any pre-sentence detention that relates to the cumulative sentences may be deducted only once from the single notional sentence.

²¹ *Taylor v Superintendent of Auckland Prison*, above n 17, at [22].

²² At [14]. In *Marino*, William Young J noted that Mr Taylor did in fact receive credit towards the second sentence for the period from his remand into custody on the second charge, which amounted to several weeks: *Marino – Supreme Court*, above n 1, at [92].

²³ *Marino – High Court*, above n 15, at [15].

In essence, what Simon France J rejected was what he termed an “expansive reading of s 91(1)(a), (b) and (c)”,²⁴ namely that the “proceedings” in s 91(1) relate to any charge faced between arrest and sentence: he found that this had been rejected in *Taylor*, which indicated the need for a relationship between the charge and the subject matter of the sentence.

The Court of Appeal dismissed Mr Marino’s appeal.²⁵ It found that the key was the distinction drawn in the Parole Act 2002 between cumulative and concurrent sentences and that the legislation clearly required separate calculation of the release date for concurrent sentences, each of which was to be considered separately, as Simon France J had held. Mr Marino argued that to find him to be serving a single sentence of 22 months to which pre-sentence detention since the first remand into custody applied was (i) consistent with the totality principle in relation to sentencing and (ii) avoided the risk of different outcomes based on how a sentence was constructed or when the prosecution chose to lay a charge or whether a defendant had been on bail or in custody prior to sentence, which could entail arbitrary detention.²⁶

The Court of Appeal’s reasoning was that the Parole Act required that required pre-sentence detention be calculated for each concurrent sentence, unlike for cumulative sentences because statutorily they were combined into a notional single sentence (which was not done for concurrent sentences and so represented a legislative choice).²⁷ It commented that any potential arbitrariness could be addressed by the judge in sentencing²⁸ and that the legislative aim in relation to credit for pre-trial detention was only to cover detention on charges such as mentioned in s 91(1).²⁹

On this final point, the Court of Appeal does not explain how the language of s 91(1), and in particular s 91(1)(c), which expressly refers to any charge on anything, does not mean that any period of should *not* be counted, but it endorses a comment in *Maile v Manager, Mt Eden Correctional Facility*³⁰ that prisoners should not be able to escape punishment by making use of “completely unrelated pre-sentence detention”.³¹ This is no doubt also the core reasoning of *Taylor*, where there was an evident desire to ensure that the quirk of statutory language that gave him credit for

²⁴ *Marino – High Court*, above n 15, at [10]; see also [16].

²⁵ *Marino – Court of Appeal*, above n 9.

²⁶ At [13]–[14]. The points made were that cumulative sentences totaling 22 months would have a different result if the decision below were correct, that the effect of the police not charging the second phone call until June even though they knew about it in March was problematic, and that a person who received 22 months (however constructed) who had been on bail prior to sentence would serve 11 months.

²⁷ At [22]–[24]. The points made were that cumulative sentences totaling 22 months would have a different result if the decision below were correct, that the effect of the police not charging the second phone call until June even though they knew about it in March was problematic, and that a person who received 22 months (however constructed) who had been on bail prior to sentence would serve 11 months.

²⁸ At [26]–[27]. Of course, as noted, the sentencing judge seems to have understood that he was imposing a sentence that would run from the initial remand.

²⁹ At [22] and [25].

³⁰ *Maile v Manager, Mt Eden Correction Facility* [2012] NZAR 39 (HC).

³¹ *Marino – Court of Appeal*, above n 9, at [25].

361 days twice – ie the judge reduced the sentence and then he was given administrative credit, a fact which the government conceded – did not extend to three times that credit.³² However, the counter-arguments remain obvious, namely that this policy-based reasoning does not sit easily with the fact that s 91(1)(c) does not require that the detention in question be related to the charges on which the person was sentenced: it just has to occur whilst the proceedings are ongoing. Moreover, the focus on “escaping punishment” ignores the fact that the construction reached would mean that a defendant could not claim credit for time in detention only on an earlier unrelated charge that led to an acquittal.

