IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV 2011-409-001449
[2013] NZHC 1321

	BETWEEN	ADRIAN NICHOLAS MASON Plaintiff
	AND	RUPERT GRANVILLE GLOVER Defendant

Hearing: 18, 19 and 20 February 2013

Counsel: D A Ewen for Plaintiff
C A McVeigh QC and B M Russell for Defendant

Judgment: 5 June 2013

JUDGMENT OF WHATA J

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Introduction

[1] Mr Mason was convicted after trial for importing drugs. He went to prison for several months until his appeal was successful and a retrial ordered. Prior to that retrial, a discharge under s 347 of the Crimes Act 1961 was granted. The Judge said that there was uncontested evidence that Mr Mason was expecting an EFTPOS machine, not the package of drugs delivered to him. He was therefore satisfied that a jury, properly directed, could not reasonably convict on the evidence.

[2] Mr Glover was Mr Mason's defence counsel at the first trial. He did not obtain EFTPOS records showing that a request had been made for an EFTPOS machine to be delivered to Mr Mason's address. Rather, in a response to a request from Mr Mason, EFTPOS NZ sent Mr Glover the wrong records. Mr Glover dismissed them as unhelpful. Mr Mason says that Mr Glover did not discuss what he had received with him. He also now alleges that Mr Glover failed to identify the significance of telephone records that showed a call from Mr Mason's phone to EFTPOS NZ. Mr Mason therefore claims that Mr Glover should have inquired further with EFTPOS NZ and was negligent in not doing so.

[3] Mr Glover says that he advised Mr Mason about the EFTPOS records he received and Mr Mason said he would follow up with EFTPOS. He accepts that he did not notice the phone records, but says that this was not negligent in the circumstances.

[4] I must therefore resolve whether Mr Glover negligently failed to discharge his duty as counsel to obtain information and to advise Mr Mason on his defence.

Facts

[5] Early on the morning of 14 January 2005 the police controlled the delivery of an intercepted package containing drugs to Mr Mason's then address. When the courier (a drug investigator) arrived, with the package, Mr Mason said "EFTPOS machine?" and the courier responded "I've been called worse," and said further "I've got a parcel here for a Mr Rangiwahia."

[6] Mr Mason then accepted the package and signed for it. He inserted the words "T. Rangiwahia".

[7] The delivery slip attached to the package is attached as **Figure 1**. The document with Mr Mason's signature is also attached as **Figure 2**.

[8] Mr Mason did not open the package and later in the same day, the police raided his property, he was arrested and he made a statement to the police denying that he imported drugs.

[9] Mr Mason then retained Mr Glover to act for him. He repeated to Mr Glover what he said to the police in explanation as to what had happened. Mr Glover asked Mr Mason to obtain documentation from EFTPOS New Zealand supporting this explanation. As a result Mr Mason called EFTPOS and asked whether they retained information about his request for an EFTPOS machine. They did, and Mr Mason arranged for this information to be sent directly to Mr Glover.

[10] The information in fact sent to Mr Glover by EFTPOS NZ contains no reference to Mr Mason, to his address, or to a request by him for an EFTPOS machine to be delivered to that address. Rather the document refers to a "request summary," "QSTRP Limited," "Mr Michael Lu," "Level 1, 72 Litchfield (sic) Street," and "request owner R Stanley". A copy of this document is attached as **Figure 3.**

[11] Mr Glover said he asked Mr Mason to see him and advised him that the documents sent by EFTPOS did not support his explanation of events. Because Mr Glover lost his diaries in the earthquakes, he cannot pinpoint a date. He said he also pressed Mr Mason for an explanation as to why he signed for the document as T. Rangiwahia. Mr Glover said that Mr Mason was unable to give a satisfactory explanation. Mr Glover also said that Mr Mason did not explain the significance of the EFTPOS document or ask him to contact Mr Lu or R Stanley. Mr Glover recalled that Mr Mason said he would attempt to obtain further documentation from EFTPOS to support his position. It transpires that Mr Lu was the owner of the bar at which Mr Mason was employed (and was subsequently convicted on charges of

importation of drugs). The EFTPOS machine was, Mr Mason said, needed to replace the machine that was damaged at the bar.

[12] Mr Mason denies that any discussion took place about the EFTPOS machine with Mr Glover and says that there was never a request by Mr Glover for further information to be obtained. There is however a file note dated 19 January 2005 said to record Mr Mason's instructions to plead not guilty, "unless more info rec'd in meantime".

[13] In any event, initial disclosure was made by the police in late January and Mr Mason and Mr Glover then met to go over his case. Neither recalls discussing the EFTPOS document. Further disclosure was then made on 1 and 8 March, including deposition statements. Mr Mason and Mr Glover met again to discuss this disclosure. There is no record of the EFTPOS document being discussed at this time or subsequently at a depositions hearing. No mention of the EFTPOS document was made at the depositions hearing. After that hearing Mr Mason also recalls asking Mr Glover why no mention was made of the EFTPOS document. He says that Mr Glover said it was not necessary for a defendant to mention defence evidence at a deposition hearing but that "the material would be used at trial". Mr Glover refutes that was said.

[14] On 13 April 2005 an indictment was filed with the District Court and this was followed by rounds of disclosure on 1, 16 and 25 May. Included within the disclosure is an index of calls made by Mr Mason on 13 January 2005 (the day prior to the drug delivery). One of those calls includes a call to EFTPOS New Zealand, and this entry and its significance was not noted by Mr Glover at the time.

[15] Mr Mason and Mr Glover met again to discuss disclosure. There is no record or recollection of the EFTPOS document having been discussed at this time. From Mr Glover's perspective that was because the plaintiff said he would attempt to obtain further documentation from EFTPOS to support his defence.

[16] As to be expected, there were then trial callovers[1] with the trial set down for hearing in early August. Immediately prior to trial Mr Mason agreed not to give evidence and this is recorded in writing. The disclaimer states:

> I, Adrian Nicholas Mason, have discussed with my Counsel, Mr R. G. Glover, the question of whether I should or should not give or call evidence on my own behalf at my trial commencing in the District Court at Christchurch on 11 August 2005 on a charge of importing a class C controlled drug. He has explained, and we have discussed, all aspects of the question, both for and against testifying, and I fully understand the issues involved.
>
> After considering all matters I have instructed Mr Glover that I do not wish to give evidence on my own behalf and that I do not wish to call evidence from any other witness.
>
> Signed by me, Adrian Nicholas Mason
>
> Dated: 11 August 2005

[17] Mr Glover said he explained the dangers that Mr Mason would face in cross-examination especially in relation to the circumstances of the delivery of the package. He said he also pointed out that the plaintiff had not obtained any further documentary evidence about the EFTPOS request. Mr Mason denies that there was any discussion about the EFTPOS request and says that he simply assumed that Mr Glover would produce the EFTPOS request in evidence. He said that on the morning of the trial he told his friend, Mr Craig Palmer, that his whole defence was based on the EFTPOS request.

[18] It transpires that the EFTPOS request was not produced by Mr Glover at the trial. Mr Mason said he was very surprised by this, and with Mr Palmer present, asked Mr Glover why he did not produce the EFTPOS evidence after counsel had closed but prior to summing up by the Judge. Mr Glover recalls a discussion about this, but only after the guilty verdict. Mr Mason then said that he was shown the document Mr Glover received and told him that it was the wrong document.

[19] Before sentencing Mr Mason contacted EFTPOS and spoke to a Ms Tracey Ioane. She then sent a letter to Mr Mason confirming that a request had been made for an EFTPOS machine to be sent to Mr Mason's then home address. In a

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[1] On 21 June and 2 August.

subsequent letter to the New Zealand Police dated 9 February 2006 she detailed the requests that had been made and attached a report dealing with those requests. The key report is attached as **Figure 4**. This is the document Mr Mason said should have been produced by Mr Glover at the first trial.

