

**CASE NOTE: EVERY SILVER LINING HAS A CLOUD — THE EXCLUSION OF IMPROPERLY OBTAINED EVIDENCE IN CIVIL PROCEEDINGS: *MARWOOD V COMMISSIONER OF POLICE* [2016] NZSC 139, [2017] 1 NZLR 260**

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I. INTRODUCTION

Section 30 of the Evidence Act 2006 (the Act) codifies New Zealand’s rule for the exclusion of improperly obtained evidence in a criminal trial. Pursuant to s 30(5), “improperly obtained” evidence is real or confessional proof secured by police (or other state agents) either: (a) illegally; (b) unfairly; or (c) in violation of the New Zealand Bill of Rights Act 1990 (NZBORA). Whenever evidence has been obtained “in consequence of” (s 30(5)) one or more of these improprieties (whether directly or derivatively), s 30(2)(b) requires a court to determine whether exclusion of the material is or is not a proportional response to the police transgression at issue in the case. To make this determination, a judge must “give appropriate weight to the impropriety and also take proper account of the need for an effective and credible system of justice” (s 30(2)(b)) — a balancing process based on a number of (non-exclusive) factors set out in s 30(3). The judicial decision to exclude or to admit improperly obtained evidence will result from whatever proportionality assessment is reached.

A voluminous body of case law and academic writing exists regarding the interpretation and application of s 30.<sup>1</sup> However, in *Marwood v Commissioner of Police* (*Marwood*),<sup>2</sup> the Supreme Court dealt with a matter that had never been comprehensively examined in any previous consideration of the exclusionary rule. That is, since s 30 applies only to a “criminal proceeding” (s 30(1)), does a court have the jurisdiction to exclude improperly obtained evidence in a *civil* case?

II. FACTS & PROCEDURAL HISTORY

*A. Facts*

*Marwood* involved a police search of the defendant’s home pursuant to a search warrant. The search uncovered evidence of a cannabis cultivation and selling operation, together with the theft of electricity (the crimes with which Marwood was eventually charged). However, in the course of criminal proceedings in the District Court, Marwood successfully challenged the validity of the warrant used to justify the

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<sup>1</sup> See generally Richard Mahoney and others *The Evidence Act 2006: Act and Analysis* (3<sup>rd</sup> ed, Brookers, Wellington, 2014) at [EV30.01] et seq [Mahoney and others *Act and Analysis*]. See also Scott Optican “The Supreme Court and the Law of Evidence” in Andrew Stockley and Michael Littlewood (eds) *The New Zealand Supreme Court: The First Ten Years* (LexisNexis, Wellington, 2015) at 426-429; Scott Optican “*Hamed, Williams* and the Exclusionary Rule: Critiquing the Supreme Court’s Approach to s 30 of the Evidence Act 2006” [2012] NZ L Rev 605 (Optican *Hamed*).

<sup>2</sup> *Marwood v Commissioner of Police* [2016] NZSC 139, [2017] 1 NZLR 260 (*Marwood* SC).

search. After reviewing the police application for the search warrant, the District Court judge found that it was deficient. The warrant was based on an anonymous tip that, in addition to being conclusory, established “a suspicion of offending only”.<sup>3</sup> Moreover, police had made no effort to validate the “reliability of the information”.<sup>4</sup> Taking into account the relevant factors under the s 30 proportionality-balancing test, the judge excluded from the defendant’s trial the drug dealing material found in his home. As a result of that ruling, there was insufficient evidence for the Crown to proceed and Marwood was discharged.

### *B. High Court Decision*

Following the dismissal of the underlying criminal prosecution, the Commissioner of Police commenced a High Court civil forfeiture action against Marwood under the Criminal Proceeds (Recovery) Act 2009 (the CPRA). Pursuant to the CPRA, a police application for civil forfeiture is independent of the initiation of, or result reached in, any criminal case.<sup>5</sup> Nonetheless, the claim against Marwood sought profits resulting from the “significant criminal activity” at his residence, and was “largely based on the evidence which was excluded in the [earlier] criminal proceedings”.<sup>6</sup> Accordingly, in a pre-trial motion heard by Cooper J, Marwood argued that “the evidence obtained as a consequence of the search should be excluded for the purposes of the application under the [CPRA] just as it was in the criminal case”.<sup>7</sup>

While not disputing that the evidence had been improperly obtained, the Commissioner argued that “by restricting s 30 of the Evidence Act to criminal proceedings, Parliament intended not to allow the remedy of exclusion to be applied in civil forfeiture proceedings”.<sup>8</sup> Cooper J disagreed. Examining the High Court judgment in a 2015 review of current evidence cases, I explained his Honour’s decision as follows:<sup>9</sup>

Despite Parliament’s supreme law-making role, in the 2012 judgment of *Fan v R*, the Court of Appeal held that, even where evidence had not been “obtained” (s 30(5)(a)) as a result of improprieties committed by official actors, the common law discretion to exclude evidence — on any general ground that it would operate unfairly in a criminal proceeding — had survived the enactment of s 30.<sup>10</sup>

Taking such approach one step further — in the recent decision of *Commissioner of Police v Marwood* — the High Court cited *Fan* for the equally controversial proposition that a “Court may supplement the Evidence Act’s exclusionary provisions, in an appropriate case, so as to do justice

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<sup>3</sup> *Commissioner of Police v Marwood* [2015] NZCA 608, [2016] 2 NZLR 733 at [8] (*Marwood CA*).

<sup>4</sup> At [8] (citation omitted).

<sup>5</sup> Criminal Proceeds (Recovery) Act 2009, ss 15–16.

<sup>6</sup> *Marwood SC*, above n 2, at [2].

<sup>7</sup> *Commissioner of Police v Marwood* [2014] NZHC 1866 at [3] (*Marwood HC*).

<sup>8</sup> At [19].

<sup>9</sup> Scott Optican “Evidence” [2015] NZ L Rev 473 at 524–525.

<sup>10</sup> *Fan v R* [2012] NZCA 114, [2012] 3 NZLR 29 at [44]–[46]. See Mahoney and others *Act and Analysis*, above n 1, at [EV30.01(1)]. For criticism of this aspect of *Fan*, see Elisabeth McDonald *Principles of Evidence in Criminal Cases* (Brookers, Wellington, 2012) at 239–241; Law Commission, *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [2.43]–[2.49].

in cases not directly provided for by the Evidence Act”.<sup>11</sup> As a result, Cooper J relied on various provisions of the Act and the [NZBORA] to hold that jurisdiction existed to exclude — in *civil* forfeiture proceedings brought under the Criminal Proceeds (Recovery) Act 2009 — evidence of drug dealing previously excluded in the District Court *criminal* case giving rise to the forfeiture claim (a s 30 ruling, based on an unreasonable police search of the defendant’s home in breach of s 21 of the Bill of Rights, that led to dismissal of the underlying criminal charges against the accused).

While noting that the proportionality-balancing test did not specifically apply to civil forfeiture cases, Cooper J stated that s 30 “exemplifies the approach that should be taken” where an application is made to exclude improperly obtained evidence in such proceedings (a method likewise adopted by the Court of Appeal in the circumstances presented by *Fan*).<sup>12</sup> Importantly, his Honour also rejected the Commissioner’s claim that, because the remedy of exclusion had already been applied in the criminal trial, the defendant’s right to be free from unreasonable search and seizure under s 21 “had been sufficiently vindicated”.<sup>13</sup> According to the Court:<sup>14</sup>

‘Such an approach seems to me wrong in principle. I consider it more appropriate to focus on the fact that there was a breach of rights. The fact that it is once vindicated should not have the consequence that the breach is able to be set on one side for subsequent purposes. In my view, that would diminish the importance of the right. ... Section 21 of the Bill of Rights should not cease to have effect merely because it has been applied in one relevant context when the same facts are relied on for a second time.’

