CASE NOTE: *CAMERON V R* [2017] NZSC 89 – CONTROLLED DRUG ANALOGUES, INDETERMINACY AND MENS REA UNDER THE MISUSE OF DRUGS ACT 1975

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I. INTRODUCTION

In *Cameron v The Queen*,[1] the Supreme Court addressed the mens rea element in offences under the Misuse of Drugs Act 1975 (the MDA) involving controlled drug analogues. The Court also considered whether it falls to the jury to decide, as a question of fact, whether a substance is "substantially similar" to a controlled drug and thus a "controlled drug analogue" or, alternatively, if this is a question of law to be decided by the trial Judge. The Court identified two further statutory interpretation issues that required resolution. First, whether the indeterminacy of the definition of controlled drug analogue necessitated the appellants' proceedings to be stayed and, second, whether the active ingredient in the drugs that the appellants were manufacturing and distributing are caught by the drug analogue regime.

The Court heard the appeal over two days in November 2016, but reconvened in April 2017 to allow the parties the opportunity to address whether the mens rea standard should encompass recklessness, despite the fact this was not how the Crown advanced its case in the High Court.

II. THE FACTS

The four appellants were found guilty in the High Court on numerous charges of importing, selling and possessing, for the purpose of sale, the Class C controlled drug 4-methylethcathinone, which goes by the name "4-MEC".[2]

At the centre of the case was a business called "London Underground", which marketed and distributed "legal highs", but also sold products on "the after-market". This arm of the business manufactured and sold pills with 4-MEC as the active ingredient. The pills were intended to mimic the effects of MDMA ("Ecstasy"), which is a Class B controlled drug. The after-market was a lucrative operation, as the street value of the pills manufactured and sold during the period covered by the charges – June 2010 to November 2011 – was $36 million.

Three of the four appellants were part of London Underground's operation – its co-founder (Mr C), his second in command (Mr Good) and a technical advisor who received commission on each pill sold (Dr L). The fourth appellant (Mr Cameron) was the business's liaison with gangs involved in the after-market activities; described in the judgment as a major customer of London Underground as an on-seller of pills.

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[1] *Cameron v R* [2017] NZSC 89 (*Cameron*).

[2] A fifth appellant abandoned his appeal before the decision was delivered.

London Underground had two faces. Whereas the legal highs operation was operated in an "above-board" way, the after-market arm was:[3]

> … clandestine in nature, in that, for instance, imported materials were mislabelled, codes were used, cash was the medium of exchange, tax was not accounted for and proceeds were laundered. All of this was capable of supporting an inference that the appellants realised that their activities were illegal.

While the Court did not consider it a material mistake, for most of the timeframe covered by the charges the appellants believed the active ingredient of the pills was 4-methylmethcathinone, or 4-MMC, rather than 4-MEC.

III. The Drug Analogue Regime

Section 6 of the MDA prohibits dealing with its three categories - Class A, Class B and Class C - of controlled drugs. The drugs contained in each class are specified in schs 1, 2 and 3. A "controlled drug analogue" is a Class C controlled drug under the MDA, which is mirrored in the definition of Class C controlled drug, which means "the controlled drugs specified or described in Schedule 3; and includes any controlled drug analogue".[4]

A "controlled drug analogue" is defined as:[5]

> [Any] substance, such as the substances specified or described in Part 7 of Schedule 3, that has a structure substantially similar to that of any controlled drug; but does not include—
> (a) any substance specified or described in Schedule 1 or Schedule 2 or Parts 1 to 6 of Schedule 3; or
> (b) any pharmacy-only medicine or prescription medicine or restricted medicine within the meaning of the Medicines Act 1981.

The Court held that s 29 rendered inconsequential the appellants' mistake that they thought they were dealing with 4-MMC instead of 4-MEC. It provides:[6]

> 29. Mistake as to nature of controlled drug or precursor substance
> Where, in any proceedings for an offence against … section 6 … it is necessary, if the defendant is to be convicted of the offence charged, for the prosecution to prove that some substance … involved in the alleged offence was the controlled drug … which the prosecution alleges it to have been, and it is proved that the substance … was that controlled drug … , the defendant shall not be acquitted of the offence charged by reason only of the fact that he did not know or may not have known that the substance … in question was the particular controlled drug … alleged.