[20] Mr Mason appealed against conviction. In his second affidavit (in reply) he provides the backgrounds to the request for the EFTPOS machine attaching the correspondence sent by Ms Ioane. For present purposes the additional significance of Mr Mason's reply affidavit is that he confirms that he did not see the first EFTPOS summary until "after the verdict".

[21] Mr Mason's appeal was allowed, but on the basis that the Judge did not properly direct the jury. In particular the Court of Appeal found that the prosecutor's final address to the jury was inaccurate in stating the law of importation.[2] The short point was that the Crown did not put to the jury that it was crucial to be sure that Mr Mason had knowledge about the contents of the package prior to the decision to retain it in Customs custody. A new trial was ordered.

[22] Before a new trial could be commenced, Mr Mason applied for a discharge pursuant to s 347 of the Crimes Act 1961. An objection has been raised with me referring to the decision of Judge MacAskill. I deal with that objection below. For present purposes I simply refer to it here to complete the narrative of facts. The Judge discharged Mr Mason noting in conclusion:[3]

> [17] The Crown is entitled to rely only upon inferences reasonably drawn from the facts proved. In discharging the accused, I was satisfied that the jury, properly directed, could not reasonably convict the accused. While the bare facts of the accused's acceptance of delivery of the package and his signing for it under the name of T Rangiwahia might reasonably have justified an inference of guilt in the importation of the drug, the evidence as a whole more than equally justified the conclusion that the accused believed that he had taken delivery of an EFT-POS machine. In the face of the uncontested evidence supporting this innocent explanation, to have left it open to the jury to convict on the basis of the inferences relied upon would have been to invite the jury to speculate against the weight of the evidence. It would have been my obligation to instruct the jury not to speculate and not to draw an inference adverse to the accused when the uncontested direct evidence plainly supported a conclusion that was consistent with innocence.

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2 *R v Mason* CA340/05, 16 March 2006.

3 *R v Mason* DC Christchurch CRI 2005-009-428, 7 February 2007.

The claim

[23] Mr Mason claims that Mr Glover failed to inform him about the deficiencies in the EFTPOS records, and failed to investigate and obtain available evidence for the trial. He also claims that Mr Glover failed to inform him that he did not intend to produce evidence. Mr Mason says that Mr Glover therefore breached his contract and/or acted negligently in the way he prepared for trial on charges of drug importation.

[24] Mr Glover denies these claims. He also says that Mr Mason caused his own loss by not seeking further information from EFTPOS.

Preliminary issue

[25] There was an application by the plaintiff to reverse the ruling of Associate Judge Osborne[4] rejecting the application to amend the statement of claim.

[26] The plaintiff sought the following amendments:

> 37. At the retrial on 25 January 2007 an employee from EFT-POS NZ, Tracy Ioane, gave evidence of the interactions between EFT-POS NZ and the Plaintiff.
>
> 38. On the basis of the evidence from Ms Ioane the presiding judge discharged the Plaintiff under section 347 of the Crimes Act 1961.

[27] I reject the application for the reasons given by the Associate Judge, namely that the events which the plaintiff must prove to succeed in his cause of action are materially pleaded up to paragraph 36. Paragraphs 37 and 38 cover subsequent events. I simply add that the claimed matters are not within the direct knowledge of the defendant with the inevitable result that the defendant would not be required to plead to them in any event.

[28] The defendant also made a belated application for further and better particulars. The nub of his claim is that the pleadings are too discursive and the defendant has been unable to properly prepare for trial as a consequence of the pleadings. Given that we were on the precipice of the hearing, I elected to proceed

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4 *Mason v Glover* [2012] NZHC 2815.

notwithstanding this application. It transpires that there may have been something to the defendant's application, particularly insofar as concerns the belated allegation that the defendant failed to have regard to certain phone records. I deal with that issue below.

The evidence

Mr Mason

[29] Mr Mason confirmed in evidence that he made a request for an EFTPOS machine to replace one damaged by alcohol. He says that he asked for it to be delivered to his home address at 59 Keighleys Road, Bromley, Christchurch. He narrates the delivery of the courier package and the police raid. He also details his initial contact with Mr Glover and his belief that it was during this initial contact that Mr Glover asked him to obtain documentation from EFTPOS NZ. He says as a result of that meeting he rang EFTPOS NZ and that the person from EFTPOS read out what was on the computer regarding his earlier phone call to them and that he asked EFTPOS NZ to fax that to Mr Glover immediately. He recalls telling Mr Glover that it was going to be sent. He recalls meeting again with Mr Glover prior to the pre-depositions hearing. He does not recall the document from EFTPOS NZ being discussed and noted that Mr Glover seemed to be stuck on why he had signed for the package. He recalls writing the Rangiwahia name on the delivery document but signing it with his signature underneath. He says after depositions he asked Mr Glover why he had not used the information he had been faxed by EFTPOS NZ. He said Mr Glover responded that the defence did not produce evidence at the deposition hearing. He maintained under cross examination that Mr Glover said that this "material would be used at trial".

[30] He recalls next meeting Mr Glover before the jury trial call-over. He says that the material from EFTPOS NZ was not discussed. He then recalls meeting Mr Glover again just before trial and Mr Glover's advice that it was in his best interest not to give evidence. Mr Mason confirms that he agreed and signed an acknowledgment to that effect. He also recalls telling his friend, Mr Palmer, about the EFTPOS terminal and that his defence was based on the EFTPOS confirmation.

[31] He also noted that the EFTPOS evidence was not mentioned when he had signed his acknowledgment until he discussed the case with Mr Palmer subsequently in 2012. He says he now remembers Mr Palmer asking Mr Glover about the EFTPOS evidence. At that time he also says he left Mr Glover in no doubt that the most important thing backing up what he said was the EFTPOS evidence.

[32] He says that after counsel's speeches the Court adjourned for the Judge to sum up the case the following morning. He said that he and Mr Palmer waited for Mr Glover outside Court and that he expressed his shock and confusion about his failure to use the EFTPOS evidence. He said that Mr Glover told him it did not help the case. Mr Glover then showed the document he had. Mr Palmer said he looked at it and told him it was not what he was supposed to have received. It should have contained a copy of the phone conversation. Mr Mason says that Mr Glover said that that was all there was.

[33] Mr Mason then narrates events after trial. He details how he spoke to Ms Tracy Ioane, that she sent a letter to him summarising the replacement EFTPOS machine process and that this was given to his then barrister, Mr Hall, before sentencing. He also narrates the process through the Court of Appeal and his ultimate discharge under s 347. He then sought compensation from the Ministry of Justice but was unsuccessful.

[34] He was pressed in cross-examination about his discussions with Mr Glover, including the fact that in his affidavits before the Court of Appeal there was no mention of Mr Palmer. Mr Mason denied it was a recent invention.

[35] He was also pressed on the fact that earlier drafts of his pleadings did not assert that a discussion took place prior to the conclusion of trial, but after it. But Mr Mason did not resile from his recollection that the discussion took place prior to verdict.

[36] Mr Mason was then questioned on whether Mr Glover mentioned that the EFTPOS documentation was not helpful. Mr Mason maintained that they never discussed it. He did not think it necessary to discuss the document with Mr Glover,

because he simply assumed it was the right document having spoken to the EFTPOS representative earlier. He simply assumed that Mr Glover would produce it at the appropriate moment.

[37] He was also taken to a statement produced by Mr Lu (being the Michael Lu referred to in the EFTPOS documentation). The statement made by Mr Lu supported Mr Mason's version of events. It was put to him that he did not refer Mr Lu's statement to Mr Glover because he was a drug dealer. Mr Mason denied that he knew at the time he was a drug dealer. It was only after Mr Mason was in jail that Mr Lu was convicted for drug dealing.

[38] Mr Mason was also questioned about the Chinese lettering on the cover note to the parcel. It was put to him that unless he thought that EFTPOS had moved their head office to Shanghai then it was clearly not from EFTPOS. He said "no and that is why it was never opened". He was then asked why he signed for it on behalf of "Rangiwahia". He said that a previous tenant had a similar sounding name.