Quoting the language of s 30(2)(b) — along with the Supreme Court’s approach to that provision in the 2011 decision of *Hamed v R*<sup>15</sup> — Cooper J excluded the drug dealing evidence for the same reasons it had been ruled inadmissible in the defendant’s criminal trial. Indeed, his Honour concluded that “to allow the evidence to be relied on for the purposes of the Commissioner’s application for forfeiture orders when it has already been excluded for good reason in the criminal proceeding would not take proper account of the need for an effective and credible system of justice.”<sup>16</sup>

### *C. Court of Appeal Decision*

The Commissioner appealed Cooper J’s ruling to the Court of Appeal. The Commissioner contended that the judge had no jurisdiction to exclude the evidence found in Marwood’s home, and that relevant evidence is admissible in a civil proceeding “even if improperly obtained”.<sup>17</sup>

The Court of Appeal agreed. Starting with the principle that all relevant evidence is admissible pursuant to s 7 of the Evidence Act — unless “excluded under [the] Act or any other Act” (s 7(1)(b)) — the Court noted that, unlike the s 8 rule requiring the exclusion of unfairly prejudicial evidence in *all* trials, the exclusionary rule codified in

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<sup>11</sup> *Marwood HC*, above n 7, at [23].

<sup>12</sup> At [49]. See *Fan v R*, above n 10, at [44]–[46].

<sup>13</sup> At [61].

<sup>14</sup> At [61].

<sup>15</sup> *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305.

<sup>16</sup> *Marwood HC*, above n 7, at [62] (citing Evidence Act, s 30(2)(b); *Hamed*, above n 15).

<sup>17</sup> *Marwood CA*, above n 3, at [9]. For further discussion of the Court of Appeal decision in *Marwood*, see Alexandra Franks “Admissibility of excluded evidence in later proceedings” [2016] NZLJ 386.

s 30 was clearly and deliberately limited by Parliament to *criminal* proceedings.<sup>18</sup> The implication of these provisions was therefore clear. As Harrison J put it:<sup>19</sup>

On this construction of the combined effect of ss 7 and 30, the evidence obtained by the police on execution of the search warrant of Mr Marwood's house is plainly admissible in the CPRA proceeding. The question then is whether the [High Court] Judge was correct to find that these provisions were insufficient "to oust any relevant provisions of the [NZBORA] in the civil forfeiture context" [*Marwood* HC, above n 7, at [29]]. It was central to the Judge's reasoning that, properly construed, the NZBORA itself provides for exclusion, thereby satisfying the exception within s 7(1)(b) of the Evidence Act for "evidence excluded under any other Act".

Noting that the power to exclude unfairly obtained evidence in criminal proceedings "originated in the common law" and "preceded the NZBORA", the Court observed that "the NZBORA does not prescribe or provide for the consequences of a breach of its provisions".<sup>20</sup> For the purposes of s 7(1)(b), this meant that improperly obtained evidence was not "excluded 'under ... any other Act' — the NZBORA".<sup>21</sup> Instead, pursuant to s 30, "[t]he evidence is excluded because of a judicial determination based on a discretionary evaluation of statutory criteria as they apply to the particular circumstances".<sup>22</sup>

Summing up the Court's view, Harrison J observed that "[t]he NZBORA does not independently provide a foundation for an exclusionary rule in a civil proceeding where the legislature has chosen not to provide one". Nor did s 12 of the Evidence Act ("Evidential matters not provided for") support the judicial promulgation of such a rule. According to the Court:<sup>23</sup>

[Section 12] simply deals with cases for which there is 'no provision in this Act or any other enactment regarding the admission of any particular evidence or the relevant provisions deal with that question only in part'. The [High Court] Judge reasoned that s 30 ... dealt with the admission of improperly obtained evidence only in part because of its limitation to criminal proceedings. For the reasons we have set out, we are satisfied that this limitation was deliberate. Admissibility generally, including in a civil proceeding, is expressly addressed by ss 7 and 8. The situation is not one where it is necessary to invoke the NZBORA to fill a lacuna of the type envisaged by s 12.

In support of the conclusions above — and after reviewing relevant pre-Evidence Act decisions from New Zealand and the United Kingdom — Harrison J noted that the Court's interpretation of the relevant statutory provisions likewise reflected "the settled common law principle affirmed by the Evidence Act, that there is no jurisdiction to exclude evidence in civil proceedings on the ground that it would be unfair to admit it because it was unlawfully obtained".<sup>24</sup>

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<sup>18</sup> At [31].

<sup>19</sup> At [32].

<sup>20</sup> At [34] (citing *R v Shaheed* [2002] 2 NZLR 377 (CA) at [8] per Elias CJ, [111] per Richardson P, Blanchard and Tipping JJ and [170] and [173] per Gault J).

<sup>21</sup> At [34].

<sup>22</sup> At [34].

<sup>23</sup> At [36].

<sup>24</sup> At [44].

For the sake of completeness, and in the event that it was found to be “wrong on jurisdiction”, the Court went on to consider whether Cooper J “erred in exercising his discretion to exclude the evidence”.<sup>25</sup> Asserting that the Judge did fall into error, Harrison J wrote:<sup>26</sup>

In our judgment Cooper J erred primarily in his analogous application of the factors relevant to the s 30 balancing exercise. ... [T]he s 30 test for determining whether exclusion is proportionate to the breach of [s 21 of the NZBORA] is tailored to a criminal proceeding. ...

Adherence to process has much greater significance for criminal than civil proceedings. The liberty of an individual is at issue and the state is required to comply with basic requirements to ensure a fair trial, as affirmed by ss 23-25 of the NZBORA.

Noting that many of the s 30 factors “directly relevant” to criminal proceedings are “inapt for a discretionary inquiry in civil proceedings”, the Court observed that one particular factor — the “nature of the impropriety and ... whether it was deliberate, reckless or done in bad faith” (s 30(2)(b)) — “may be relevant in a civil [case]”.<sup>27</sup> According to Harrison J:<sup>28</sup>

A finding that the police acted with that degree of consciousness or deliberation is likely to be decisive for exclusion in both the criminal and civil jurisdiction. In a criminal proceeding exclusion on this ground may lead to a discharge; in a civil proceeding proof of bad faith may constitute an abuse of process, sufficient to justify a stay or an analogous remedy. ...

Asserting that the breach of s 21 of the NZBORA in this case “was solely one of process in applying for a search warrant without adequate inquiry”, the Court observed that “the accuracy of the information originally received by the police was proved by the discovery of the cannabis cultivation operation at Mr Marwood’s home”.<sup>29</sup> It was likewise significant that Marwood had already been “discharged from criminal liability ... despite highly probative evidence of his guilt”.<sup>30</sup> Indeed, by contrast with Cooper J’s approach, Harrison J stated:<sup>31</sup>

Exclusion is the appropriate vindication of a breach of a NZBORA right. Mr Marwood has already enjoyed that vindication. Exclusion of the evidence in the criminal proceeding, with the inevitable consequence of a discharge, has returned him to the position he would have enjoyed but for the unreasonable search. ...