[3] *Cameron*, above n 1, at [5].
[4] Misuse of Drugs Act, s 2(1), definition of "Class C drug" [MDA].
[5] MDA, s 2(1), definition of "controlled drug analogue". The definition has changed to include "an approved product within the meaning of the Psychoactive Substances Act 2013", but the Supreme Court dealt with the definition as it stood prior to 18 July 2013.
[6] MDA, s 29.

The Court described the broader context of the controlled drug analogue regime introduced in 1987.[7] The underlying policy was to bring "designer drugs" within the scope of the MDA. The Health Select Committee, which reported back on the Bill,[8] said that "[i]dentification of all kinds of analogues of controlled drugs, by name or specific description, would be impossible",[9] which explains why the "substantially similar" approach was enacted.

A. The definition of controlled drug analogue is indeterminate

The Court accepted that the definition is indeterminate and said, "It follows that there will necessarily be scope for argument about its application in marginal cases."[10] However, it rejected an argument that the courts' response to the issue should be, in every case, to "disapply the legislation" and stay or dismiss any controlled drug analogue prosecution.[11] It described the indeterminacy complaint as abstract, as, "Whatever uncertainty might exist in respect of the categorisation of other drugs, there is no uncertainty about the drugs in issue in this case. This is because 4-MMC and 4-MEC are undoubtedly both analogues of methcathinone."[12] Also, the Court observed that indeterminacy is not uncommon in the criminal law.[13]

IV. The High Court's Approach to Mens Rea

The Crown case was that both 4-MEC and 4-MMC have chemical structures substantially similar to that of the Class B drug methcathinone, which means that both are controlled drug analogues, and thus Class C controlled drugs.

It was not in dispute that the appellants, apart from Mr Cameron, had turned their minds to the question whether 4-MMC is a controlled drug analogue, and knew that its structure is similar to methcathinone which, they also knew, is a Class B controlled drug. At trial, the appellants claimed that they had been operating under the mistaken belief that, to be a drug analogue, the substance concerned had to be substantially similar to one of six families of drugs specified in pt 7 of sch 3 of the MDA.[14] This misapprehension therefore had equal application to 4-MMC, and was brought about because of erroneous legal advice about the operation of the MDA.

The trial Judge, Woodhouse J, considered that the issue of substantial similarity was a question of fact for the jury. Also, his Honour ruled that the Crown had to prove that

[7] The Court also discussed its international counterparts, the most similar of which is the Canadian Controlled Drugs and Substances Act SC 1996 c 19, although there are also "generally similar" regimes in the Australian states.
[8] Misuse of Drugs Amendment Bill 1987 (154–1).
[9] (24 November 1987) 484 NZPD 1248.
[10] *Cameron*, above n 1, at [21].
[11] At [21].
[12] At [22].
[13] At [22] and [42], using indecency as an example.
[14] MDA, sch 3, pt 7, describing analogues of six controlled drugs specified in schs 1 and 2, thus creates six drug families, the members of which are all controlled drugs in their own right.

the appellants either knew the identity of the substance, or that it was a controlled drug, and directed the jury that knowledge would be established if the prosecution proved either:[15]

- The appellant knew, or believed, that the substance he was dealing with was a particular drug, such as knowledge of the type of drug or of its name (identity knowledge); or
- The appellant knew or believed that the substance he was dealing with was illegal – that it was a controlled drug – even though the defendant may not have known the particular type of drug involved (illegality knowledge).

Under the first alternative, the Judge made it clear that identity knowledge would comprise guilty knowledge even if the appellant did not know the substance was a controlled drug. It was at this point that Woodhouse J explained that ignorance of the law is not a defence – thus, if the jury was sure that an appellant had identity knowledge, then the fact he believed the drug was not a controlled drug analogue – whether that belief was the result of an honest mistake or not - provided no defence.

V. The Court of Appeal's Judgment[16]

The Court of Appeal endorsed the approach taken by the trial Judge and held that the question whether a substance is compositionally substantially similar to a controlled drug is an issue of fact for the jury.