[39] It was also put to him that in a previous affidavit he had stated that he believed it was Mr Lu who had sent the parcel to him. It was put to him that this was nonsense. He did not accept this.

[40] Mr Mason was also asked various questions about an association with Mr Davies. Apparently Mr Davies was involved in party pills. I discount this line of inquiry as irrelevant.

Craig Palmer

[41] The plaintiff also called Craig Palmer. Mr Palmer is Mr Mason's friend. Mr Palmer stated that Mr Mason informed him at an early stage that he had signed for an EFTPOS terminal that he had ordered the previous day. He also says that he drove Mr Mason to the courthouse on the morning of his trial and he was present when Mr Mason signed his waiver to give evidence. He also recalls that he asked Mr Glover about the EFTPOS document and that Mr Glover said that he had it, it would be with the other documents and that he would look at it. He corroborates Mr Mason's testimony that at the end of the first day of the trial Mr Mason had asked

Mr Glover why he had not produced the document to prove the expectation about the EFTPOS machine arriving. Mr Palmer says that Mr Glover said that he looked at the fax and could not use it as evidence as there was nothing of value in it. He said he got it out and showed it to Mr Mason. Mr Mason looked at it and said it was not the right document. He said that Mr Glover looked through his files and said that was the only one he had.

Mr Glover

[42] Mr Glover provided a reasonably detailed narrative of events. He confirmed that when he received the EFTPOS document it had nothing helpful on its face. He was sure that Mr Mason saw the document and he notes that he sent Mr Mason 369 pages of copying and that he was confident it was in that bundle. He recalls Mr Mason stating that he would obtain further information. He also accepts that there was a discussion about the EFTPOS document after verdict.

[43] Mr Glover also confirmed and produced a file note recording an instruction from Mr Mason that he would see Mr Glover at Court and plead not guilty "unless more information was received in the meantime".

[44] Mr Glover's recollection of events was challenged extensively under cross-examination. Mr Glover accepted that some of his timing may not have been correct given the timing of disclosure and other related steps.

[45] Mr Glover also maintained that he had traversed in detail the information that was disclosed. Mr Glover was also pressed on whether or not Mr Mason raised the existence of the EFTPOS document after the preliminary hearing. Mr Glover maintained that it was not raised with him in light of the fact he told Mr Mason that it was worthless. Mr Glover also reiterated under cross-examination that when he told Mr Mason the information he received from EFTPOS did not confirm what he wanted, Mr Mason said he would try to get more. Mr Glover conceded however that his recollection of this was not clear and the best he can put it is that he may have had a discussion with Mr Mason to that effect.

[46] Mr Glover also conceded under cross-examination that he did not ask Mr Mason about Mr Lu. But he discounted the document because it did not say any of the things that Mr Mason said that it would say.

[47] Mr Glover was also taken to a document disclosed by the police detailing the calls made by Mr Mason on 13 January, the day before the police raid. One of the numbers was an 0800 number for EFTPOS New Zealand. Mr Glover conceded he should not have missed reference to this number in the following terms:

> Q. Here was a piece of police evidence which demonstrated phone calls from him from his cellphone to EFTPOS New Zealand?
>
> A. Yes I accept that I missed that particular phone number.
>
> Q. You take the two together, the phone evidence and the material you'd received from EFTPOS, you had support, independent support for the defence case?
>
> A. Well just bear with me a moment please. Unless I'm mistaken and please correct me immediately if I am, that 0800 number does not appear on the fax I received at Mr Mason's behest.
>
> Q. No it doesn't.
>
> A. I, therefore, have no – I accept that perhaps I shouldn't have missed it but I did it and I have to accept that I missed that unidentified 0800 call and in the best of all worlds I probably have taken steps to find out who that number belonged to but I had no way of relating that number to the fax.
>
> ...
>
> Q. Mr Glover if you had rung the number, just rung the 0800 number yourself, given that it was on such an important date, you would have found that out?
>
> A. Yes I guess I would have.
>
> Q. And you accept now the that when you take the two pieces of evidence together, even though EFTPOS document is in itself not brilliant you take the two pieces of evidence together you've got something of some substance?
>
> A. With the wisdom of hindsight if I had rung that number and identified it with EFTPOS, yes, that would be correct. At the time I did not advert to the number, I have to accept that and I did not ring it, it did not appear on the EFTPOS fax. If it had I probably would have made the connection but it didn't. I put that down to human infallibility rather than negligence Mr Ewan.

Debra Jane Mountney

[48] Ms Mountney also gave evidence that at the time she was an assistant to Mr Glover. She produced certain documents, including a file note recording that Mr Mason told her that he intended to plead not guilty until such time as he could see what the police had on him. She also details essentially administrative matters in her knowledge dealing with Mr Mason's case and subsequently. Under cross-examination she accepted she had no independent recollection of the phone conversation with Mr Mason. She was confident however that her note would have been an accurate record of what was said.

Evidence of Messrs Illingworth QC and Sainsbury

[49] The parties also produced expert evidence dealing with the obligations of defence counsel.

[50] I have found that evidence of assistance in terms of providing some general guidance from senior counsel as to the nature and application of the duties of defence counsel to an accused. At my request they also agreed a position in relation to certain issues. That is helpfully succinct so I repeat it here, as recorded in the final version of the evidence given by Mr Illingworth QC:

> **Does defence counsel instructed on legal aid without an instructing solicitor owe a duty to make inquiries concerning evidence that might assist in the defence of a criminal charge?**
>
> 37. Yes.
>
> **What is the nature and scope of that duty?**
>
> 38. In the first instance counsel should take instructions from the client. In relation to issues on which the client is unable to provide comprehensive instructions defence counsel will often need to arrange for inquiries to be made of third parties. In straightforward situations it may be appropriate for counsel to make those inquiries. In more complex situations, it may be necessary for a private investigator to be instructed. In my opinion there is nothing wrong with counsel relying on the client to obtain further information if the situation is one in which the client could reasonably be expected to do so without significant difficulty.
>
> **Is defence counsel required to be satisfied that all relevant information for the purpose of conducting the defence has been obtained?**

39. Yes.

What is the nature and scope of that duty?

40. The nature and scope of the duty depends on the precise circumstances of the case, the question being whether the practitioner exercised reasonable care and skill to ensure that all relevant information had been obtained in those circumstances. In the present case, this may come down to the question whether it was reasonable for the practitioner to rely on a statement by the client that the client would seek to obtain the further information that the plaintiff says should have been obtained, if available. Put another way: would such conduct fall below the standard of reasonably competent New Zealand defence counsel? In my opinion it would not.

Is defence counsel instructed on legal aid without an instructing solicitor obliged to discuss information in his possession with his client?

41. This will often be the case but not always. It will depend on the precise circumstances. In some situations there will be no need to discuss information with the client. For example, a document provided by the client may be clear and self explanatory. In such a case there may be no need for discussion. In other situations there may be a need for extensive discussion to enable counsel to understand the meaning and/or significance of a document. In the present case the Eftpos document clearly needed to be discussed with the client. The question whether it was discussed is obviously a matter for the Court. The document needed to be discussed for a number of reasons including:

    (a) The fact that on its face it did not obviously comprise an order for a new or replacement Eftpos machine.

    (b) The fact that it did not bear any reference to Mr Mason.

    (c) The fact that it bore reference to a company and two individuals who had no apparent relationship with the plaintiff.

[51] Mr Illingworth further clarified this agreement in the following terms:

> Mr Sainsbury is of the view that in my paragraph 38 there should be reference to the need for defence counsel to have the prosecution disclosure documents available before attempting to finalise instructions from the client and I respectfully agree with that.

[52] Mr Sainsbury also emphasised when he gave his evidence that the assumptions of fact (in particular about the statements made or not made) contained in paragraph 40 are matters for me to resolve and he offers no view on them.

