IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA343/2024
[2024] NZCA 554

BETWEEN	MARLANNA SHIRLY DIANA HARRIS Appellant
AND	THE KING Respondent

Hearing:	4 September 2024
Court:	Ellis, Peters and Downs JJ
Counsel:	T Aickin for Appellant L Fiennes and C E Martyn for Respondent
Judgment:	30 October 2024 at 11.00 am

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Downs J)

The appeal

[1] Marlanna Harris was sentenced to a term of three years and 11 months' imprisonment for a raft of offending, the most serious of which were charges of burglary and using a document with intent to deceive.[1] Ms Harris appeals that sentence. We must allow the appeal if there is an error in the sentence and a different

[1] *R v Harris* [2024] NZDC 9940 [judgment under appeal] at [1] and [66]–[68].

sentence should be imposed,[2] or in short, if the sentence imposed was manifestly excessive.[3]

Background

[2] Ms Harris' sentence spanned 19 charges, which we tabulate:

	Charge	Section	Maximum Penalty
1–6	Using a document for pecuniary advantage(x 6)	Crimes Act 1961, s 228(1)(b)	7 years' imprisonment
7	Obtains by deception (under $500)	Crimes Act, ss 240(1)(a) and 241(c)	3 months' imprisonment
8	Obtains by deception ($500–$1,000)	Crimes Act, ss 240(1)(a) and 241(b)	1 year's imprisonment
9–10	Receiving (over $1,000) (x 2)	Crimes Act, ss 246 and 247(a)	7 years' imprisonment
11–13	Failing to answer bail (x 3)	Bail Act 2000, s 38(a)	1 year's imprisonment
14	Burglary	Crimes Act, ss 231(1)(a) and 66	10 years' imprisonment
15	Using an altered document	Crimes Act, s 259(1)(a)	10 years' imprisonment
16–17	Theft (over $1,000) (x 2)	Crimes Act, ss 219 and 223 (b)	7 years' imprisonment
18	Possessing goods capable of being used to facilitate crimes involving dishonesty	Crimes Act, s 228C	3 years' imprisonment
19	Dangerous driving	Land Transport Act 1998, s 35(1)(b)	3 months' imprisonment

2 Criminal Procedure Act 2011, s 250(2).
3 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [35].

[3] The facts are best explained by reference to Judge Gilbert's sentencing remarks, and by dividing the charges into four brackets.

[4] The first bracket comprised charges 1–9 on the table, about which the Judge said:[4]

> [3] You and the various victims of this offending were not known to each other. You obtained debit card details of several unsuspecting members of the public. It is unknown how you got those because at the time of the offending the victims were still in possession of their physical cards.
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> [4] On Thursday 3 September 2020 you used the first victim's Bankcard details to purchase $489 worth of goods from Rebel Sports online store. You then collected the products from Rebel Sports in Papanui. You arranged for a refund for some of those products to the value of $323 which was then paid into your own bank account.
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> [5] At the time of offending, you were living temporarily in emergency accommodation. On 18 September 2020 you used the second victim's Mastercard to complete four online transactions without authorisation. Two online transactions were completed with 2 degrees mobile for $20 and $30 respectively. One online transaction worth $127 was completed with Hell Pizza in Bishopdale. One online transaction worth $175 was attempted with Countdown online but was subsequently rejected by the company's fraud system.
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> [6] Between 3 and 4 October 2020 you used the third victim's Mastercard to complete several transactions valued at approximately $3,000. There were about 10 such transactions. Two were at The Warehouse worth $549 each. One was at Pizza Hut worth $113. Five transactions were completed through Liquor Land online. One transaction was with 2 degrees mobile and on 4 October you used the card twice at the Pepper's Clearwater Resort to the value of $100 and $601 respectively. Clearwater is the fancy golf club out on the outskirts of Christchurch, and it is not a place where people offend because of need.
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> [7] On about 16 January 2021 a further victim's credit card details were obtained by you. Between 16 January and 31 January, you made 29 purchases from various online retailers using those credit card details to the value of $1,900. You used the cards to purchase a subscription to an online Antique Valuing service on a website. There were also multiple uses to obtain fuel.
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> [8] On 1 February there was another victim's credit card details that were obtained by you and between that date and 3 February you made 27 purchases from various online retailers. The total amount was $2,600.
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> [9] Yet another victim's card details were obtained by you in March and between 26 and 28 of that month you made 20 purchases from various online retailers using those credit card details to the value of about $4,260.

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4 Judgment under appeal, above n 1.