...

The CPRA regime is designed to ensure that a person is not enriched by criminal activities. A forfeiture order would simply return Mr Marwood to the same financially neutral position he would have been in but for his participation in significant criminal activity. ... It would be contrary to public policy to allow Mr Marwood to retain the financial fruits of his crime where the evidence,

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<sup>25</sup> At [45].

<sup>26</sup> At [51]-[52].

<sup>27</sup> At [52]-[53].

<sup>28</sup> At [53].

<sup>29</sup> At [58].

<sup>30</sup> At [58].

<sup>31</sup> At [57] and [60] (citations omitted).

even though improperly obtained, is nevertheless highly probative, not only of his participation in significant criminal activity but also of his receipt of an unlawful benefit.

Accordingly, the Court of Appeal concluded that, even if the discretion to exclude improperly obtained evidence did exist in civil proceedings, Cooper J “erred in principle” in the exercise of that discretion.<sup>32</sup> This meant that the evidence found in Marwood’s home could be admitted in the CPRA case.

### III. THE SUPREME COURT DECISION

Marwood appealed the Court of Appeal’s decision to the Supreme Court. As with the lower court rulings in the case, the appeal raised two issues: (a) whether there was jurisdiction in civil CPRA proceedings to exclude evidence improperly obtained by the police; and if so, (b) whether exclusion was appropriate in the Commissioner’s CPRA case against Marwood?

Regarding the first matter, the Supreme Court held unanimously that judges do have the jurisdiction in civil trials to exclude evidence obtained by the police in violation of the NZBORA. This was despite the fact that the exclusionary rule codified in s 30 of the Evidence Act applied only to “a *criminal* proceeding” (s 30(1)).<sup>33</sup> According to William Young J — who wrote for a four Justice majority including Glazebrook, Arnold and O’Regan JJ — such limitation provided no bar to the exclusion of improperly obtained evidence in a civil case:<sup>34</sup>

Prior to enactment of the [Evidence] Act, we think that in proceedings akin to the present (that is, by way of law enforcement and with a public officer as a plaintiff) it would have been open to a judge to exclude evidence which has been obtained in breach of the [NZBORA]. Such evidence would have been by way of remedy for the breach. To use the expression which now appears in s 7(1)(b) of the Act, evidence so excluded could be said to have been “excluded under ... [the New Zealand Bill of Rights] Act”. For this reason it seems to us that exclusion of evidence as a remedy in this case would not be in breach of the s 7(1) “fundamental principle” that relevant evidence is admissible.

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In company ... with Cooper J, we see s 11 [of the Evidence Act] as providing support for this approach; this is on the basis that the powers of a court to provide remedies for both abuse of process and breach of the [NZBORA] are within the “inherent and implied powers of a court” [s 11(1)]. We agree with the Chief Justice that the obligations of the courts imposed by s 3 of the [NZBORA] are important considerations in relation to breaches of that Act.

Accordingly, we find that there was jurisdiction to exclude the evidence.

Concurring in the reasoning above, Elias CJ wrote separately to add the following:<sup>35</sup>

The Court of Appeal conclusion that there is no power to exclude improperly obtained evidence in civil proceedings following enactment of the Evidence Act turns on the view that such jurisdiction is impliedly removed by s 30 of the Evidence Act. It depends on accepting that the

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<sup>32</sup> At [61].

<sup>33</sup> Emphasis added.

<sup>34</sup> *Marwood* SC, above n 2, at [35] and [37]–[38] (citations omitted).

<sup>35</sup> At [58]–[61] (citations omitted).

provision of a statutory requirement to exclude improperly obtained evidence in criminal proceedings where exclusion is “proportionate to the impropriety”, without making distinct provision for the position in civil proceedings, entailed necessary and deliberate exclusion of the former common law inherent jurisdiction to exclude such evidence in civil proceedings. ...

Section 30 does not on its face purport to be exclusive of the circumstances in which improperly obtained evidence may be excluded. Nor is such result a necessary consequence of the enactment of s 30.

I am of the view that the Court of Appeal’s approach is inconsistent with s 11 of the Evidence Act. Section 11 makes it clear that “[t]he inherent and implied powers of the court are not affected by the Act, except to the extent that this Act provides otherwise”. ... I am unable to agree that s 30 “provides otherwise”. Section 30 captures and partly modifies the then-current common law principles governing the circumstances in which the power to exclude evidence was formerly exercised in criminal proceedings ... The inclusion of s 30 and the structure it enacts for determining questions of exclusion in criminal proceedings does not explicitly or directly oust the powers of the court to exclude in civil proceedings evidence improperly obtained.

The only modification of the inherent and implied powers preserved by s 11 is that they must be exercised to “have regard to the purposes and principles set out in ss 6, 7 and 8” of the Evidence Act [s 11(2)]. ... Section 6 provides that one of the purposes of the Act is that rules of evidence are to “recognise the importance of the rights affirmed by the [NZBORA]” [s 6(b)]. The courts, which are bound by s 3 of the [NZBORA] to give effect to it, are not precluded from excluding evidence for breach of the [NZBORA], if that course is appropriate to meet the impropriety.

Having determined that jurisdiction to exclude improperly obtained evidence existed in the CPRA proceeding, the Court nonetheless determined that the evidence should have been admitted in the case. In this regard, and by contrast with the language of the Court of Appeal, William Young J noted that the decision to exclude was “not discretionary in nature”.<sup>36</sup> Instead, it involved “an evaluative assessment — necessarily open-textured ... — as to the appropriateness of the remedy proposed”.<sup>37</sup> Adopting the proportionality-balancing approach set out in s 30, his Honour stated that “[t]he real question is whether relief by way of exclusion of evidence is proportionate to the breach of rights”.<sup>38</sup> On this point, the Court observed:<sup>39</sup>

Despite the dismissal of the charges against him, it would have been open to Mr Marwood ... to have sought compensation for the unlawful search. ... The relief obtainable would be confined to a vindication of the rights which were breached and non-economic loss, such as, for instance, loss of privacy and distress. ... We accept that it may be that such a claim would fail on the basis that the judgment of [the District Court Judge] and the dismissal of the charges were a sufficient vindication of the breach of rights which had occurred. This may suggest that any further vindication in the form of exclusion of evidence in the CPRA proceedings would not be warranted. ...

To our way of thinking ..., what is critically important is that CPRA proceedings involve only a claim for money and, in particular, to the proceeds of criminal conduct. Mr Marwood ... [is] not at risk of conviction and imprisonment. ...

In company with the Chief Justice, and for the reasons she gives, we do not regard the conduct of the police as a serious breach. There was information warranting inquiry. ... Also significant is

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<sup>36</sup> At [46]. See the text at n 25 above.

<sup>37</sup> At [46].

<sup>38</sup> At [50].

<sup>39</sup> At [48]–[52] (citations omitted).

the acknowledgement of breach [by the District Court Judge] and the dismissal of the criminal proceedings, as well as the policy of the CPRA ... Forfeiture is not dependent upon conviction. It follows that considerations which preclude conviction ... do not necessarily exclude forfeiture. ...