Plaintiff's submissions

[53] Mr Ewen closed his case for the plaintiff with the following key points (in summary):

(a) It is simply implausible to suggest that Mr Glover advised on the letter he obtained from EFTPOS. This is evidenced by:

(i) The ease with which Mr Mason obtained Ms Ioane's letters;

(ii) It beggars belief that Mr Mason would not pursue EFTPOS if Mr Glover told him that the information supplied was useless;

(iii) Mr Glover's evidence borders on bizarre relating to the information of Mr Michael Lu because he could not have advised Mr Mason about that document without the first question being "Who is Michael Lu?" Yet it was Mr Glover's evidence in the Court of Appeal that Mr Lu did not come up in the course of taking instructions;

(iv) Mr Glover was obliged to investigate, or at least discuss the contents of the key letter from EFTPOS with Mr Mason and clearly he did not;

(b) Mr Glover was also subject to an obligation to actively protect his client and a continuous obligation to review disclosure material that might be relevant to Mr Mason's defence.

(c) Whatever advice he had given Mr Mason earlier (without accepting that any such advice was given) about the EFTPOS letter, that needed to be revisited, because following disclosure there was now a further and proper foundation for Mr Mason's statement to the police that he had been expecting an EFTPOS machine. That evidence or information was the telephone records which showed that on 13 January Mr Mason made a call to EFTPOS.

(d) Mr Glover negligently failed to pursue this line of inquiry – in his own evidence he gave the disclosure a "quick flick through" and by failing to pursue this line of inquiry deprived Mr Mason of the opportunity to obtain the correct records.

(e) The prior instruction (if any) to Mr Mason to get better information became a secondary consideration. Mr Glover was obliged on the principles enunciated in *Acton v Graham Pearce & Co (a firm)*[5] to pursue this line further given the phone evidence. Put another way, the telephone records triggered the duty of independent action rather than simple reliance on Mr Mason.

(f) There is then a direct link between the failure to follow upon on the telephone record and the failure to obtain evidence which clearly demonstrated that Mr Mason had made a call as he said he had done and specifically requested an EFTPOS machine be delivered to him.

[54] Mr Ewen submits that had Mr Glover carried out the necessary inquiry as he was obliged to do he would have had four pieces of information that supported Mr Mason's case, namely:

(a) His statement to the courier that he was expecting an EFTPOS machine;

(b) His statement to the police that he had been expecting the EFTPOS machine;

(c) The phone records recording that he had made a request;

(d) The records ultimately produced by EFTPOS through Ms Ioane.

[55] Therefore he says that Mr Mason lost the opportunity or chance of putting this combination of material to a jury, and that Judge MacAskill's s 347 decision

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5 *Acton v Pearce & Co (a firm)* [1997] 3 All ER 909 (Ch D).

supported the basic proposition that there was a high probability of an acquittal had the evidence been obtained as it should have been.

[56] Overall Mr Ewen contends that, as in *Acton*, there is a clear nexus between Mr Glover's negligent failure to make proper inquiry on behalf of Mr Mason and the loss of chance to obtain an acquittal at the first trial. Thus, and in short, but for Mr Glover's acknowledged failure to appreciate what he had, namely mutually supportive pieces of evidence and information that would have inevitably led to the production of Ms Ioane's EFTPOS New Zealand records, there is a high probability that Mr Mason would have been acquitted.

Defendant's submissions

[57] Mr McVeigh submitted:

(a) Mr Glover's evidence about what happened is more plausible:

(i) It is simply not plausible that Mr Glover would say nothing about a key document to Mr Mason or that Mr Mason would not inquire about it before trial;

(ii) It is nonsense to suggest, as Mr Mason did, that Mr Glover would tell him that the EFTPOS letter would be produced when it clearly had no probative value at all;

(iii) Mr Mason signed a disclaimer that stated in simple terms that he would not give or call evidence – there was therefore no way for the EFTPOS document to be produced and no reason for Mr Mason to assume it would be produced;

(b) Mr Glover is more credible than Mr Mason:

(i) He is a very experienced lawyer with an unblemished record;

(ii) Mr Mason has convictions for dishonesty offences, namely burglary;

(iii) Mr Mason's associate, Mr Lu, was later convicted on drugs charges;

(iv) Mr Mason's whole account of why he signed for the parcel lacks any credibility – there was and is no plausible explanation for why Mr Mason dishonestly signed for a parcel sent from China addressed to "Rangiwahia";

(v) Mr Mason's attempt at explaining his dishonesty is equally implausible – he said Mr Lu may have arranged to have the parcel sent to a former occupant, Ms Rangiaho, a name known to Mr Lu from mail he might have seen on the fridge;

(c) Mr Glover's evidence should be preferred (in addition to the matters already raised):

(i) Mr Palmer's evidence is recent invention – multiple affidavits and pleadings claimed that the EFTPOS document was first discussed immediately after trial, but it is now said, with the belated support of Mr Palmer, that it happened after the first day of trial at a time when Mr Palmer was able to hear the alleged discussion;

(ii) Mr Palmer's evidence was confused and unpersuasive – he could not remember much about a trial he said he sat through;

(iii) Mr Mason was equivocal about pleading not guilty – stating that he was to plead not guilty unless further information turned up;

(iv) Mr Glover maintained a consistent position under cross examination, but reflecting his honesty, he made appropriate concessions even though potentially damaging to his position.

[58] On the critical issue of the standard of care, Mr McVeigh submits that the plaintiff must show that the error was one which no reasonably competent member of the legal profession, in the position of the lawyer, would have made.[6] He then says that Mr Glover's action fell within those that would be expected from a reasonably competent barrister. As to the nature of the duty, Mr McVeigh appeared content to adopt the agreed position, overlaid by the standard just mentioned.

[59] Mr McVeigh also maintains that Mr Mason caused his own loss. He was said to be careless by either not following up with EFTPOS NZ about the records or for not asking Mr Glover about it.

[60] On the question of causation, Mr McVeigh submitted that I must decide whether Mr Glover caused the loss and that Mr Mason must prove that he had a real and substantial chance and not a speculative one. He says further that if he succeeds in doing so, the evaluation of chance is part of the assessment of the quantum of the damage.[7]

[61] Mr McVeigh also referred to the leading case of *Benton v Miller & Poulgrain (a firm)*,[8] noting the guidance there that broad judgments are called for, and how in that case a third party Mrs Benton would have acted in the counterfactual scenario by reference to facts, matters and circumstances that existed at the particular time. He also submits that it must also be shown that the incompetence caused a wrong and unjust result.[9] That is, only if the production of the EFTPOS records would have produced a not guilty verdict can Mr Mason succeed.

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6 *Arthur J S Hall (a firm) v Simons* [2002] 1 AC 615 (HL); *Moy v Pettman Smith (a firm) and Another* [2005] 1 WLR 581 (HL); *Popat v Barnes* [2004] EWCA Civ 820; *Jung v Templeton* [2010] 2 NZLR 255 (HC).

7 *Powerbeat Canada Limited v Powerbeat International Ltd* [2002] 1 NZLR 820 (HC).

8 *Benton v Miller & Poulgrain (a firm)* [2005] 1 NZLR 66 (CA).

9 *Saif Ali v Sydney Mitchell & Co* [1980] AC 198 (HL).

[62] Taken together, I am told that I must assess the probability of the chance of a different result, having regard to all factors which took place at trial, including in this case the misdirection by the Judge.[10]

[63] It is also submitted that some account must be made of the plaintiff's contributory negligence. The short point being if I thought there was a 20% chance of an acquittal and the plaintiff was 50% responsible then the damage would be 10%.

[64] On the failure to identify the significance of the 0800 number, it is accepted that this was a mistake, but it needs to be put in its proper context – there was no reference to this number in the EFTPOS document, and the call is recorded as 1.27 pm and 1.32 pm which is different from the EFTPOS document which has a call at 5.35 pm.