[10] By my count there are approximately 90 odd individual transactions involved and as I have already noted many of them appear completely unrelated to any urgent need and in that sense that this offending does not appear to me to have been driven by poverty, rather by greed.

….

[17] On 6 March 2021 a lady called [N] reported to the police that she had lost her wallet containing her driver's licence. At 4.19 pm on 25 June 2021 an unknown person called the Vodafone call centre purporting to be the second victim, [T] and requested that [N] be added as an authorised person to [T's] Vodafone account. At 4.33 pm on 25 June 2021 you entered the Vodafone Hornby store and identified yourself as [N].

[18] You presented a New Zealand Driver's licence in the name of [N] as identification and requested a SIM [card] swap on [T's] cellphone number after correctly quoting the PIN number for the account. The SIM swap was successfully completed enabling you to access [T's] phone number. A total of $8,420 was then transferred out of the victim [T's] bank account without authorisation.

[19] On 21 June 2021 another victim by the name of [H] listed his vehicle for sale on Trade Me. He was contacted by an interested buyer named Michael to whom he provided his bank account and driver licence details. After providing his details he received no further contact from Michael. A week later on 28 June an unauthorised transfer totalling $8,300 was made from [H]'s bank account into an account with the name Lee Fraser with the reference, Melanie, Rent, Ray White. The victim did not authorise that transfer.

[20] At 12:45 on 29 June $6,300 was sent from Fraser's account into your bank account. You then transferred $2,500 into another of your accounts and withdrew $3,800 in cash from Northlands Papanui ASB branch.

[21] On 11 August 2021 you called Spark purporting to be yet another victim [R], and added a password to her account. Later the same day your name was added to the victim's account through Spark's online webchat. The victim's cellphone number was then ported to 2 degrees mobile without her authorisation with you listed as the account holder. The victim's phone remained ported to 2 degrees mobile until 23 August 2021.

[22] At 4.58 pm on 17 August 2021 a layby verification code was sent to the victim's phone which at this stage was under your control. After receiving this code you entered the Frontrunner store located at Northlands Mall Christchurch. You selected items to the value of $290 and provided the victim's cellphone number to complete the transaction. This number was entered into the Frontrunner system in order to verify the layby purchase.

[23] At 5.54 pm on 17 August 2021 a text message was sent to the victim's phone number for the approval of the abovementioned layby purchase by way of some form of two factor authentication. You approved the purchase via the layby application on the mobile phone and left the store with the items. Two of the three items listed on the layby receipt for the Frontrunner Northlands were later located at your address.

> [24] At about 6 pm on 17 August 2021 you entered a Stirling Sports store in Northlands Mall Christchurch. You selected a number of clothing items to the value of $510 and provided the victim's cellphone number to complete the transaction. This number was entered into the Stirling Sports system in order to verify that layby purchase.
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> [25] A text message was then sent to the victim's phone number for approval of that purchase, and you again were able to approve that via the layby application on your mobile phone and left with the items. One of the items listed on the receipt was later located at your address.

[5] The second bracket comprised the burglary offence, charge 14. The victim, whom we call S, is Ms Harris' cousin:

> [31] At about 4.30 pm on 17 February 2022, you and your partner Mr Rapana entered [S's] address … through an open bedroom window. The pair of you then searched the address and took several items including specialised bottles of alcohol clothing and blankets. You have then loaded these items into a washing basket and left the property via a front door.
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> [32] Those items belonged to [S] and were valued at over $6,000. As you have heard many of them had not just reasonable financial value to them but immense sentimental value because they had been gifted to her. You did not have permission to enter that property or take items as you tried to tell the jury at your trial. Three of the stolen bottles of alcohol were located at the home address where you were living on 8 March 2022.
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> [33] When you were spoken to by the police you said that you had gone into that property to obtain items with [S's] full permission and as I have noted the jury dismissed those claims and rightly so.

[6] The third bracket comprised charges 11–13: Ms Harris failed to answer District Court bail on 26 November 2021, 3 February 2022, and "another date".[5]

[7] The last bracket comprised charges 15–19:[6]

> [36] The next summary of facts relates to a charge of receiving and altering a document. Between 26 January 2023 and 3 February 2023, the victim's red Canyon mountain bike worth $4,650 went missing from a locked bike cage at her home address …
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> [37] On 7 February you emailed a business known as Around Again Cycles asking when she could bring down a bike that you had for sale. You asked roughly what price you would get for a Canyon Neuron dipped red and stated that you had receipts et cetera. The next day on 8 February 2023 you and your partner Mr Rapana went to Around Again Cycles at 620 Ferry Road in Christchurch with the stolen red Canyon mountain bike.