The Court grappled with the issue whether anything about drug analogue offences justifies departure from the presumption that mens rea attaches. It identified the purpose of the legislation – to respond to "the proliferation of designer drugs that mimic the effect of scheduled controlled drugs but differ in chemical structure" and recognised "obvious difficulties in scheduling these substances in advance", which is why the legislature chose to address these concerns through the concept of substantial similarity.[17]

The Court was concerned that full mens rea, "even recognising that it would include the concepts of subjective recklessness and wilful blindness", would risk negating the effectiveness of the legislation because those alleged offenders removed from the immediate design and manufacture of the drug (distributors) may only know its effects; not its chemical constitution. It relied upon the exception to proof of mens rea described in *Millar v Ministry of Transport*[18] that arises in cases where that interpretation is justified by the regulatory nature of the legislation. While it recognised that the instant case involved serious crime rather than offending of a regulatory nature, the Court held that "there is good reason to impose a high standard of care in this area of risk-taking activities", as those involved in the trade of drugs that mimic

[15] The Crown opened on the basis that it was required to prove that the defendants knew that 4-MMC was a controlled drug or were wilfully blind. However, it changed direction towards the end of the trial and successfully persuaded the Judge that knowledge of the name of the drug, identity knowledge, would suffice.
[16] *Cameron v R* [2016] NZCA 48, (2016) 27 CRNZ 700.
[17] At [93].
[18] *Millar v Ministry of Transport* [1986] 1 NZLR 660 (CA).

the effects of a controlled substance "know the conduct is close to the line".[19] It saw negligible risk that the net would be cast too widely and ensnare those engaged in innocent activity. However, it declined to treat absolute liability as appropriate sans express statutory authority.[20]

The Court of Appeal concluded that the balance was struck by requiring the Crown to prove either identity or illegality knowledge, but with an available defence of total absent of fault, which enables a defendant to prove that "notwithstanding knowledge of the identity of the drug they were not at fault in dealing with a controlled drug (its status once a jury has determined the substantially similar issue)".[21]

The trial Judge had not left total absence of fault to the jury as a defence, but the Court held this had not caused a miscarriage of justice.

VI. The Supreme Court's Review of Mens Rea in Controlled Drug Cases

The Supreme Court undertook its review of the authorities under the heading "The mens rea problem in respect of possession and supply of illicit material". It observed that full knowledge of the illicit character of the material concerned – complete knowledge and honest belief it is innocent - innocent belief – fall at opposite ends of the continuum.[22]

The central conclusion reached by the Supreme Court is that courts have tended either to equate lack of complete knowledge with innocent belief or to hold that complete knowledge is required for criminal liability. It described this as inconsistent with the general principles of criminal law as to recklessness. It endorsed the thrust of the Court of Appeal's approach by agreeing that the approach to date is not consistent with the policy underpinning the controlled drug analogue regime.[23]

The Court foresaw several possible responses to the policy concern. The approach taken in the High Court and Court of Appeal was to treat identity knowledge as sufficient. The Court observed that in most drug cases this will suffice,[24] but this approach does not work "so well" in the case of controlled drug analogues if the issue of substantial similarity is one of fact and not law because, if mens rea must encompass awareness as to substantial structural similarity, "there is an indeterminacy problem". The options it described were:[25]

- Awareness that 4-MMC has a structure that is similar to that of methcathinone constitutes mens rea; or

[19] *Cameron v R*, above n 18, at [95].
[20] At [95].
[21] At [96].
[22] *Cameron*, above n 1, at [37].
[23] At [39].
[24] At [40]–[41]. It used the example of cannabis where a person who sells material knowing it to be cannabis will have full mens rea even if not aware cannabis is a controlled drug.
[25] At [41].

- Awareness that the degree of similarity is substantial (or might or would be so regarded by a jury).

The Court was concerned that the bar would be set too low and have an over-criminalising effect, if "awareness of similarity suffices for mens rea", as it would make no allowance for the person who has taken reasonable steps to address the question whether the similarity is substantial.[26]

The gravamen of the Court's decision is its conclusion that a strict identity knowledge approach would have the potential to catch those who had no idea that the drug in question was or might be controlled. Thus:[27]

> Treating recklessness as sufficient to constitute mens rea avoids the over-criminalising risk just adverted to while, at the same time, providing a workable and just solution to the indeterminacy problem which we have just discussed.