Assessment

[65] In order to resolve this matter I must:

(a) Identify the nature and scope of the duty of defence counsel to obtain and then to advise an accused about information affecting his or her defence;

(b) Examine whether, as a matter of fact, Mr Glover complied with that duty;

(c) If Mr Glover did not comply with that duty, examine whether his failure to comply caused Mr Mason to suffer loss.

[66] Each of these issues spawns other subsidiary issues, but these are the focal point of my inquiry.

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[10] ie: the failure to direct the jury to assess *mens rea* at the time of the importation not delivery. See *Arthur J S Hall*, above n 6, at 731.

[67] As a preliminary point, the case was not argued under the specific heading of breach of contract. I therefore propose to simply proceed on the basis that the standard and duty of care applies for both breach of contract and negligence.

The standard of care

[68] Mr Mason must show that the alleged error made by Mr Glover was one that no reasonably competent barrister would have made.[11] As the Supreme Court stated in *Lai v Chamberlains*:[12]

> [77] ... Moreover, negligence is more than error of judgment. Lord Salmon in *Saif Ali* indicated why establishing negligence will not be easy:
>
> > "Lawyers are often faced with finely balanced problems. Diametrically opposite views may and not infrequently are taken by barristers and indeed by judges, each of whom has exercised reasonable, and sometimes far more than reasonable, care and competence. The fact that one of them turns out to be wrong certainly does not mean that he has been negligent."
>
> [78] ...There, the House of Lords was careful to recognise that the standard of care to be expected of any professional who works in an environment where judgment calls have to be made under time constraints and in difficult circumstances must not be set at a level which is unrealistic and must be assessed in context. ... And establishing that negligence is causative of loss will not be easy in circumstances where the direct cause of loss is the imposition of an independent judgment.

The duty to obtain information

[69] This case concerns the undoubted duty of defence counsel to take active steps to obtain information that might assist in the defence of an accused.[13] The failure by counsel to produce information that might have resulted in a different verdict may provide a proper basis for retrial[14] and for damages.[15]

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11 See [58].

12 *Lai v Chamberlains* [2007] 2 NZLR 7 (SC) at [77]-[78].

13 Refer *R v S* CA 179/95, 14 December 1995, where the Court of Appeal overturned a conviction and ordered a retrial because of a failure to pursue a line of inquiry relating to telephone records which would have corroborated the accused's testimony that he made a telephone call to the complainant.

14 Ibid.

[70] The scope of this duty is not amenable to exact definition, but it is common ground that:

(a) Defence counsel must make inquiries concerning evidence that might assist in the defence of a criminal charge;

(b) Defence counsel must be satisfied that all relevant information for the purpose of conducting the defence has been obtained;

(c) Defence counsel must discuss the information in his or her possession with the defendant prior to taking instructions on the conduct of the defence.

[71] All of this sets the frame for the assessment of Mr Glover's conduct.

Did Mr Glover comply with his duty to obtain information?

[72] Mr Ewen alleges two core failures by Mr Glover:

(a) He failed to discuss the EFTPOS record with Mr Mason; and

(b) He failed to identify the significance of the telephone records showing that Mr Mason made a call to EFTPOS on 13 January.

[73] Mr Ewen thus contends that individually and/or together these failures meant that Mr Glover did not properly advise and/or obtain informed instructions from Mr Mason about the conduct of his defence.

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[15] Refer *Acton*, above n 5, where the solicitors acting for a defendant were found to be negligent for failing to pursue a line of inquiry, namely the defendant's claim that the complainant was a liar who it transpired had forged documents said to implicate the defendant. The Court observed that the solicitors by failing to pursue this line of inquiry deprived Mr Acton of a legitimate defence, and the conviction was quashed. The solicitors were also held liable for the loss suffered by Mr Acton for their failure to investigate the defendant's claims about the complainant.

[74] Mr McVeigh accepts that the first alleged failure if proven must mean that Mr Glover was negligent. He does not accept however that the second failure by itself meant that Mr Glover was negligent.

[75] I therefore turn to examine the facts in relation to each alleged failure.

Did Mr Glover discuss the EFTPOS records with Mr Mason prior to trial?

[76] Yes, for the following reasons.

[77] First, I prefer Mr Glover's account as more plausible. I accept Mr McVeigh's basic contention that it is highly implausible that Mr Glover would simply forget to mention the EFTPOS records at all. It is also implausible that Mr Mason would not follow up on what was sent to Mr Glover. It is also highly unlikely that Mr Glover would advise Mr Mason that the records he received would be used at trial. Indeed I find it inconceivable that Mr Glover said after the depositions hearing that he would produce the EFTPOS records at trial (as Mr Mason asserted) when they plainly had no probative value at all. On their face the records sent to Mr Glover were wholly unhelpful to Mr Mason. They did not confirm that an EFTPOS machine was ordered by him or would be sent to him. His name and address is not mentioned anywhere. And it is not at all surprising that Mr Glover did not seek instructions to produce the records he had at trial.

[78] I nevertheless acknowledge that there is force to the proposition that it was likely that Mr Mason would have gone back to EFTPOS if Mr Glover had said the EFTPOS records were not helpful. It also does seem odd that the reference to Mr Lu was not raised by Mr Glover, had he turned his mind to the records and advised Mr Mason on them. But the uncertainty generated by the implausibility of these scenarios does not outweigh the implausibility of the EFTPOS records not being mentioned at all and then promoted by Mr Glover as something that would be introduced into evidence when they were so obviously unhelpful. Rather it is more likely that Mr Glover thought that the records sent to him were worthless and told Mr Mason as much because their lack of probative value was obvious.

[79] Second, and in any event, I find Mr Glover to be the more credible witness. There are essentially two reasons for this. Mr Mason's explanation for why he signed for the package appeared contrived. I agree with Mr Ewen's submission that it "established why not giving evidence [at the trial] was a good idea". Mr Mason could not and did not cogently explain why he signed for a package knowing it was not addressed to him. While the name "Rangiwahia" bears some resemblance to a former occupant of Mr Mason's address, Rangiaho, quite how he could have thought the package contained an EFTPOS machine is unclear. The addition of a "T" when he signed for it is also unexplained. Regrettably Mr Mason's attempt at an explanation left no doubt in my mind that he was, as Mr McVeigh suggested, "making it up as you go along". The following exchange in cross-examination about Mr Mason's affidavit statement that Mr Lu may have sent the package to him illustrates the point:

> Q. I suggest that's just nonsense. Mr Lu wouldn't have done that without you, knowing full well that you knew what was in it and that you would accept it and not send it away. That's right isn't it?
>
> A. Not at all. I don't know what he was thinking.
>
> Q. So just go back to that. How would Lu have known about the previous tenant?
>
> A. There was mail sitting on the fridge. It had been there, mail turned up from time to time from her, I left it in a bundle on the fridge.
>
> Q. But the police didn't find anything did they?
>
> ...
>
> Q. So Mr Lu's just happened to pluck a name out from seeing some mail on your fridge did you say?
>
> A. Yeah it's just in a bundle sitting on top of the fridge.
>
> Q. Come on Mr Mason you're just making this up as you go along aren't you?
>
> A. No I'm not.
>
> Q. Can you just explain to me then, if you didn't notice the Chinese lettering on it, just assume that you're right and you just simply did not notice that Chinese lettering we can see at document 14, how come you thought an EFTPOS machine that had been ordered by you was sent to someone by the name of Rangiwahia by EFTPOS?

A. Because we never got my name right the day before when I was talking to the EFTPOS company.

Q. And EFTPOS just happened to pick also mistakenly the name of Rangiwahia, that was certainly never given by you to them and they wouldn't have the faintest clue who that was?

A. No as I said I realised after the parcel, the courier had gone, that wasn't the parcel I wanted.

Q. You signed Rangiwahia on the docket?

A. I did because I had to accept the parcel that was there or it would have got taken away and we wouldn't have had a machine for that night. That's why I was at home.