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5 At [28].
6 At [36]–[44].

> [38] You agreed to sell the bicycle to the store for $1,200 and provided a bank account number to deposit the funds into. You then provided a receipt to Around Again Cycles for a Canyon mountain bike which was dated 9 December 2022 with your name and address recorded on it. You claimed that it was the original receipt for the bicycle which had been brought online from Canyon which is based in Germany.
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> [39] The police have investigated that, and a Canyon representative has confirmed that the invoice was falsified. You initiated an online order for a red Canyon bike but did not pay for it, thus obtaining the order number and email under your details which were then used to falsify the receipt and once again this shows a real level of sophistication and determination on your part.
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> [40] The next summary involves a driving matter. On 9 September 2020 at about 11.40 in the morning when you were driving a Toyota on Cashel Street. That is a two-lane road here in Christchurch in a residential area with a posted limited of 50 kilometres an hour.
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> [41] You were locked on by a police radar at 110 kilometres an hour, exceeding the speed the limit by 60. At the time in the morning on Cashel Street there was moderate intermittent traffic flow. When you were spoken to you said you had had a bad week and wanted to get your friend home so that you could move house.
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> [42] The next summary involves 27 January this year 2024 at about 5.35 in the afternoon. You went to the Briscoes at Bush Inn Christchurch. You entered the store and walked directly to the electrical section. You then selected a My Genie Smart Pro vacuum from the shelf and walked towards the front of the store. You then left through the main entrance holding the vacuum and made no attempt to pay for it. That was valued at $1,600.
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> [43] The next summary of facts relates to 21 January this year. On this occasion you went to Briscoes in Papanui at Northlink. After arriving in a Nissan sedan which was silver you walked towards the vacuums and selected another My Genie Smart Pro vacuum valued at about $1,600. You left the store holding it in your hands bypassing the checkouts and making no attempt to pay for it.
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> [44] You were in fact the owner of a light-coloured Nissan vehicle. You had prior to going to the store fitted it with fake homemade registration plates in an attempt to avoid identification which once more is an indicator of your premeditated and somewhat sophisticated mode of offending.

[8] The Judge adopted a starting point of two years and 10 months in relation to the first bracket,[7] "about 22 months" for the second,[8] and 20 months for the fourth bracket, with the exception of the dangerous driving offence.[9] In relation to it and the three charges of failing to answer bail comprising the third bracket, the Judge adopted

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7 At [56].
8 At [57].
9 At [58] and [59].

a two-month starting point.[10] This resulted in a nominal starting point of 76 months' imprisonment.[11]

[9] The Judge deducted 20 months from the nominal starting point in recognition of the totality principle, leaving a starting point of 56 months' imprisonment. The Judge uplifted it by 12 per cent for Ms Harris' criminal history but also applied the same discount for Ms Harris' guilty pleas;[12] Ms Harris pleaded guilty to all charges except for the burglary charge, which went to trial. The Judge deducted a further 15 per cent for Ms Harris' personal circumstances and "statements relating to a commitment to rehabilitation".[13]

[10] As observed, this resulted in a sentence of three years and 11 months' imprisonment.

[11] On Ms Harris' behalf, Ms Aickin contends:

(a) the starting point on the burglary charge was too high;

(b) the Judge made factual errors in relation to the mountain bike offending and fraud offending, resulting in excessive starting points for both;

(c) the uplift for previous offending was too high; and

(d) the discount for Ms Harris' guilty plea was inadequate.

[12] Ms Aickin contends the sentence should not have exceeded three years' imprisonment.

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10 At [59].
11 At [60].
12 At [61] and [62].
13 At [63].

Analysis

The starting point for the burglary offending

[13] Ms Aickin contends the 22-month starting point was too high as there was little risk of a danger of confrontation with S, no "wanton destruction" of property, and the value of the property taken was "not particularly high". Ms Aickin also contends the Judge was wrong to consider the offending aggravated by a breach of trust.

[14] In *Arahanga v R*,[14] this Court observed that the offence of burglary does not attract a particular tariff. It noted burglary of a dwellinghouse "at the relatively minor end of the scale" of seriousness tends to attract a starting point ranging from 18 months' imprisonment to two and a half years' imprisonment.[15] Higher starting points apply to burglaries of greater (relative) seriousness.