The Court broke its analysis down into five topics,[28] but it is helpful to pick the thread up where it discussed total absence of fault as a defence, and its subsequent consideration of recklessness. It observed that the general understanding amongst criminal practitioners that existed until the mid-1970s, in its most simplistic form, was that there were three categories of offences: (a) full mens rea offences; (b) *Strawbridge* offences;[29] and (c) absolute liability offences. A fourth category – strict liability offences for which a total absence of fault is a defence – was later added.[30] It places the onus of proof on the defendant, although the Court recorded that this may require reconsideration in a future case, as the leading authorities establishing the rule pre-date the enactment of the New Zealand Bill of Rights Act 1990.[31]

The Court explained that many offences, instead of specifying the particular state of mind required to prove the charge, are defined by reference to either or both of (a) the circumstances in which an offender acts; and (b) the results that the offender brings about. It said, "the general position is that recklessness suffices as mens rea in respect of either circumstances or results".[32] This "sufficient but minimum degree of fault" is consistent with the authorities from England and Wales, and Australia, too.

Jumping ahead, the Court described a 1988 article by Simon France as a "useful overview of the law in New Zealand as to recklessness and the policy issues

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[26] At [43].
[27] At [44].
[28] At [45] which it described as "The *Ewart – Matuarika* lines of cases", "*R v Martin and Soles v R*", "total absence of fault as a defence", "recklessness" and "mistake of law and mens rea".
[29] *R v Strawbridge* [1970] NZLR 909 (CA), which provided that, upon the actus reus of the offence being proved, guilty knowledge is presumed unless there is evidence that the defendant honestly believed on reasonable grounds that the act was innocent, in which case the Crown bears the onus to establish beyond reasonable doubt that should not be accepted. The Court observed that a shift occurred in 1982 when New Zealand dispensed with the reasonableness requirement of a postulated innocent belief: obiter comment in *R v Wood* [1982] 2 NZLR 233 (CA), but affirmed in *R v Metuariki* [1986] 1 NZLR 488 (CA).
[30] *Cameron*, above n 1, at [62].
[31] *Civil Aviation Department v MacKenzie* [1983] NZLR 78 (CA); *Millar v Ministry of Transport* [1986] 1 NZLR 660 (CA) (*Millar*).
[32] *Cameron*, above n 1, at [64] (emphasis omitted).

involved".[33] The author observed that the Court of Appeal had touched upon the role of mens rea in three decisions of (then) recent vintage – *Strawbridge*, *Metuariki* and *Millar*; "yet in all of them recklessness has hardly featured … the absence of talk concerning recklessness is significant".[34]

The Court, in a statement that the Crown in future will no doubt argue should be treated as applicable to other offences in the criminal calendar, held that:[35]

> In cases such as the present in which the offence is not defined in terms which require actual knowledge or intention and nothing less, we consider that recklessness as explained in *G*[36] will (at least usually and perhaps always) be sufficient to satisfy mens rea requirements as to circumstance and result. For these purposes, recklessness is established if:
> (a) The defendant recognised that there was a real possibility that:
> i. his or her actions would bring about the proscribed result; and/or
> ii. That the proscribed circumstances existed; and
> (b) Having regard to that risk those actions were unreasonable.

In terms of limb (b), the Court said that there has been limited judicial and academic discussion about unreasonableness. It described a continuum – at one end are those actions of an offender that have no social utility (using the example of personal violence with the risk of serious injury or death), where the running of the appreciated risk is necessarily unreasonable. At the other end of the spectrum (using the surgeon who performs risky but potentially life-saving surgery as an example) are those actions with high social utility. Thus, in those cases where there is some social utility, a more nuanced approach that asks whether a reasonable and prudent person would have taken the risk is required. The Court said this may require consideration of the level of the risk involved, counterbalanced by the utility of the actions of the defendant.[37]

The Court described a grey area between recklessness and intention, which tends to result in their conflation, but said "we think it best to treat intention and recklessness as distinct concepts; this for clarity of thinking and discussion".[38] It addressed wilful blindness, and said that the principle does not equate recklessness with knowledge; rather it provides a method by which knowledge may be inferred. It considered the line of authority culminating in *R v Martin*[39] (*Martin*) and *Soles v R*[40] (*Soles*), which held that the offence requires proof of knowledge, and wilful blindness offered a mechanism by which knowledge could be inferred.[41] It concluded that *Martin* and *Soles* could have been dealt with "more easily" on the basis that recklessness sufficed