[80] The relevance of this is not about whether Mr Mason was guilty of the alleged offending. Rather, the implausibility of his explanation about his reason for accepting the parcel casts doubt on the veracity of his testimony overall. By comparison Mr Glover's evidence was presented in a clear way, without any attempt at embellishment and indeed he readily and responsibly made concessions harmful to his position though it would have been tempting for him to rebut them. I refer here specifically to the omission to identify the significance of the 0800 number. He readily accepted that he should have noticed this number and that if he had, he would have inquired further about it. It would have been easy for him to seek to diminish its significance or, if he were dishonest, to simply say he cannot recall whether he identified the significance of the number.

[81] This then leads to my second reason for preferring Mr Glover's credibility. In order for Mr Mason's narrative to be correct, Mr Glover would have had to lie. Yet there is nothing in the cross examination that remotely suggests to me that Mr Glover is lying. Mr Ewen makes much of what he calls "an unguarded admission that Mr Mason had contacted him following his contact with EFTPOS." Yet what Mr Glover said was simply that the document did not say any of the things Mr Mason said it would say. To the extent it is an admission, it confirms Mr Glover's overall evidence that the document was worthless.

[82] I must then overlay this with Mr Glover's longstanding and unblemished record as a solicitor of the High Court, a fact not challenged by Mr Ewen. In contrast, Mr Mason has been convicted of dishonesty offending and was a close

associate of a now convicted drug offender. In combination, Mr Mason has fallen well short of coming close to the requisite mark for establishing such a profound allegation of dishonesty against Mr Glover.

[83] I note for completeness that Mr Ewen placed much emphasis on Mr Glover's mistaken chronology of events. But Mr Glover can hardly be criticised for not having a fine grained recollection of the timing of disclosure or other matters, given that it has been several years since they occurred and that parts of his file did not survive the earthquakes.

[84] Third, I do not accept that the conversation about the EFTPOS letter occurred after the first day of the trial. While Mr Palmer presented as a forthright witness, his recollection of the structure of the trial was unclear. By contrast, Mr Glover's recollection was relatively clear on this aspect and plausible. If it had been made plain to him that the EFTPOS letter was wrong before the end of the trial, then I accept Mr Glover's evidence that he would have raised the matter with the Judge. There is no obvious reason why he would not take that step. But I qualify this finding by noting, as Mr Glover did, that we are reconstructing events that occurred over eight years ago. The timing of discussions cannot be fixed with exactitude. Nothing I say here should be taken to be an adverse finding as to Mr Palmer's honesty.

[85] Accordingly, all of these factors together lead me to the conclusion that Mr Glover raised the EFTPOS records with Mr Mason and dismissed them as unhelpful. I also accept Mr Glover's evidence that Mr Mason offered to check with EFTPOS to obtain any further information that might help his case. Mr Mason maintains that none of this happened, so there is no middle ground explanation. In any event Mr Mason has failed to persuade me that the EFTPOS records were not discussed. His primary charge has therefore fallen at the first hurdle.

[86] There however remains the residual issue of whether Mr Glover advised Mr Mason and/or was wrong to rely on Mr Mason to make further inquiries with EFTPOS. It appears that the content of the records was not discussed in any depth. But the records were so obviously worthless that there was little for Mr Glover to

discuss. Indeed, as I have found that Mr Mason was shown the records, it would have been a simple enough matter for him to highlight those parts he thought supported his case. In those circumstances I do not think Mr Glover can be criticised for giving them relatively short shrift. I also see nothing wrong with Mr Glover relying on his client to make further inquiries with EFTPOS. Mr Mason had the contact details. He had already obtained some information from them. He also had the background necessary to pursue the inquiries. It was also a relatively simple matter for him to call EFTPOS.

Did Mr Glover fail to identify the significance of the telephone records showing that Mr Mason made a call to EFTPOS on 13 January?

[87] Yes. Mr Glover accepted that he failed to identify the record of the call to EFTPOS by Mr Mason on 13 January and its significance. This then calls for an examination as to whether Mr Glover was then obliged to reactivate the inquiry with EFTPOS. I think so, for the following reasons:

(a) The initial correspondence drew no obvious link to Mr Mason. But the phone records did corroborate Mr Mason's account of what had happened.

(b) Had Mr Glover been alert to the number and its significance, he was obliged to raise it with him, being information directly relevant to Mr Mason's case.

(c) I also proceed on the basis (and I have every confidence) that Mr Glover would have performed his duty and pressed Mr Mason on the EFTPOS communication in light of this new material had he realised its significance.

(d) Therefore, the failure to identify the significance of the number inevitably meant that Mr Glover failed to discharge his consequential duty to advise Mr Mason on its significance and with the inevitable result that a proper line of further inquiry was not pursued.

[88] Balanced against this analysis, by the time the records were disclosed, Mr Glover had already read the EFTPOS documents which showed nothing of significance. He had already left the task of follow up with Mr Mason. So it is understandable that Mr Glover was not searching for material that might link Mr Mason to EFTPOS. Indeed he already had the material he thought he might get from EFTPOS. Further there is nothing on the face of the records to suggest there was a call to EFTPOS. It was simply a reference to a 0800 number. That number is not recorded on the document that was supplied by EFTPOS. It might be said therefore that it is unduly onerous to expect counsel to scour phone records and then to assume that a 0800 number might be significant, even though he or she has already explored the obvious line of inquiry that might flow from it without any success. I am therefore not satisfied that Mr Glover's error qualifies as negligence. As the Supreme Court said in *Lai*, the error "must be assessed in context", including the expectation in this case that Mr Mason was going to press EFTPOS for more information.

[89] Nevertheless, if I am wrong about this, I am going to proceed on the basis that Mr Mason has established that Mr Glover negligently erred by not identifying the significance of the 0800 number, by failing to advise Mr Mason about the significance of that information and by then failing to take instructions in light of it.

[90] Before turning to the issue of causation, I must address the objection raised by Mr McVeigh to the late emergence of this error. The failure to identify the phone records was not pleaded. That pleading omission is very surprising given the long history of this matter. It does not accord with the basic requirement to plead the essential particulars of a claim. It meant that Mr Glover has been deprived of the opportunity to respond in the proper way, including any appropriate admissions, denials or affirmative defences tailored to this issue. For example there is no pleading as to the issue of causation or contributory negligence in light of this error. But I am prepared to give Mr Ewen the benefit of the doubt and assume that this error first became apparent to him through cross-examination. The basic claim has always been that Mr Glover was obliged to pursue the EFTPOS inquiry to a conclusion and he did not. The failure then by Mr Glover to pick up on the phone records could be said to simply be evidence supporting that underlying breach of

duty. The pleadings failure nevertheless means that there can be no objection to proper regard being had to the issue of contributory negligence. It may also be relevant to the issue of costs.

Causation/Loss

[91] The assessment of causation (and damages) in this case must be based on a counterfactual hypothesis, which assumes that the phone record had been identified. I take my guidance for this assessment from the steps taken by the Court in *Acton*,[16] overlaid with the principles adopted by the Court of Appeal in *Benton*[17] and drawn from *Allied Maples*.[18] In short, this calls for an assessment of:

(a) Whether identification of the phone record of the EFTPOS call would have stimulated further inquiry; and then, if so,

(b) Whether as a result of such inquiry the correct EFTPOS document would have been produced; and

(c) Whether production of that document would have led to a s 347 discharge or acquittal.

[92] Each limb of this assessment will require examination of various hypothetical scenarios. Where that assessment involves a step by the plaintiff, an orthodox on balance threshold will be applied. Where the assessment involves a step by a third person, the threshold test is whether there was a substantial chance of that step occurring. It is the probability of this chance that is then the focal point for damages assessment. As stated in *Benton*:

> [50] In making a "loss of chance" assessment, broad judgments are called for. At one end of the spectrum, very low probabilities are unlikely to be reflected in an award of damages. So if the chance of avoiding an adverse event is as low as say one in ten, a Court will probably reject the claim rather than fix damages at ten per cent of the cost to the plaintiff associated with those adverse events.