[15] We consider the starting point unremarkable. Ms Aickin refers to the absence of aggravating factors. However, if one or more of these factors had been present, the offending would likely lie beyond the relatively minor end of the scale of seriousness. Moreover, we do not accept that the value of the items taken ("over $6,000") diminishes the seriousness of the offending, particularly given some items had sentimental value, S lived alone and was uninsured, and S's psychological trauma in consequence of the offending. The last aspect also addresses the breach of trust submission, which we consider unsustainable given the familial connection and the likelihood Ms Harris exploited that connection in concluding S would not be home when she entered the property.

[16] The starting point adopted by the Judge is also commensurate with those in cases identified by Ms Fiennes on behalf of the Crown.[16]

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14 *Arahanga v R* [2012] NZCA 480, [2013] 1 NZLR 189.
15 At [78].
16 *Ivar v Police* [2021] NZHC 493; *Nelson v Police* [2012] NZHC 2266; and *Johnstone v Police* [2012] NZHC 551.

The mountain bike offending

[17] As will be recalled, the last bracket included offending in relation to a mountain bike. The Judge adopted a starting point of 12 months' imprisonment for that offending, to which he added eight months for the rest of the offending in the bracket.[17] Ms Aickin contends the 12-month starting point rested on a misapprehension that Ms Harris had altered the mountain bike receipt to obtain the bike when the agreed summary of facts in relation to which Ms Harris pleaded guilty made no such allegation.

[18] The summary of facts in relation to this aspect records:

> The defendants provided a receipt to Around Again Cycles for a Canyon Mountain bike dated 9 December 2022 with Harris' name and address recorded on it. They claimed that it was the original receipt for the bicycle which had been bought online from Canyon, which is based in Germany.
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> A Canyon representative confirmed the invoice was falsified. Harris had initiated an online order for a red Canyon bike but not paid for it, thus obtaining the order number and email under her details which were then used to falsify the receipt.

[19] For ease of reference, we repeat what the Judge said on this topic:[18]

> [38] ... You then provided a receipt to Around Again Cycles for a Canyon mountain bike which was dated 9 December 2022 with your name and address recorded on it. You claimed that it was the original receipt for the bicycle which had been brought online from Canyon which is based in Germany.
>
> [39] The police have investigated that, and a Canyon representative has confirmed that the invoice was falsified. You initiated an online order for a red Canyon bike but did not pay for it, thus obtaining the order number and email under your details which were then used to falsify the receipt and once again this shows a real level of sophistication and determination on your part.

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17 Except for the charge of dangerous driving, which the Judge considered separately.

18 Judgment under appeal, above n 1.

[20] We note the Judge's description of the offending mirrors the summary of facts. Furthermore, the 12-month starting point (for the mountain bike offending) is consistent with authority. Three examples, identified by Ms Fiennes, are illustrative:

(a) *Proctor v Police*: jewellery valued at approximately $5,000 was stolen from the victim's home and sold by the defendant the same day.[19] A starting point of 15 months' imprisonment was upheld on appeal.[20]

(b) *Nikau v R*: the defendant was in possession of $6,940 worth of items stolen from a home four days earlier.[21] A starting point of 12 months' imprisonment was upheld.[22]

(c) *Burkhart v R*: the defendant was found guilty of two charges of receiving stolen property worth up to $4,500.[23] A starting point of 12 months' imprisonment was upheld by this Court.[24]

Error in relation to the fraud?

[21] One of the summaries of fact in relation to which Ms Harris pleaded guilty referred to a Police investigation named Operation Apollo and to a family member of Ms Harris as an offender caught by that investigation. Ms Aickin contends the Judge "erroneously factored in matters that were never alleged against the appellant":

> It was never alleged or agreed that Ms Harris was part of her [family member's] offending or that the stolen credit card details she used to make online purchases were supplied by him.
>
> It is unknown how the appellant obtained those details.
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> It is submitted that the sentencing Judge erroneously considered the Operation Apollo material, which was included in the summary to provide context on the manner in which the offending was apprehended by Police but did not allege involvement by the appellant.

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19 *Proctor v Police* [2018] NZHC 763 at [2].
20 At [48].
21 *Nikau v R* [2017] NZHC 1366 at [4].
22 At [31].
23 *Burkhart v R* [2013] NZCA 314 at [3].
24 At [16].

> It is submitted that in all the circumstances, the Judge's characterisation of the appellant's offending as "complicated and sophisticated" was overstated and resulted in an excessive sentencing starting point for those offences.

[22] However, as Ms Fiennes observes, the summary of facts in question does not assert Ms Harris' offending was linked to her family member's offending, and neither did the Judge.

[23] More importantly, we do not consider the Judge's characterisation of the offending as "complicated and sophisticated" matters greatly, given Ms Harris:

(a) obtained more than $30,000 from 10 victims, all of whom were unknown to her; and

(b) used each victim's credit card details to make multiple purchases over a period of nearly seven months.