This point, however, was not determinative on the facts: the key conclusion of the Court of Appeal was that each sentence was separate, such that the 11 months imposed in relation to the second telephone call ran from the date of his remand into custody on that charge, even though there had been a delay of many weeks in laying the charge. Implicitly, the Court found that the sentencing judge should have constructed the sentence differently to achieve the outcome he expected: this in turn would mean that Mr Marino’s counsel should have been fully familiar with the early release provisions to alert the judge to the fact that the sentence imposed would not have the effect the judge thought. This would probably also apply to the prosecution, given that objective advice on the effect of a sentence (a matter of law) should come from them as well.

C. The Supreme Court Ruling for Mr Marino

The Supreme Court allowed Mr Marino’s appeal. Glazebrook J, speaking for all but William Young J, opened with a point also made by the latter, namely that the effect of the timing of the second charge of attempting to pervert the course of justice in the context of a statutory construction of all 12 sentences as individual ones was that Mr Marino received no credit at all for the time already spent in custody, namely from 12 February to 19 June 2015.³³ Setting out such a stark fact in the opening chronology may be a precursor of support for the person adversely affected, in just the same way as referring to Mr Taylor as seeking to triple dip rather than being content with his good fortune in double credit set the course of the judgment against him.

So it turned out to be. For Glazebrook J, the key point was that s 91(1) provided for an aggregation of pre-trial detention during the proceedings, whatever the charges involved in that pre-trial detention:³⁴ there was, she noted, “no warrant in the language of s 91(1) for it to be calculated on a charge by charge basis”.³⁵ Further, the idea that there had to be an evaluation of whether there was detention for related or unrelated offending so that the latter could be excluded was simply not

³² See *Taylor v Superintendent of Auckland Prison*, above n 17, at [5], where reference is made to “triple dipping”.

³³ *Marino – Supreme Court*, above n 1, at [5] per Glazebrook J and [56] per William Young J.

³⁴ At [15]–[17].

³⁵ At [17].

justified on the statutory language.³⁶ The distinction between concurrent and cumulative sentences in relation to credit for pre-sentence detention on which the Court of Appeal had relied was found to be unwarranted: ss 90(2) and (3) did not detract from the generality of ss 90(1) and 91(1) but provided guidance on calculation.³⁷ Section 90(3) was designed to make clear that there could be no double counting in the case of cumulative sentences (which was implicit in light of them being a notional single term):³⁸ this prevented the argument made in *Taylor*. Section 90(2) reflected the fact that the release dates for concurrent sentences of different lengths would differ (as would other key dates), but this did not alter the fact that:³⁹

the pre-sentence detention on each charge will be the same (as long as the charges were ones faced during the proceedings leading to the conviction or pending sentence of the person).

This interpretive conclusion was said to be bolstered by s 92 of the Parole Act 2002. This requires the compilation of a record of:

- (a) the date on which a person is admitted to the detention place on detention ...; and
- (b) the total period during which the person is subsequently detained before sentence in that detention place, whether on the original charge or any other charge.

As such, it does not proceed on a charge by charge basis. Nor does it require a record of when a further charge is laid, or whether a sentence is cumulative or concurrent, which would be necessary if the Court of Appeal was correct.⁴⁰ Other factors identified to support the conclusion were:

- (i) the absence of any good policy reason to treat the counting of pre-trial detention differently in relation to cumulative and concurrent sentences;⁴¹
- (ii) the simplicity and certainty of a single approach, important in the context of sentence calculation;⁴²
- (iii) no greater anomalies arose under the approach suggested for Mr Marino than under the Court of Appeal approach;⁴³
- (iv) the result was the same as would have applied under the predecessor legislation and there was no indication of a desire to change the outcome when the legislation changed;⁴⁴
- (v) the Court of Appeal decision produced arbitrary results, since cumulative sentences or an earlier laying of a charge would produce an earlier release date.⁴⁵

³⁶ At [18]. It was also pointed out that cumulative sentences often reflected unrelated offending and yet became a notional single sentence to which from which all pre-sentence detention was deducted, which undermined any policy as to not deducting time served on an unrelated concurrent sentence: [26].

³⁷ At [19]–[21].

³⁸ At [20].

³⁹ At [21].

⁴⁰ At [22]–[23].

⁴¹ At [26].

⁴² At [27].

⁴³ At [28].