[The High Court] implied that the vindication of the breach of s 21 [of the NZBORA] represented by [the District Court Judge's] ruling is entirely irrelevant, a proposition which we do not accept. To take that vindication into account when determining whether further relief is appropriate ... does not mean s 21 of the [NZBORA] ceases "to have effect". This is not to say that evidence of the kind in issue on this appeal ... will always be admissible under the CPRA. ... [I]f ... the police have acted in bad faith, a judge may well conclude that further vindication of exclusion of evidence in a CPRA proceeding is required. ...

For the reasons just given, we are of the view that relief in the form of exclusion of evidence would not be proportionate to the breach.

While concurring in the result, Elias CJ adopted a different perspective on both the proportionality-balancing test and the relevant considerations involved in such weighing. According to her Honour:<sup>40</sup>

The proper assessment to be made was whether the breach of the [NZBORA] necessitated exclusion of the evidence, even though it was "highly probative". ... It turns, principally, on assessment of the seriousness of the breach ... and the extent to which it is proper for the court to be co-opted into countenancing it. ...

The public interest in observance of the [NZBORA] and proper and lawful police conduct means that the question of admission must be considered on a principled basis. Stripping "unlawful benefit" is no more sufficient justification for admission of unlawfully obtained evidence than convicting the guilty. ...

I do not accept [the majority's view] that the ... "acknowledgement of breach [by the District Court Judge] and the dismissal of the criminal proceedings" absolves the Court from considering the question of exclusion on a principled basis. ... It cannot be principled to treat exclusion of evidence in one proceeding as sufficient observance of fundamental rights.

It seems to me that in every case where evidence is challenged it is necessary to consider the application on its merits, without any preconception derived from the outcome in earlier proceedings. Nor is it appropriate to take the view that the different nature of forfeiture justifies less concern about observance of the human rights contained in the [NZBORA]. ... It is, in my view, the sort of reasoning which is likely to prove slippery.

...

The correct approach is to focus on the breach of s 21 in the circumstances of the current application. In that consideration, I do not rely on the fact that Mr Marwood may have a claim for compensation [for a police breach of the NZBORA] ... Even if such a remedy is available in principle, such possibility does not preclude exclusion of evidence as the immediate response here sought. ...

Notwithstanding the observations above, Elias CJ agreed with the other members of the Court that exclusion of the improperly obtained evidence was not warranted in the CPRA case. According to her Honour:<sup>41</sup>

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<sup>40</sup> At [64]–[67] and [69] (citations omitted).

<sup>41</sup> At [70]–[74].



[The search of Marwood's home] was not baseless. ... The application [for the search warrant] ... passed the judicial officer who issued the warrant. The ensuing search conformed with the authorisation provided by the warrant on its face. The error made by the police was in a judgment as to sufficiency of information, rather than any conscious evasion of the statutory criterion. ...

[H]ere the error arose from sloppy policing, and the sloppiness was not of a high level of seriousness. ...

In considering the question of admission, it is relevant too that the important information obtained was real evidence. ...

It is true that the warrant was executed at a home, but there was no suggestion of any incursion of privacy beyond that circumstance. It is relevant, too, in the assessment of whether exclusion of relevant evidence is an appropriate response to impropriety, that the proceeding in which it is sought is not one in which Mr Marwood is in jeopardy of a criminal conviction.

I would therefore dismiss the appeal. ...

#### IV. DISCUSSION

How sound are the conclusions reached by the Supreme Court in *Marwood* and what are the implications of the decision going forward? As set out and discussed below, the case raises a number of different issues suitable for analysis and critique.

##### *A. Exclusion of improperly obtained evidence in civil cases at common law*

In both the majority and concurring decisions, the Justices asserted that an inherent, common law jurisdiction existed in civil proceedings to exclude evidence obtained by police in violation of the NZBORA or otherwise improperly. However, the assertions are just that, unsupported by any relevant authority or real argument. To the contrary, as William Young J candidly admitted in his review of the common law position:<sup>42</sup>

Although the courts ... recognised a power to exclude illegally obtained evidence in criminal cases, there was no corresponding development in relation to civil cases in the sense that there are *no reported cases* in which such a power has been exercised. ...

Indeed, not only was the power *not* recognised at common law, the settled position was just the opposite. This is made clear by the review of UK cases undertaken in *Marwood* by the Court of Appeal.<sup>43</sup> Nor does the scant New Zealand authority on the matter alter that view.

In the 1994 decision of *Queen Street Backpackers Ltd v Commerce Commission*, the Commission instituted penalty proceedings against the owners of backpacker hostels for price fixing in violation of s 27 of the Commerce Act 1986.<sup>44</sup> While acknowledging that the proceeding was civil in nature, the Court accepted the Commission's concession "that there was sufficient analogy with criminal proceedings to enable the

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<sup>42</sup> At [22] (emphasis added).

<sup>43</sup> *Marwood* CA, above n 3, at [38]–[44].

<sup>44</sup> *Queen Street Backpackers Ltd v Commerce Commission* (1994) 2 HRNZ 94 (CA).

Court to exclude improperly obtained evidence".<sup>45</sup> However, as the Court of Appeal judgment in *Marwood* pointed out:<sup>46</sup>

Implicit in this observation is an acceptance of the *inclusionary* rule applying in *civil* proceedings. By contrast with *Queen Street Backpackers*, the Commissioner's claim is a civil proceeding, as s 10(1) of the CPRA confirms.

In her Honour's concurring judgment in *Marwood*, Elias CJ cited *Queen Street Backpackers* to support the existence of the "common law inherent jurisdiction to exclude [improperly obtained] evidence in civil proceedings".<sup>47</sup> Yet, in limiting its holding to quasi-criminal actions brought by state officials to impose punishment in the form of a penalty, *Queen Street Backpackers* supports exactly the contrary result. Indeed, this was recognised in a 2006 decision of the High Court not cited by any of the Justices in *Marwood*. In *NJG Holdings Ltd v Oliphant* — a proceeding seeking relief against forfeiture of a lease for non-payment of rent — Allan J cited *Queen Street Backpackers* and stated directly:<sup>48</sup>

[T]here is no statutory or common law bar to the admission in a civil case of illegally obtained evidence. ...

[E]ven if certain of [the plaintiff's] business records were unfairly or illegally obtained [by the defendant], they are not thereby rendered inadmissible in civil proceedings. *Queen Street Backpackers Ltd v Commerce Commission* (1996) 2 HRNZ 94 at 97 (CA).

Accordingly, and by contrast with the assertions of the Justices in *Marwood*, the position prior to enactment of the Evidence Act was clear. As the Court of Appeal observed, the "settled common law principle" was that "no jurisdiction" existed in civil proceedings "to exclude evidence ... on the ground that it would be unfair to admit it because it was unlawfully obtained".<sup>49</sup> The Supreme Court therefore erred in holding otherwise.

### *B. Exclusion under the Evidence Act*

Following on from the discussion above, the Court's erroneous claim of inherent jurisdiction to exclude improperly obtained evidence in civil proceedings was relevant to its key argument perpetuating that alleged prerogative under the Evidence Act.

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<sup>45</sup> At 96–97.

<sup>46</sup> *Marwood CA*, above n 3, at [41] (emphasis added). See also *Marwood SC*, above n 2, at [14]. In relevant part, s 10(1) of the CPRA states: "(1) Proceedings related to any of the following are civil proceedings: ... (d) a profit forfeiture order ...".

<sup>47</sup> *Marwood SC*, above n 2, at [58].

<sup>48</sup> *NJG Holdings Ltd v Oliphant HC Auckland CIV-2006-404-4749*, 1 December 2006 at [27]–[28].