Whatever else may be said about the offending, it was serious.

[24] Finally on this point, we note the starting point of two years and 10 months' imprisonment is consistent with authority.[25]

Is the uplift too high?

[25] Ms Aickin contends the 12 per cent uplift was excessive, or as she put it, "hefty". Ms Aickin acknowledges Ms Harris has an extensive criminal history but argues her offending was tapering off, albeit with one or more exceptions.

[26] Section 9(1)(j) of the Sentencing Act 2002 requires a court to take into account the number, seriousness, date, relevance, and nature of an offender's previous convictions. Consequently, an offender's criminal history may constitute an aggravating feature, but care must be taken to ensure an uplift for this feature does not

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[25] See *Tiopira v Police* [2012] NZHC 1720; and *Wilkins v R* HC Wellington CRI-2004-485-86, 6 July 2004. Ms Aickin referred us to the case of *Rako v R* [2015] NZCA 463, where this Court upheld a starting point of 18 month's imprisonment. This case is not on point as Mr Rako only obtained approximately $1,800 and the offending was in relation to a single victim over a less protracted period of time.

re-punish the defendant given the earlier offending will have already attracted a penalty.

[27] The uplift constituted 12 per cent of the starting point, hence 6.7 months' imprisonment. In *Taitapanui v R*, the Judge uplifted a 15-year starting point by one year for previous offending.[26] This Court upheld the 6.7 per cent uplift on the basis denunciation and community protection were important sentencing objectives.[27] In the recent decision of *Farrell v R*, the sentencing Judge uplifted a 33-month starting point by nine months for previous offending.[28] This Court upheld the 27 per cent uplift, albeit noting it lay "toward … the limit of what was permissible".[29]

[28] We have considered Ms Harris' criminal history. We are unable to discern a material reduction in the frequency of her offending, nor any diminution of the seriousness of her offending.

[29] Given all of this, we consider the uplift was (well) within range, a conclusion underscored by the rationales of denunciation and community protection considering Ms Harris' criminal history.

[30] For completeness, we note some of Ms Harris' offending was committed while she was on bail, including the burglary of her cousin's home. We mention this because it is an aggravating factor under s 9(1)(c) of the Sentencing Act. The Judge considered that the 12 per cent uplift for prior offending incorporated any uplift for this factor.[30] This approach was generous to Ms Harris, because these uplifts recognise different policy objectives. Uplifts for offending on bail recognise "disregard for Court

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26 *R v Taitapanui* [2021] NZCA 161.
27 At [33].
28 *Farrell v R* [2024] NZCA 482.
29 At [16].
30 Judgment under appeal, above n 1, at [61].

processes".[31] Uplifts for previous convictions reflect the risk of reoffending, the need for harsher deterrence for reoffenders, and as an indicator of character or culpability.[32]

Was the discount for the guilty pleas too little?

[31] Ms Aickin contends the Judge should have applied a slightly higher discount of 15 percent for Ms Harris' pleas of guilty.

[32] The Supreme Court decision of *Hessell v R* caps any guilty plea discount at 25 per cent and holds the level of discount depends on a variety of considerations, including, unsurprisingly, the timing of the plea.[33]

[33] Ms Harris pleaded guilty promptly to some of the charges in the last bracket, but her other guilty pleas were entered much later; either at, or following, pre-trial callover. And, of course, Ms Harris took the burglary charge to trial. We are unpersuaded the Judge erred in choosing 12 per cent as the appropriate level of overall discount, particularly given the measure of discretion inherent to the exercise and the level of discount now contended for is only an additional three percent.

[34] Ms Aickin also questioned whether the Judge had recognised Ms Harris' apparent preparedness to undertake residential rehabilitation and a restorative justice process. However, we note the 15 per cent discount given by the Judge for personal factors encompassed Ms Harris' "statements relating to a commitment to rehabilitation".[34]

Conclusion

[35] We discern no error in the sentence, or importantly, with the sentence overall. As will be apparent, the starting points adopted by the Judge were within range, and the Judge appreciably mitigated the nominal starting point for totality, a point rightly not challenged. The uplift and discounts were, as we have explained, available. It follows that the sentence is not manifestly excessive.

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31 *Clunie v R* [2013] NZCA 110 at [22].
32 *Reedy v Police* [2015] NZHC 1069 at [19].
33 *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [75].
34 Judgment under appeal, above n 1, at [63].

Result

[36] The appeal is dismissed.

Solicitors:
Crown Solicitor, Christchurch for Respondent.