⁴⁴ At [29]–[31]. This was a point of difference with William Young J, as noted below.

The consequence of all this was “pre-sentence detention” as defined in s 91(1) is “detention during the whole of the court process or processes from the original remand in custody on any charge up to the imposition of a sentence (or sentences) of imprisonment”; and the effect of s 90 – and in particular, s 90(1), which is the core provision – is that the “entirety” of the pre-sentence detention:⁴⁶

... is deducted from each sentence or sentences of imprisonment imposed ... whether the sentence of imprisonment relates to a single charge or more than one, whether or not the sentence of imprisonment relates to the charge for which a person was originally arrested, whether or not sentences are imposed cumulatively or concurrently and whether or not the sentences are imposed at the same time or subsequently as long as any charges for which the sentence or sentences of imprisonment relate were faced after arrest and before conviction.

There is no formal overruling of the decision in *Taylor* on which reliance had been placed below, but the reasoning is clearly inconsistent with the application of the *Taylor* approach to the current statutory regime, and the express rejection of the need for detention in relation to “related” detention overturns the reasoning on which *Taylor* depended.

The outcome is that concurrent sentences are indeed separate sentences but the pre-sentence detention is aggregated and will be deducted from each sentence. The key and important dates will then be calculated; invariably, the longest of the concurrent sentences will be the one that controls the other key and important dates.

D. The Different Reasoning of William Young J and a Critique of it

The separate opinion by William Young J leads to the same outcome on the facts, and he would have granted a declaration as to Mr Marino having been entitled to be released on 12 January 2016;⁴⁷ he also opined that the legislation merited a review in light of ongoing anomalies.⁴⁸ His reasoning has some overlapping elements with that of Glazebrook J but also some significant differences, and it is much more complex. He started with contextual matters, noting that as the Sentencing Act 2002 and Parole Act 2002 were passed together, it is intended that they be a coherent whole⁴⁹ and that concurrent and cumulative sentences can be passed either on a single occasion or on separate occasions and are always bound by the totality principle, such that it should not matter how the sentence is structured.⁵⁰ This was a precursor to the important comment that the effect of the decision of the Court of Appeal is that “a great deal depends on chance”⁵¹ – such as whether a cumulative sentence is imposed or the date a charge is laid. This resulted in arbitrary detention

⁴⁵ At [32]–[34]. This was a point developed further by William Young J.

⁴⁶ At [24].

⁴⁷ At [118].

⁴⁸ At [117].

⁴⁹ At [43].

⁵⁰ At [44]–[46].

⁵¹ At [63].

within the meaning of s 22 of the New Zealand Bill of Rights 1990 and so brought into play the interpretive obligation to avoid this (s 6 of the NZBORA).

The complexity now arises. His Honour had described the statutory regimes, noting the choice they made between making the pre-sentence detention for the court or for the prison, and indicated that the legislative history of the Parole Act sections did not help to clarify their meaning in his view.⁵² He was, however, clear that on the version of the Criminal Justice Act 1985 that was in place before the Parole Act came into effect, described above in the discussion of *Taylor*, the full amount of pre-sentence detention on all charges would have been counted.⁵³ This flowed from being the most obvious reading of the language in the situation of Mr Marino, though he noted in this context that there was no equivalent then to s 90(2) of the Parole Act 2002 (ie that referring to concurrent sentences).⁵⁴ He also outlined the case law that arose in relation to pre-sentence detention under the prior and current legislation and commented that the issue of whether offending was “related” was a matter of nuance that was difficult for administrative officials, albeit that the legislation helped by allowed prisoners to seek a review.⁵⁵

He noted the approach adopted by Corrections (and upheld by the courts below) was to treat the calculation of pre-sentence detention under s 91(1) on a charge-by-charge basis; this could include detention on a charge that differed from that on which the person was convicted by reason of s 91(1)(b) and the reference to changes on which the person was originally arrested: His Honour described this to involve a related charge. He accepted that the approach set out in *Taylor* to the effect that this is limited to a holding charge or one that evolved into the final charge at the time of conviction and sentence was not the only meaning available because, as Glazebrook J for the majority holds, the language could convey only a temporal overlap rather than one looking to the substance of the charges.⁵⁶ Moreover, he noted that Mr Taylor’s “unattractive” attempt at double-counting – which he realistically accepted was relevant to the dismissal of his case – had been cut-off by the language of s 90(3), which allows only one deduction of time from a notional single sentence.⁵⁷ But he concluded that the *Taylor* reasoning should be upheld because it was also a tenable reading and had been applied for so long.⁵⁸