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16 Above n 5, at 932-935.
17 Above n 8, at [48]-[53].
18 *Allied Maples Group Ltd v Simmons & Simmons (a firm)* [1995] 1 WLR 1602 at 1609.

[93] I would add one qualifier. The rather linear approach adopted in *Acton* does not apply easily to the facts in this case. In *Acton*, the negligence meant that evidence establishing guilt was erroneously admitted. Here, as I will explain below, the evidence only has indirect relevance to the elements of the offending, if at all.

[94] In any event, I must first assess whether competent counsel and/or Mr Mason would have searched further with EFTPOS (against a backdrop where the initial contact proved fruitless). Assuming that the answer to that question is yes, I must assess how EFTPOS would have responded to a further request for information and the likelihood of EFTPOS producing information helpful to Mr Mason's case. Third, I must assess the likelihood of competent counsel producing whatever EFTPOS might provide (either for the purpose of a s 347 application or a jury trial). Fourth, assuming that something is produced, I must decide the chance of either a successful s 347 application or the chance of an acquittal. Fifth, if there is a substantial chance of a s 347 discharge or an acquittal I must assess the likelihood of that prospect for the purpose of setting damages, if any.

Frame for assessments

[95] The frame for these assessments will be the state of affairs at the time of disclosure of the phone records and the information then available to counsel. I do not have regard to the previous trial verdict or the discharge. To do so would be to improperly conflate the factual with the counterfactual. They are jury or judicial utterances made in the circumstances then confronting the jury and Judge. Those circumstances do not exist for the purpose of my evaluation, and to place any weight on them now would be to undermine the counterfactual exercise.

[96] The state of affairs, however, includes matters of fact, for example documents that exist and would have been available to the defence on proper inquiry. This must include the record of the EFTPOS request later produced by Ms Ioane. I do not think it can be doubted now that the record exists or that it would not have been discoverable. Further, I will assume that the Crown case would remain largely unchanged, assuming the matter went to trial.

Further inquiry?

[97] I have already resolved that Mr Glover would have pressed Mr Mason further on the EFTPOS documentation in light of the phone records. But given my findings that Mr Mason was already tasked to get further information, it is not obvious to me that Mr Mason would have called EFTPOS again, assuming that he had not already done so. After all Mr Mason already knew that he had made the call, so the phone record would not have come as a surprise to him. However I think it is fair to assume that Mr Glover would have been more energised about the EFTPOS information because there was now evidence of the fact of the call having been made from Mr Mason's home. I am therefore prepared to find that with this fresh information and likely impetus, he or Mr Mason would have sought further information from EFTPOS in light of the phone record.

EFTPOS response?

[98] There then must have been a reasonable chance that EFTPOS would have produced the record later produced by Ms Ioane. Conversely I am not prepared to assume that EFTPOS would not discover that record on closer inspection of their files. This is not about accepting the evidence given by Ms Ioane for the purpose of this case. Rather I am making an assessment based on the information that would have been available to EFTPOS and the likely response to a persistent inquiry.

Production of EFTPOS record?

[99] It is also likely that competent defence counsel would seek to produce the correct record. It, as Mr Ewen says, ostensibly supports Mr Mason's statement that he was expecting an EFTPOS machine. This in turn supports the basic contention that Mr Mason was an innocent handler of the package.

Section 347 discharge and/or acquittal?

[100] Having said that the chance of discharge or acquittal based on the production of the correct EFTPOS record is low. Before setting out my reasons for this, it is necessary to understand the elements of the offending and essential cases for the Crown and for the defence.

[101] In order to prove that Mr Mason imported drugs, the Crown must satisfy the jury beyond reasonable doubt that Mr Mason imported or brought drugs into New Zealand. In a courier situation, that importation will end at the port. Evidence of post importation conduct might be used to support an inference that an accused aided or abetted the importation. But a jury must be clearly told that acts following the importation cannot themselves be the basis for liability. The significance of this is that whatever Mr Mason did after importation is only indirect and at most circumstantial evidence that might support the charge of importation. That evidence as a matter of law cannot be determinative.[19] Accordingly, Mr Mason's receipt of the package and lack of explanation alone could not provide a basis for a verdict of guilt. There always needed to be evidence linking him to the importation.

[102] The Crown case had (and has in the counterfactual) four key parts:

(a) The EFTPOS explanation for receipt of the package is fanciful;

(b) The other people who were living at the address at the time and Ms Rangiaho, a past occupant, were all excluded from the investigation;

(c) Mr Mason admitted to Detective Pritchard that he knew someone in China;

(d) Mr Mason wrote the name "T Rangiwahia" on the delivery docket and then signed it under that name.

[103] On the information available to me, the defence case would be that:

(a) There is no evidence that Mr Mason knew about the importation of the drugs into New Zealand;

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[19] *R v Wickremasinghe* CA137/03, 21 August 2003; *R v Mason*, above n 2.

(b) A request was made on the day before the drug raid by someone called "Bruce" to send an EFTPOS machine to the "Other Manager" at Mr Mason's address;

(c) A call was made from Mr Mason's phone at about the same time the request was made;

(d) Mr Mason greeted the courier driver with: "EFTPOS machine?"

(e) Mr Mason explained to the police that Rangiwahia was a previous tenant, and that he "squirreled" his name thinking that it was the courier dropping off an EFTPOS machine;

(f) Mr Mason also told the police that he had spilled alcohol on an EFTPOS machine at Heaven Nite club last week;

(g) Mr Mason signed for T Rangiwahia, because the courier told him the package was for Rangiwahia;

(h) Mr Mason said that there will be other mail for Rangiwahia somewhere.

[104] Turning then to the chance assessment.

[105] First, as I have said, post importation conduct is only indirectly relevant to proving the elements of drug importation. The mere receipt of the drugs cannot be determinative of guilt. A corollary of this is that the EFTPOS request is therefore unlikely to be determinative of the verdict. Significantly, a jury properly directed and seized of the evidence, would be unlikely to find, beyond reasonable doubt, that Mr Mason knew about the importation, with or without the correct EFTPOS record. At most the signing for the package as or for T Rangiwahia might suggest some connection to the importation. But there is simply no direct evidence of knowledge or intent upon which to graft the mere receipt of the drugs for or as Rangiwahia. Without that evidence the charge of importation must fail.

[106] Second, if I am wrong and the jury were to infer guilt from the receipt of the package alone, the significance of the EFTPOS request is that it might support an inference of innocent handling – i.e. Mr Mason was expecting an EFTPOS machine and signed for it on that basis. But in order to reach that view the jury would have to overcome the fact that Mr Mason deliberately signed the delivery docket as or for "T Rangiwahia". There is no evidence linking the request to "T Rangiwahia". There is no reference to that name in the correct EFTPOS document. In the absence of evidence from Mr Mason, the jury could only speculate on why he assumed that a package addressed to Rangiwahia included an EFTPOS machine. By contrast, the easier and more plausible inference to be drawn from this deliberate act is that Mr Mason did not think that the package included an EFTPOS machine and signed for Rangiwahia anyway.

[107] As to whether Mr Mason would be called to give evidence, I find it highly unlikely that competent counsel would call him. His explanation for signing for or as T Rangiwahia is not enhanced by oral repetition. This, combined with the risk ordinarily associated with cross examination strongly argues against calling Mr Mason.

[108] Third, the jury might alternatively reason that Mr Mason mistakenly assumed that the package might contain the EFTPOS machine, or that he kept it just in case EFTPOS addressed it to the wrong person. The production of the correct EFTPOS record also supports such an inference. The jury might then place weight on the fact that he signed for the parcel using his usual signature so there is no additional duplicity – a point emphasised by Mr Glover at the first trial. But I do not think this reasoning is likely on the evidence. The courier told him that the package was for "Rangiwahia". Mr Mason therefore signed for a package knowing it was not addressed to him. The package was also covered in Chinese writing and recorded that it was sent from China, making it highly unlikely to contain an EFTPOS machine sent within New Zealand. These are strong indicators that Mr Mason was not mistaken when he signed for Rangiwahia.