<sup>49</sup> *Marwood CA*, above n 3, at [44]. The Court of Appeal did observe, however, that there was "a recognised [common law] exception to the inclusionary rule in civil proceedings. A stay or related remedy may be justified where evidence has been obtained through violence, deception or bad faith amounting to contempt or abuse of process. ... The discretion, which has the effect of excluding evidence obtained by means of deliberate misconduct, is based on public interest grounds of policy" (at [39]) (citations omitted). However, as the Court pointed out, none of the police behaviour in *Marwood* fit that description or rose to the level of such wrongdoing (at [40]).

According to both William Young J and Elias CJ, s 11 of the Act supported the continued exercise of such jurisdiction in civil trials. However, as previously noted, s 11 states that “[t]he inherent and implied powers of a court are not affected by the Act, *except to the extent that the Act provides otherwise*” (emphasis added). The exception clause in s 11 was ignored by the majority, who asserted simply that “the powers of a court to provide remedies for both an abuse of process and breach of the [NZBORA] are within the ‘inherent and implied powers of the Court’”.<sup>50</sup> While this is undoubtedly correct, it begs the real question posed by the *Marwood* appeal. That is, whether the Evidence Act *ousts* that jurisdiction with respect to a *particular* remedy: the exclusion of improperly obtained evidence in a *civil* case.

In this regard, the majority made no effort to explain why the plain language of s 30(1) — “This section applies to a *criminal* proceeding ...” (emphasis added) — does not reflect Parliament’s clear and settled intention to confine the Act’s exclusionary rule to *criminal* trials. Indeed, it would seem to be a rather obvious point for judicial discussion.

Elias CJ, at least, attempted to deal with the matter in her Honour’s concurring judgment. As previously noted, Elias CJ asserted that:<sup>51</sup>

[t]he inclusion of s 30 and the structure that it enacts for determining questions of exclusion in criminal proceedings does not *explicitly or directly* oust the powers of the court to exclude in civil proceedings evidence improperly obtained.

However, what could be more explicit or direct than Parliament *expressly* constraining the application of a statutorily-based evidence rule with clear language of limitation? Indeed, there are many instances in the Act that self-consciously confine a particular tenet of evidence law to either civil or criminal trials.<sup>52</sup> Conversely, there are numerous examples of rules applying to every “proceeding” — itself defined broadly in s 4(1)(a) as a “proceeding conducted by a court” — or which clearly refer to, and distinguish between, the applicability of a particular provision in either a civil or criminal case.<sup>53</sup>

To the extent that the Act says anything about the inadmissibility of improperly obtained evidence in civil trials, it does so only in the narrow fashion provided for in ss 53(4) and 90(1).<sup>54</sup> Among other limitations, s 90(1) prohibits parties in civil or criminal proceedings from questioning a witness with a document excluded under s 30. Nor can any witness consult such a document when giving evidence (s 90(2)). In any proceeding, s 53(4) gives the judge a broad discretion to prevent an unauthorised person from disclosing acquired information that is otherwise privileged under the Act. However, apart from those rules, as Mahoney and others point out, “[t]he Act does

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<sup>50</sup> *Marwood* SC, above n 2, at [37].

<sup>51</sup> At [60] (emphasis added).

<sup>52</sup> See, eg, Evidence Act 2006, s 22 (“Notice of hearsay in criminal proceedings”) and s 26 (“Conduct of expert in civil proceedings”).

<sup>53</sup> See, eg, Evidence Act 2006, s 7 (“Fundamental principle that relevant evidence admissible”; 8 (“General exclusion”); s 40(2) (“Propensity rule”) and s 50 (“Civil judgment as evidence in civil or criminal proceedings”).

<sup>54</sup> Mahoney and others *Act & Analysis*, above n 1, at [EV30.02].

not specifically control the admissibility of improperly obtained evidence in civil [cases] ...”<sup>55</sup>

The broad point, of course, is that the entirety of the Evidence Act reflects Parliament’s concrete decision making about which rules of evidence apply in civil proceedings, criminal proceedings, or both. Accordingly, there is no reason to treat the limited scope of s 30 as reflecting anything other than Parliament’s actual purpose and aim. Indeed, the Law Commission apparently intended the same. Commenting on the original version of s 30 in its 1999 report on the nascent Act — which limited the exclusionary rule to criminal proceedings using the same language now codified in s 30(1) — the Commission stated: “Improperly obtained evidence is *admissible* in civil proceedings, subject to relevance and the general exclusion in s 8”.<sup>56</sup> However, that report is nowhere cited in the *Marwood* case.

In sum, the Supreme Court wrongly concluded that various provisions of the Evidence Act either support, or do not rule out, a judge’s jurisdiction to exclude in civil cases evidence improperly obtained by the police. To the contrary, and as its drafters apparently intended, the Act accomplishes precisely the opposite.

As discussed at Part IV(A) above, the exclusion of improperly obtained evidence in civil proceedings was never contemplated at common law as being within the “inherent and implied powers of a court” (s 11(1)). Even if it were, the Act “provides otherwise” (s 11(1)).

A similar argument eliminates any reliance on s 12 (“Evidential matters not provided for”) — which permits a judge to fill lacunas in the Act with admissibility decisions based on ss 6, 7 and 8 (and, in some circumstances, the common law). Section 12 applies only “[i]f there is *no provision* in this Act or any other enactment regulating the admission of any particular evidence or the relevant provisions deal with the question only *in part* ...” (emphasis added). However, as the analysis above should make clear, the Evidence Act *does* regulate the admission of improperly obtained evidence in a distinct and self-conscious fashion. Nor can one argue logically that, in plainly limiting the exclusion of improperly obtained evidence to criminal cases, Parliament has only dealt with the issue *in part*. In other words, as regards the admissibility of improperly obtained evidence in civil proceedings, there is simply no statutory hole in the Act to be filled. Any attempt to create one both misrepresents legislative intent and, in the words of the Law Commission, does not reflect “the type of gap at which s 12 is targeted”.<sup>57</sup>

Section 7 likewise offers no assistance to the Court’s argument in *Marwood*. Again, just the opposite. Section 7(1)(a) states that *all* relevant evidence is admissible in a civil or criminal proceeding — such as the drug selling evidence in the CPRA case against *Marwood* — unless it is “inadmissible under this Act or any other Act”. But no

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<sup>55</sup> At EV30.02.

<sup>56</sup> Law Commission *Evidence: Volume 2 — Evidence Code and Commentary* (NZLC R55, 1999) at 87 (emphasis added).

<sup>57</sup> Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [2.49]. See also Mahoney and others *Act & Analysis*, above n 1, at [EV10.01].

provision of the Evidence Act makes improperly obtained evidence inadmissible in a civil trial. Nor, pursuant to s 7(1)(b), is improperly obtained evidence “excluded *under* this Act or any other Act” (emphasis added). As the Court of Appeal correctly pointed out in its *Marwood* judgment, evidence obtained in breach of the NZBORA is not excluded *under* the NZBORA — which itself contains no remedy or exclusion clause.<sup>58</sup> Instead, the police breach of s 21 of the NZBORA in *Marwood*’s case simply rendered the recovered evidence “improperly obtained” pursuant to s 30(5)(a) of the Evidence Act. This would make such proof eligible for exclusion under the s 30 proportionality-balancing test — provided that s 30 applied. However, as previously discussed, s 30 does not apply to a civil CPRA proceeding, or to any other civil case.