Having upheld the reasoning in *Taylor*, he found that it did not govern the facts for two reasons. First, the attempted perverting charges were related and so the proceedings commenced when he was arrested on the family violence charges (ie before the attempting to pervert offences had even occurred);⁵⁹ and, secondly, any

⁵² At [94].

⁵³ At [75]–[76].

⁵⁴ At [76] read together with [71].

⁵⁵ At [96]. The review provisions are in s 92 of the Parole Act 2002, the record-keeping section found important by Glazebrook J.

⁵⁶ At [102].

⁵⁷ At [103].

⁵⁸ At [104].

⁵⁹ At [107].

sentences that are imposed on a “single sentencing occasion” are covered by the statutory language.⁶⁰

Both these are difficult to sustain. In the first place, it may be very much a matter of chance as to whether matters are sentenced on one occasion: it may depend on such things as whether files relating to separate matters are consolidated.⁶¹ Secondly, the inherently contestable question of what is a “related” charge should not be implied into what should be a simple matter of calculation rather than evaluation by officials. In *Marino*, although there was a clear link in that the attempts to pervert the course of justice would not have occurred in the absence of the existing charges because it was in relation to those charges that he sought to persuade witnesses not to give evidence, they were also of a very different nature and so one could argue that the link was inadequate. Were the approach of William Young J the one to apply, it would invite questions as to how far it went. For example, if a person in custody sought to have drugs brought into prison because of their importance in that context, and so formed a conspiracy to that end, would that be related? It might well be that the two sets of charges went to trial and each involved co-defendants, so avoiding the opportunity for a single occasion for sentencing that would avoid the question.

His Honour also accepted that the referability test was difficult to reconcile with the requirement in s 90(2) to determine and deduct pre-sentence detention from each concurrent sentence. Rather than the explanation of Glazebrook J, namely that this was merely a calculation section relevant to parole eligibility and final release dates, William Young J was compelled to suggest that s 90(2) apparently required the separation of pre-sentence detention on a charge by charge basis even if the pre-sentence detention was consolidated in the way he suggested was applicable on the facts. For him, it was this literal interpretation that led to arbitrary detention (eg because it depended on such matters as the date a charge was laid) and meant that the interpretation of s 91(1) that he favoured was rendered ineffective.⁶² It was at this stage that he introduced the interpretive obligation under s 6 of the NZBORA to hold that an available meaning of s 90(2) was that all pre-sentence detention referable to any charge that led to the concurrent sentences was to be deducted from the sentence for each charge.⁶³

But, consistently with his view that the single sentencing occasion was a key feature, he added that there might be a different conclusion if concurrent sentences were imposed on separate occasions.⁶⁴ This might mean that had Mr Marino admitted the family violence charges and been sentenced on those, but denied the attempting to pervert charges and been convicted on those after a trial and sentenced to a concurrent sentence on a separate occasion, the result would be different. This would create a significant difference from the judge imposing a cumulative term

⁶⁰ At [106] and [108].

⁶¹ The assignment of legal aid counsel on a random basis for less serious offences may militate against this.

⁶² At [109]–[111].

⁶³ At [112]–[114].

⁶⁴ At [114(c)].

reduced to take account of the totality principle, since then there would be a single notional term and detention from the earliest would count.

In addition to these imponderables, there is a significant gap in the analysis of His Honour as he presents *Taylor* as being limited to what is now s 91(1)(b), whereas it also concerned with what is now s 91(1)(c).⁶⁵ As has been noted, the simple point is that this sub-section includes within pre-sentence detention that on any charge between arrest and sentence, with no mention of any need for it to be related to any detention on any other charge. How this rule as to what is pre-sentence detention interplays with the obligation in s 90 to take it into account is solved much more simply by Glazebrook J. Her Honour holds that s 90(1), the core provision, requires that all pre-sentence detention be deducted from “a sentence of imprisonment” to calculate the key dates in that sentence: in effect, the structure of the sentence is irrelevant, and the prison officials have a fairly simple dual inquiry of determining (i) the total length of the sentence being served and (ii) the amount of detention served on any matter between the first remand into custody prior to the date of sentence and the sentencing date.