[33] Simon France "A reckless approach to liability" (1988) 18 VUWLR 141; *Cameron*, above n 1, at [71].
[34] France, above n 33, at 144.
[35] *Cameron*, above n 1, at [73].
[36] *R v G* [2003] UKHL 50, [2004] 1 AC 1034, which was discussed by the Court in *Cameron*, above n 1, at [69]. The Court recognised that the approach to recklessness adopted in *G* mirrored that earlier taken by the Court of Appeal in *R v Harney* [1987] 2 NZLR 576.
[37] *Cameron*, above n 1, at [74].
[38] At [75].

[41] See *Cameron*, above n 1, at [57]–[60].

for mens rea purposes, and where actual knowledge is not an element of the offence, there "should be no need to resort to wilful blindness".[42]

The Court rounded out its discussion on mens rea by saying that the language employed in s 29 of the MDA assumes that knowledge is, or may be, an element of the Act's offences. Despite that, it concluded that "the conditionality of the language of the section" leaves it to the courts to determine if knowledge is an element of any particular offence under the MDA; thus, if the Court concluded that recklessness suffices for mens rea, then the only work to be done by s 29 is to provide that "the required recklessness need extend only to the controlled nature of the drug and not its specific identity".[43]

The Court reasoned that, having regard to the New Zealand authorities, as well as the position adopted in other jurisdictions, it was entitled to adopt the view that the relevant mens rea encompasses recklessness.[44] It regarded it to be "not practicable" for the law to continue to apply the "complete knowledge/innocent belief dichotomy", and held that:[45]

> [I]n the unique context of drug analogues, the policy of the statute would be defeated if the courts apply a concept of mens rea which involves complete knowledge which in many and perhaps most cases, will not be able to be established given the indeterminacy of the definition of controlled drug analogue.

I interpolate that it is probable that the Crown in future will seek to argue that the reasoning in *Cameron* justifies the adoption of recklessness as the mens rea element in other offences outside the MDA. However, I suggest that such an application should be challenged on the basis that the Court's reasoning was directed at the specific policy considerations behind the MDA's analogue regime. Any application to apply the reasoning in *Cameron* to another offence will require careful judicial consideration of the wording and purpose of the statute in question.

A. The Court's proposed mens rea direction

Having concluded that the Court of Appeal in *Millar* identified four, not three, categories of offences, the Court saw the instant offence as falling within the "*Strawbridge* principle".[46] As such, the Court said that a trial judge should, in a way missing in this case, direct the jury that the Crown has no obligation to establish the state of mind of the defendant in respect to the status (controlled or otherwise) of the substance. Thus, the direction proceeds on the basis that, in the absence of evidence to the contrary, mens rea is assumed.

[42] At [77].
[43] At [86].
[44] At [87].
[45] At [91].
[46] At [83]–[84].

If the Judge is "of the view" there is such an evidential basis, then he or she should direct the jury that:[47]

> (a) A defendant should be found not guilty unless the Crown has proved, beyond reasonable doubt, that the defendant has a guilty state of mind.
> (b) A defendant will have a guilty state of mind if:
>
> i. He or she knew or believed that the drug in question was a controlled drug. This would be established if the defendant knew that 4-MMC (for example) is an analogue of methcathinone (that is, their structures are substantially similar) but could be established if the defendant simply understood in general terms that the drug is a controlled drug. (The knowledge limb.)
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> ii. The defendant was aware that the drug may be a controlled drug and that, given his or her assessment of the possibility that this was so, his or her actions in dealing in the drug were unreasonable. The question whether the defendant's actions were unreasonable comes down to whether he or she has acted as a reasonable and prudent person – that is, as a law-abiding person doing their best to comply with the law would have done (The recklessness limb.)