### *C. Exercise of the Jurisdiction to Exclude*

In the second part of its *Marwood* ruling — and as set out more fully at Part III above — the Supreme Court considered whether the asserted jurisdiction to exclude improperly obtained evidence in civil proceedings should have been exercised in the CPRA case.

Unsurprisingly, the Court adopted the proportionality-balancing methodology of s 30 to determine “whether relief by way of exclusion of evidence is proportionate to the breach of rights”.<sup>59</sup> In this regard, the s 30-linked factors relied on by the majority, together with their balancing, evinced a rather mainstream judicial approach towards the decision to exclude.

William Young J noted that the police breach of rights was “not ... serious” (s 30(3)(a))<sup>60</sup> and that police did not act in bad faith (s 30(3)(b)).<sup>61</sup> Moreover, as an “alternative [remedy] to ... exclusion ... which can adequately provide redress ...” (s 30(3)(f)), *Marwood* could pursue a civil claim against the police seeking “compensation for the unlawful search” of his home.<sup>62</sup> The Court also found it relevant that the policy behind the CPRA is not to make forfeiture “dependent upon conviction”,<sup>63</sup> and that *Marwood* was facing only “a claim for ... the proceeds of criminal conduct” rather than “conviction and imprisonment” for a criminal offence.<sup>64</sup> Finally, and by comparison with the High Court decision of Cooper J, the majority took into account that *Marwood* had already enjoyed a large measure of rights vindication — including the exclusion of improperly obtained evidence and the “dismissal of ... criminal proceedings” against him — in the original District Court trial.<sup>65</sup> Absent police bad faith, which might suggest that “further [rights] vindication [by] exclusion of evidence in a CPRA proceeding is

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<sup>58</sup> See the text at n 20 above.

<sup>59</sup> *Marwood SC*, above n 2, at [50].

<sup>60</sup> At [50].

<sup>61</sup> At [50] and [51].

<sup>62</sup> At [48].

<sup>63</sup> At [50].

<sup>64</sup> At [49].

<sup>65</sup> At [50].

required”, a judge could rely on the previous decision to exclude as a factor supporting the admission of improperly obtained evidence in a subsequent civil forfeiture case.<sup>66</sup>

Concurring in the result, Elias CJ likewise relied upon s 30’s approach and cited various factors set out under s 30(3). Her Honour observed that the “real evidence”<sup>67</sup> at issue in the CPRA proceeding was “highly probative” (s 30(3)(c)),<sup>68</sup> and that the search of Marwood’s home in breach of s 21 of the NZBORA resulted only from “sloppy policing” that “was not of a high level of seriousness” (s 30(3)(a) & (b)).<sup>69</sup> In line with the majority, Elias CJ likewise found it relevant that the CPRA proceeding in which the admission of improperly obtained was sought was not one where Marwood faced any “jeopardy ... [of] criminal conviction”.<sup>70</sup>

Nonetheless, as regards the concrete proportionality-balancing in the *Marwood* case, her Honour’s key points of difference with the majority related to the perceived significance of: (a) the exclusion of the drug dealing evidence in Marwood’s underlying criminal trial; (b) the different nature of civil forfeiture proceedings from criminal prosecutions; and (c) the possibility that Marwood might himself mount a civil claim against the Crown for a police breach of s 21 of the NZBORA.

For Elias CJ, none of these considerations assumed any real relevance for the instant decision to exclude.<sup>71</sup> In sum, and stemming from a “contextual assessment in the circumstances of the particular case”,<sup>72</sup> her Honour’s approach requires a court to: (a) consider an application “on its merits, without any preconception derived from the outcome in earlier proceedings”;<sup>73</sup> and (b) “confront directly the question whether exclusion of evidence is warranted by the impropriety”.<sup>74</sup> In *Marwood*, this determination turned “on [an] assessment of the seriousness of the breach of the [NZBORA] and the extent to which it is proper for the court to be co-opted into countenancing it”.<sup>75</sup> The “critical” enquiry was therefore whether the CPRA case was *itself* based on “evidence that it is proper to admit” — a question Elias CJ answered in the affirmative (as did the majority) after balancing the various factors involved.<sup>76</sup>

For persons familiar with the large body of case law utilising the s 30 proportionality-balancing test to admit improperly obtained evidence in criminal proceedings, the

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<sup>66</sup> At [51]. The same majority of the Supreme Court took a comparable approach with respect to the use of improperly obtained excluded in an earlier criminal proceeding that police subsequently seek to rely upon when applying for a search warrant in a new investigation. See *R v Alsford* [2017] NZSC 42, 1 NZLR 710 at [87] (citing *Marwood SC*, above n 2, at [50]–[52]). See similarly *Clark v R* [2013] NZCA 143, (2013) 26 CRNZ 214 at [26]; *R v Hsu* [2008] NZCA 468 at [32]. As discussed in the text at n 88 below, Elias CJ adopted a contrary view in the *Alsford* appeal (at [125]) just as she did in the *Marwood* case (at [66]–[67]).

<sup>67</sup> At [72].

<sup>68</sup> At [64].

<sup>69</sup> At [71].

<sup>70</sup> At [73].

<sup>71</sup> See the text at n 40 above.

<sup>72</sup> *Marwood SC*, above n 2, at [62].

<sup>73</sup> At [67].

<sup>74</sup> At [69].

<sup>75</sup> At [64].

<sup>76</sup> At [63].

overall thrust of *Marwood* — with respect to both reasoning and result — will come as no particular surprise.<sup>77</sup> Indeed, assuming that the potential for exclusion applies (a matter queried at Part IV(B) above), the *Marwood* decision presents relatively standard s 30 fare (although as applied to a civil forfeiture trial). Nonetheless, several points of critique can be made.

The first involves the majority's rather disingenuous view that: (a) Marwood might seek money damages for the unlawful police search of his home breaching s 21 of the NZBORA; and (b) if awarded, such damages could provide some alternative measure of rights vindication supporting the inclusion of the improperly obtained evidence in the CPRA case.

The availability of "alternative remedies to exclusion of evidence which can adequately provide redress to the defendant" is a stated consideration for proportionality-balancing set out at s 30(3)(f). However, largely dismissed by the Supreme Court as a meaningful s 30 factor in *criminal* proceedings,<sup>78</sup> there is little reason to conclude that, as a practical matter, Marwood could successfully mount an action against the Crown of any real significance. This would be true even if, as William Young suggested, such claim might "be brought and heard at the same time as the [CPRA proceeding]".<sup>79</sup> Likewise, as a policy matter, Elias CJ correctly observed that "[e]ven if such a remedy is available in principle, ... [m]onetary relief is not an obvious response".<sup>80</sup> Indeed, as Tipping J previously acknowledged in *Hamed v R*, the leading Supreme Court decision dealing with s 30 in the penal context, financial compensation has "the appearance of the Crown buying the right to admit the evidence" — albeit here within the confines of a civil CPRA case.<sup>81</sup>

The second issue worth scrutinising involves the majority's notion that the original decision to exclude evidence in the District Court criminal case — and the resulting dismissal of the drug dealing charges against Marwood — was a significantly relevant factor supporting the denial of additional relief in the CPRA trial. Indeed William Young J made it clear that, absent police bad faith or some equally blameworthy official misconduct, the District Court result made it unlikely that "further vindication" of rights through the "exclusion of evidence in a CPRA proceeding [would be] required".<sup>82</sup>

The inevitable result of such reasoning is that Marwood's successful s 30 challenge to the admission of the improperly obtained evidence at his criminal trial actually counted *against* (if not effectively eliminated) his ability to argue for exclusion in the Crown's subsequent CPRA case. While really only a remote possibility, and as noted above,

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<sup>77</sup> See generally Simon France (ed) *Adams on Criminal Law — Evidence* (online looseleaf ed, Thomson Reuters) [*Adams on Criminal Law*] at [EV30.11]–[EV30.12]; Mahoney and others *Act & Analysis*, above n 1, at [EV30.11]–[EV30.12].