One surprising feature of the decision is the failure to mention the principle of lenity, namely the idea that ambiguous penal provisions should be interpreted in a way that secures the least disadvantageous outcome for the defendant. That would have secured the same outcome for the majority and should have steered William Young J away from his convoluted reasoning to preserve *Taylor* given the tenable alternative approach.

E. Implications of the Decision

As was illustrated in the judgment of William Young J, the legislature has decided regularly to change the mechanism for the calculation of pre-sentence detention, and so one can expect that this will happen again. However, the call by His Honour for this to be done in light of the concerns he had is less compelling if the critique of his reasoning is correct. The reasoning of Glazebrook J for the majority leaves a situation that it easier to comprehend and, one would hope, administer.

The more major implication of the decision is illustrated by the fact that Mr Marino had been released before the Supreme Court decision, having served the additional 127 days in issue. Not surprisingly, he is now seeking damages, as are others who have been detained for longer than they should have been in light of the correct explanation of the law, using false imprisonment as the relevant tort. Corrections is, also understandably, arguing that they had no power to release other than when they did because *Taylor* governed their actions. A similar point has been argued in England and Wales in *R v Governor of Her Majesty's Prison Brockhill, ex parte Evans (No 2)*,⁶⁶ which involved a woman detained an additional 59 days on the basis of the

⁶⁵ William Young J merely mentions this sub-section in passing at [99]. In *Taylor*, its equivalent language is emphasised but side-lined because of the gloss of requiring that charges be somehow related: *Taylor v Superintendent of Auckland Prison*, above n 17.

⁶⁶ *R v Governor of Her Majesty's Prison Brockhill, ex parte Evans (No 2)* [2001] 2 AC 19 (HL).

prison governor correctly applying the law as it had been previously stated. Reflecting what has happened in *Marino*, this understanding was changed as a result of *R v Brockhill Prison, ex parte Evans*,⁶⁷ in which the Divisional Court overturned the previous sentence calculation decisions.

False imprisonment involves imprisonment that is not lawful: it is a matter of strict liability in the sense that it does not require fault, but the dispute in *Evans (No 2)* was whether the lawfulness of the detention was assessed by reference to the law as understood at the date of the detention or the law as understood at the time of the claim. When there has been a change in that understanding, the argument becomes one of whether the declaration that the law is to be understood differently is prospective only or retrospective (though limited in effect by limitation periods). The House of Lords determined that the choice between leaving uncompensated the prisoners who were the victims of the court's previous error and making the prison (ie the state) pay compensation for a detention they were blameless in enforcing was to be resolved in favour of the prisoners.

The argument as to what should happen in New Zealand came in front of Simon France J.⁶⁸ He ruled⁶⁹ that the proper approach was to regard the Supreme Court as having clarified what the law always was – the so-called declaratory theory as to the impact of judgments – and that there was no proper basis for an argument that the ruling was prospective only. Amongst his reasons were that the Chief Executive should have asked the Supreme Court to make clear that its ruling was prospective only if it wanted to avoid the normal, declaratory effect of a judgment.

This civil aspect of the case involved a second applicant: the flawed understanding and application of the law for more than a decade in the context of New Zealand's relatively high use of imprisonment⁷⁰ will no doubt mean that there are a significant number of claims, albeit that some will be time-barred.

⁶⁷ *R v Brockhill Prison, ex parte Evans* [1997] QB 443.

⁶⁸ This may be thought somewhat poetic, given that his argument for the government in *Taylor* is the root cause of the problem that is now being unravelled.

⁶⁹ *Marino v Chief Executive of the Department of Corrections* [2016] NZHC 3074.

⁷⁰ 210 per 100,000 of the population at the time of writing (compared to 162 in Australia, 145 in the UK, and 114 in Canada): figures from "World Prison Brief data" World Prison Brief <www.prisonstudies.org/world-prison-brief-data>.