B. The interplay between a mistake of law and mens rea

The Court concluded that the fact that the appellants had relied upon incorrect legal advice did not provide them with a defence. It held that they had been operating under a mistake of law regarding the operation of the MDA's drug analogue regime, which engaged s 25 of the Crimes Act 1961.[48] It observed that, notwithstanding the wording of s 25, the section and its international equivalents have been applied robustly to exclude defences based on mistake as well as ignorance of the law and observed, "[i]n particular we are not aware of cases where a mistake as to the existence or application of the criminal law in respect to the defendant's conduct has been held to be a defence."[49]

C. The court's conclusions regarding the appeals

The Court found there to be no issue with the illegality limb of the trial Judge's directions, but concluded that the direction regarding identity knowledge was problematic, as the question whether 4-MMC and 4-MEC are controlled turned on the jury's assessment of substantial similarity. The Court identified an intermediary step between identity knowledge and a knowledge of all the facts that result in the drug being controlled – thus, knowledge of the identity of a drug that is later found to be a drug analogue does not necessarily equate to knowledge that the drug is controlled.[50] However, the Court said that identity knowledge "is likely to be very

[47] At [97].
[48] "Ignorance of law: The fact that an offender is ignorant of the law is not an excuse for any offence committed by him or her".
[49] *Cameron*, above n 1, at [78].
[50] At [93], the Court described the situation where a defendant either knew the drug by the name it appears in the MDA or "most cases in which the drug was known by reference to its slang name".

significant", as a defendant who knows the true identity of a controlled drug analogue has a very specific knowledge – more specific than that held by most drug dealing offenders.[51] Using 4-MMC to illustrate the point, the Court said that "a defendant who believed he was dealing in [that drug] had a very particular belief and its corollary might be thought to have been recognition of the probability that its structure was similar to that of methcathinone".[52] As such, someone who knows that 4-MMC has a structure substantially similar to that of methcathinone knows all the facts that are necessary to comprise knowledge that 4-MMC is a controlled drug. In contrast, the common name(s) of the drug analogue involved may provide no link to its associated controlled drug. Accordingly, identity knowledge is not automatically indicative of a guilty mind.[53]

The Court's conclusion there had been an error in the trial Judge's direction on identity knowledge meant that it was required to allow the appeal unless satisfied that the appellants were guilty of the offences on which they were found guilty.[54] The Court said that it was only entitled to dismiss an appeal if satisfied, on the evidence adduced at trial, either that an appellant was aware that 4-MMC is a controlled drug analogue, or that he appreciated that 4-MMC is a controlled drug analogue and his actions in dealing with the drug were, in light of that appreciation, unreasonable. The absolute right to a fair trial required the Court to be satisfied that an appellant was not prejudiced by the course taken at trial – in particular, by the trial Judge's incorrect directions.[55]

The Court dismissed three out of the four appeals in reliance on the proviso. It described a "striking feature" of the case to be that none of the appellants with a close association with London Underground (Messrs C and Good and Dr L) denied the substantial similarity of 4-MMC and methcathinone.[56] While the Court accepted that the appellants were not indifferent to the issue of legality, they were attempting to exploit a perceived loophole in the law created by pt 7, sch 3 of the MDA, and the clandestine nature of the operation was designed to avoid inviting official scrutiny and the potential inclusion of 4-MMC into an MDA schedule. This meant that they acted unreasonably, as the appellants' conduct was not that "of a law-abiding citizen intending to do his or her best to comply with the obligations or duties imposed".[57] Thus, both the knowledge and recklessness alternatives of the test proposed by the Court were met.

It allowed Mr Cameron's appeal on the basis that his position could be distinguished. While it concluded that it was open to inference that Mr Cameron knew that the chemical composition of 4-MMC was substantially similar to that of a controlled drug, and "even more strongly open to inference that he was at least reckless in that

[51] At [95].
[52] At [95].
[53] At [95].
[54] The proviso in s 385(1)(c) of the Crimes Act 1961, which applied to the appellants' trial.
[55] *Cameron*, above n 1, at [100].
[56] At [118].
[57] At [120], quoting Casey J in *Millar*, above n 31.

regard"[58], "[t]here was no occasion for him to engage as closely as Mr C, Mr Good and Dr L with the way in which the controlled drug analogue regime worked" [59]. This meant that, if the Crown had advanced a case premised on recklessness, "it is not inconceivable that he would have been able to present a narrative which might have persuaded the jury to acquit him".[60] As such, his fair trial entitlements precluded application of the proviso.[61]

[58] At [139].
[59] At [140].
[60] At [140].
[61] At [140].