<sup>78</sup> See *Hamed v R*, above n 15, at [70] per Elias CJ, [202] per Blanchard J, [275] per McGrath J and [247] per Tipping J. See also *Adams on Criminal Law*, above n 77, at [EV30.12(7)]; Mahoney and others *Act & Analysis*, above n 1, at [EV30.12(7)].

<sup>79</sup> *Marwood SC*, above n 2, at [48].

<sup>80</sup> At [69] (citing *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [256] per Blanchard J).

<sup>81</sup> *Hamed v R*, above n 15, at [247] per Tipping J.

<sup>82</sup> *Marwood SC*, above n 2, at [51].

William Young suggested that the same might be true regarding any civil claim brought *by* Marwood seeking compensation for a police breach of his rights.<sup>83</sup> Somewhat inconsistently, his Honour drew this conclusion despite also highlighting Marwood's ability to sue as an alternative remedy *supporting* the admission of the improperly obtained evidence in the CPRA action. Completing the circle, William Young J likewise observed that the potential failure of such a lawsuit could itself "suggest that any further vindication in the form of exclusion of evidence in the CPRA proceedings would not be warranted".<sup>84</sup>

How can we best depict the majority's perspective? If one were to summarise it, the overall message seems clear: Marwood obtained all of the rights vindication he was entitled to when the improperly obtained evidence was excluded from his District Court trial and criminal charges were dismissed. Any additional remedial action — whether in the form of financial compensation for a breach of rights or exclusion of the improperly obtained evidence in the CPRA proceeding — would result in an unwarranted windfall to Marwood disproportionate to the unlawful police conduct in the case and antithetical to the aims of a civil forfeiture regime.

What are we to make of that view? As previously discussed, it is certainly possible to conclude that, pursuant to the methodology of s 30, the evidence improperly obtained by police from Marwood's home should have been admitted at his CPRA trial.<sup>85</sup> Indeed, for any given case, this is precisely what the evaluative, proportionality-balancing exercise would permit. As well, the actual (and unanimous) decision of the Supreme Court allowing the use of the evidence in *Marwood* is both explicable and defensible. Admitting real proof of significant unlawful activity in the face of less than serious police impropriety is, in fact, consistent with many judgments rendered — although in criminal proceedings — under the s 30 proportionality-balancing test.<sup>86</sup>

However, what does seem misguided about the majority's thinking — as regards successive cases stemming from the same set of circumstances — is to suggest that the exclusion of evidence in a prior criminal trial should negatively impact a defendant's ability to argue for exclusion in a subsequent civil one. To the contrary, the various elements relevant to the proportionality-balancing exercise in Marwood's earlier penal proceeding — such as the concrete details of police misbehaviour, the seriousness of the offending, and the probative value of the challenged proof — do not change their character when applied to the second and related CPRA action. Nor are those considerations somehow transformed by: (a) conceptual differences between civil forfeiture applications and criminal prosecutions; or (b) a defendant's ability (however notional) to seek monetary compensation for a police breach of his or her rights. Indeed, between one kind of proceeding involving Marwood's unlawful behaviour and another, nothing changes the *facts* pertinent to the proportionality-balancing exercise — they always remain the same.

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<sup>83</sup> At [48]. See the text at n 39 above.

<sup>84</sup> At [48].

<sup>85</sup> See the text at n 76 above.

<sup>86</sup> See the various decisions noted in *Adams on Criminal Law*, above n 77, at [EV30.12].



Understanding this point, Elias CJ correctly observed — by contrast with the majority — that approaching exclusion on a “principled basis” means engaging with the issue afresh for each individual case.<sup>87</sup> In fact, allowing the outcome at one trial to impact the results at another undermines the *actual* evaluative exercise at the core of the proportionality-balancing test. That assessment, as the Chief Justice noted in a later decision involving s 30, *R v Alsford*, should not take into account that an individual arguing for exclusion in a new and distinct action “received a remedy’ in ... earlier proceedings”.<sup>88</sup> Instead, and in the concrete language of s 30(2)(b), the evaluation requires a judge to “give appropriate weight to the impropriety and also take proper account of the need for an effective and credible system of justice” (s 30(2)(b)). As her Honour stated in *Marwood*, this is not “an exclusively remedial perspective” concentrating only on the individual whose legal rights have been breached.<sup>89</sup> Rather, the focus must be on the “public interest [at] both ends”.<sup>90</sup> Applied to *Marwood*, this meant the public interest in “[s]tripping ‘unlawful benefit’” from persons who have engaged in significant criminal behaviour, but also ensuring “observance of the [NZBORA] and proper and lawful police conduct”.<sup>91</sup> Thus, the ultimate issue, succinctly put by Elias CJ, is whether the improper means used by the police to secure evidence from Marwood’s home “should be countenanced”<sup>92</sup> — and hence whether the CPRA proceeding, like the criminal case underlying it, can be based on evidence “that it is proper to admit”.<sup>93</sup>

The judicial answer to that question, and the reasons underlying it, may vary — just as it did between the High Court, Court of Appeal and Supreme Court in the *Marwood* litigation. Indeed, the very nature of proportionality-balancing means that, for any given case, diverse judges might evaluate relevant factors differently, and likewise reach different conclusions as to the correct result. The Supreme Court, of course, gets the last word. Nonetheless, and as recognised in *Alsford* by the same majority as in *Marwood*, judges must always be satisfied that allowing police to rely on improperly obtained evidence at trial would not erode “public confidence” in the processes of justice.<sup>94</sup> Accordingly, and in any proceeding where the matter is raised, a *systemic* orientation towards the exclusion of improperly obtained proof is the correct approach. This is, in fact, the focus embodied in s 30 — which centers neither on vindicating the individual rights of criminal suspects, deterring particular acts of police misconduct, nor on providing personalised remedies for police transgressions of law.

The upshot of this discussion is to suggest that, while it reached a defensible proportionality-balancing *result*, the majority’s *reasoning* in *Marwood* took several wrong turns. Neither the chance of Marwood suing to redress financially a police breach of his rights, nor the fact that evidence was excluded (and proceedings dismissed) in his original criminal trial, should have impacted the Supreme Court’s

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<sup>87</sup> *Marwood SC*, above n 2, at [66].

<sup>88</sup> *Alsford*, above n 66, at [125] (citing Arnold J at [97]).

<sup>89</sup> *Marwood SC*, above n 2, at [69].

<sup>90</sup> At [65].

<sup>91</sup> At [65].

<sup>92</sup> At [65].

<sup>93</sup> At [63].

<sup>94</sup> *Alsford*, above n 66, at [98].

decision to admit the improperly obtained evidence in the CPRA case. While defensibly concurring in the actual outcome of the appeal, the Chief Justice was right to emphasise the errors of the *Marwood* majority in each regard.

Finally, and following on from the points just made, both the majority and Elias CJ found it relevant to the proportionality-balancing exercise that *Marwood* was not “at risk of conviction and imprisonment” in the CPRA proceeding — which involved “only a claim for money” alleged to be the proceeds of significant criminal acts.<sup>95</sup> Somewhat contradictorily, the Chief Justice took that view despite concluding, as noted above, that “the different nature of forfeiture” does not justify “less concern about observance of the human rights contained in the [NZBORA]”.<sup>96</sup>

Regardless, and whether employed as a pertinent factor by the majority or Elias CJ, it does not seem obvious why the *consequences* to *Marwood* of a criminal versus civil proceeding should impact the exclusion calculus in the latter action. Indeed, since a defendant can *only* be penalised financially in a civil forfeiture trial, there is scant logic to comparing it with the potential outcome of a criminal case. To do so takes the mere *description* of a CPRA application and transforms it into a proportionality-balancing *factor* always favouring the admission of improperly obtained proof. Such reasoning shifts the focus away from genuinely relevant public interest matters attending any judicial decision to countenance police impropriety or not — considerations that, despite differences in available outcomes, remain present for both CPRA proceedings and penal actions.

Simply put, if the exclusionary rule is to apply in CPRA cases, it should not be a factor favouring the admission of improperly obtained evidence that “only ... money” is at stake.<sup>97</sup> The Supreme Court wrongly concluded otherwise in the *Marwood* appeal.

## V. CONCLUSION

What are the lessons of *Marwood* going forward? Several points might be made.

*Marwood* evinces the Supreme Court’s insistent approach to the exercise of inherent jurisdiction in the remedies field. Despite common law precedent and provisions of the Evidence Act to the contrary, the Court was keen to assert its authority to exclude improperly obtained evidence in civil proceedings, just as it can in criminal ones.

What drives such result? The impulse to make such rulings may stem simply from the Court’s desire not to have its remedial jurisdiction hemmed in by statute. Or it may derive from a more noble impulse, where considered necessary, to ensure the systemic integrity of trial justice in *all* types of civil or criminal cases — particularly those, such as CPRA actions, involving the conduct of police or other agents of the State. In that regard, and notwithstanding the critique of *Marwood* developed in this

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<sup>95</sup> *Marwood* SC, above n 2, at [49], Elias CJ agreeing at [73].

<sup>96</sup> At [67]. See also the text at n 40 above and following n 70 above.

<sup>97</sup> At [49].

article, one can both understand and empathise with the Court's ostensible goal. Indeed, as the analysis in this paper should suggest, policy concerns underlying the admission or exclusion of improperly obtained evidence in criminal trials — such as the vindication of rights, the deterrence of police misconduct and the protection of court processes — may be no less extant in the CPRA realm. While the legal position in the United States is varying, such rationales are precisely why, for example, some American courts have applied that country's exclusionary rule to civil forfeiture trials.<sup>98</sup>

Nonetheless, if the statutory analysis in this article is correct, the extension of the s 30 proportionality-balancing test to civil proceedings — whether only to those involving state actors (such as CPRA cases) or more broadly — is really a question for Parliament requiring amendment to the Evidence Act. Pursuant to s 202, it is, in fact, a matter that will soon be taken up by the Law Commission in its second and upcoming statutory review of current evidence law.<sup>99</sup>

The pros and cons of any such change is beyond the scope of the instant discussion. Nonetheless, if *Marwood* is any guide — and the notional availability of exclusion notwithstanding — defendants will find it difficult, if not impossible, to convince courts to rule out improperly obtained evidence in civil forfeiture trials. Absent bad faith or particularly egregious police misconduct, *Marwood* is a clear signal that the exclusion of such proof in criminal proceedings is all the relief an applicant is likely to obtain. CPRA actions growing out of the same set of facts, even if relying on the same tainted evidence, will thus cause courts little concern. Moreover, *Marwood* points to such outcome notwithstanding any particular orientation toward either the goals of proportionality-balancing or the policies underlying the exclusionary rule. Indeed, whether nodding towards the vindication of rights, the deterrence of police misconduct or the systemic integrity of justice processes, *Marwood* demonstrates the Court's broad willingness to accept the use of improperly obtained evidence in the civil forfeiture sphere.

Accordingly, and as the title to this article suggests, the real message of *Marwood* may be that every silver lining has a cloud. Criminal defence lawyers no doubt cheered the decision at first instance — grateful that, in CPRA applications, a judicially created extension of s 30 could allow for the exclusion of the same improperly obtained evidence previously rejected in a criminal trial. Advocates probably also assumed that, in those civil forfeiture proceedings, the same proportionality-balancing assessment might apply. Ironically, however, the very success of defence efforts to exclude tainted evidence in criminal cases likely assures the opposite result in a subsequent and connected CPRA action. Nor did defence lawyers count on the fact that, in the view of the Supreme Court at least, proportionality-balancing inevitably favours the Crown when only a defendant's money — particularly in the form of unlawfully gained profits — is at stake. There is also an underlying sense in *Marwood* that lawbreakers should not push a judge's willingness to reject improperly obtained evidence too far. Indeed,

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<sup>98</sup> See Daniel Kaminski "Conclude to Exclude: The Exclusionary Rule's Role in Civil Forfeiture Proceedings" (2010) 6 Seventh Circuit Review 268.

<sup>99</sup> Law Commission "Second Review of the Evidence Act 2006" (20 February 2017) <<http://www.lawcom.govt.nz/our-projects/second-review-evidence-act-2006>>.

in all but the most extreme cases of police misconduct, the spectre of an individual avoiding both criminal punishment *and* financial penance for illegal behaviour seems like simply too much for the Court to bear.

One final point: if *Marwood* allowed criminal defendants a second chance at excluding improperly obtained evidence in CPRA proceedings, it afforded police an even more winning opportunity to secure the opposite result. However, as United States commentators have pointed out— and particularly in drug selling cases like *Marwood* — “law enforcement agencies [now] use civil remedies to achieve criminal justice goals”.<sup>100</sup> Indeed, civil forfeiture proceedings may be “easier to use, more efficient, and less costly than criminal prosecutions”.<sup>101</sup> If that turns out to be true of law enforcement practices in New Zealand, whether now or in future, *Marwood's* legacy may be to create a classic ‘moral hazard’ for the police. That is, investigators might be tempted to cut corners in the lawful obtaining of evidence for criminal prosecution, realising that the consequences of such improper behaviour will not ultimately be borne in expected CPRA trials.

The most cogent judicial response to the problem of moral hazard in civil forfeiture cases is, of course, the exclusion of improperly obtained evidence in such proceedings. However, *Marwood* suggests that courts should do so only when police misbehaviour is particularly blameworthy — and judges will undoubtedly hesitate to find such level of fault. If that assessment is correct, then in drug investigations — and other types of criminal activity amenable to CPRA actions — *Marwood* may encourage police to focus their investigative priorities where obedience to law presents less of an obstacle to enforcement success. Attractive to some in the short term, one should always bear in mind the long term consequences to justice where police are incentivised to combat illicit activity by themselves breaking legal rules.

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<sup>100</sup> Kaminski, above n 98, at 299–300.

<sup>101</sup> At 300 (citing Mary M Cheh “Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction” (1991) 42 *Hastings LJ* 1325 at 1345.