[109] In these circumstances, I am unable to find that the production of the correct record would have made a material difference to the outcome and place the chance

of doing so at no more than 10%-20%. In this regard I allow a small prospect of unsubstantiated jury reasoning that while Mr Mason signed for T Rangiwahia inferring guilt, he still thought that it contained the EFTPOS machine.

[110] As suggested in *Benton*, had I found a negligent error, I would have dismissed Mr Mason's claim in any event. The chance of a materially different outcome based on the production of the record is too low. I am fortified in this view because Mr Mason contributed to his own loss by not actively following up with EFTPOS prior to trial. A proper discount for that contribution would have resulted in negligible damages, based on a 10-20% chance.

[111] It should be clear that I am not saying that Mr Mason would be found guilty if retried. To do so would be to proceed from the unproven counterfactual assumption that the police satisfied the jury of the elements of the offence. Indeed, the most likely result is that Mr Mason would be discharged or acquitted in any event because there is no direct evidence that Mr Mason knew that the drug was being imported.

Judge MacAskill's decision

[112] While as I have said, judicial utterances in the factual are irrelevant to my determination of the counterfactual, it would be deficient not to address the apparently conflicting view of Judge MacAskill on the essentially same facts. Before doing so, nothing I say here can or should have any bearing on the discharge.

[113] The Judge reasoned that:

> [17] ... While the bare facts of the accused's acceptance of delivery of the package and his signing for it under the name of T Rangiwahi might reasonably have justified an inference of guilt in the importation of the drug, the evidence as a whole more than equally justified the conclusion that the accused believed that he had taken delivery of an EFT-POS machine. In the face of the uncontested evidence supporting this innocent explanation, to have left it open to the jury to convict on the basis of the inferences relied upon would have been to invite the jury to speculate against the weight of the evidence.

[114] I agree with the outcome, but as will be apparent, I do not agree with either of the key assumptions of the Judge's reasoning. I do not agree that signing for the

package "justified an inference of guilt" or that "the evidence as a whole justified the conclusion that the accused believed that he had taken delivery of an EFTPOS machine". Signing for a package is not direct evidence, beyond reasonable doubt, of requisite knowledge at the time of importation. It is at most indirect evidence of culpability. In order to justify an inference of guilt sufficient to convict the accused there must be other direct evidence of knowledge prior to the cessation of importation. There was none.

[115] The second assumption that Mr Mason believed he was receiving an EFTPOS machine was plainly still contestable and in my respectful opinion should have been left to the jury to resolve (assuming that there was in fact a proper basis to put the charge to a jury).

[116] Unfortunately it appears that these proceedings were also commenced erroneously assuming that the Judge's dichotomic assumptions were correct. While that may be understandable, the assumptions do not withstand close inspection for the reasons set out above.

Result

[117] Mr Glover told Mr Mason about the EFTPOS record he received. For whatever reason Mr Mason did not act on that advice.

[118] Mr Glover however erred by not identifying the significance of the record of a phone call from Mr Mason's phone to EFTPOS on the day before the drug raid. But when that error is considered in the full circumstances, Mr Glover did not breach the requisite standard of care expected of defence counsel. Mr Glover had by this stage left the task of gathering further information with Mr Mason. He quite logically had assumed that there was nothing EFTPOS could offer to help the case. While in hindsight it would have been preferable for Mr Glover to check the records and to follow up on what they revealed, I consider that it would be unduly onerous to treat as negligent Mr Glover's oversight in this regard.

[119] Nevertheless, if I am wrong in this assessment, the chance of a different outcome, because of the production of the EFTPOS record, is too low to warrant an

award of damages. The claim proceeds from the flawed assumptions that the acceptance of delivery was sufficient to infer guilt and/or that the EFTPOS records rebutted that inference. In my view a jury properly directed would not find guilt, with or without the EFTPOS evidence. And, in any event, the EFTPOS record does not cogently rebut the fact that Mr Mason signed for a package covered in Chinese writing and sent from China, as "T Rangiwahia", and knowing it was not addressed to him.

[120] The claim is therefore dismissed.

Costs

[121] If costs cannot be agreed, the parties may file submissions.

Solicitors:
The Law Store, Porirua City, for Plaintiff (Counsel Acting: D A Ewen)
Lane Neave, Christchurch, for Defendant (Counsel Acting: C A McVeigh QC)

Figure 1

00014

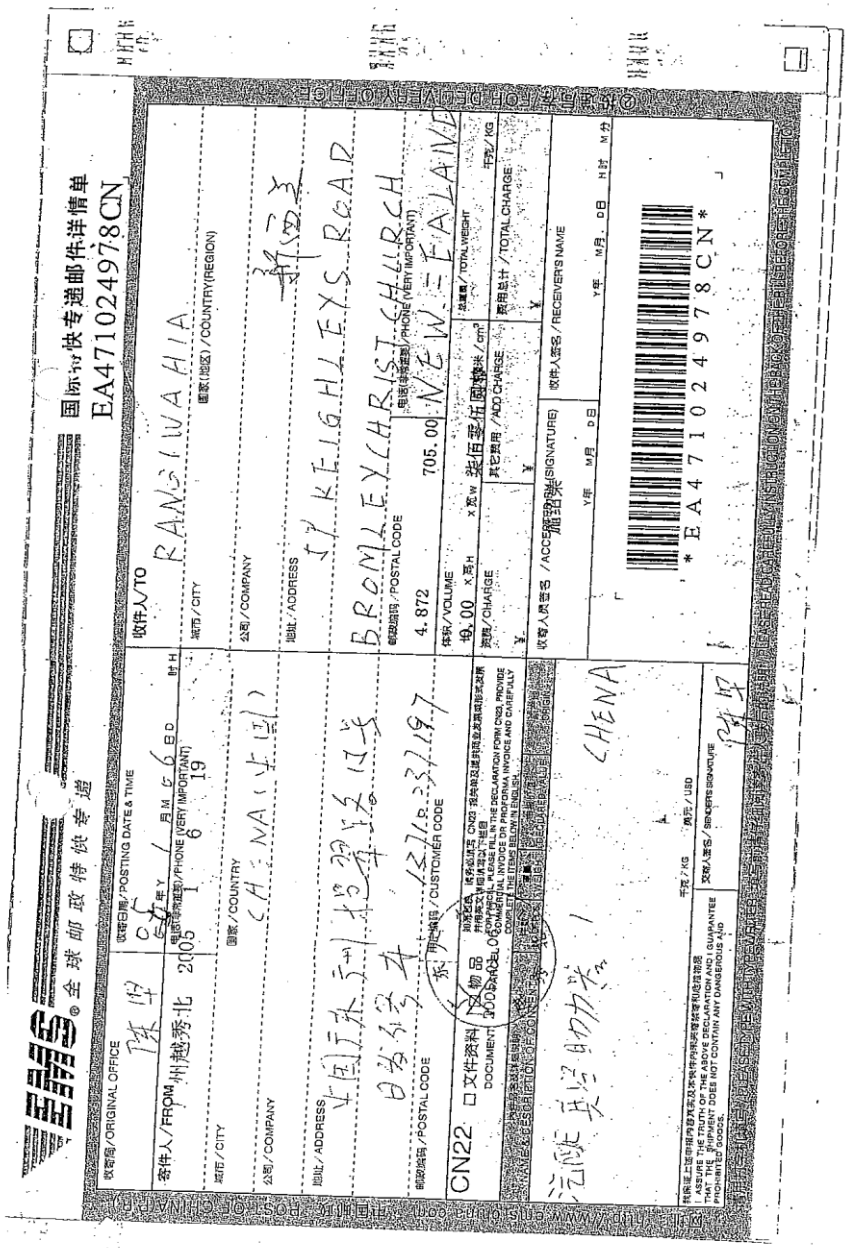
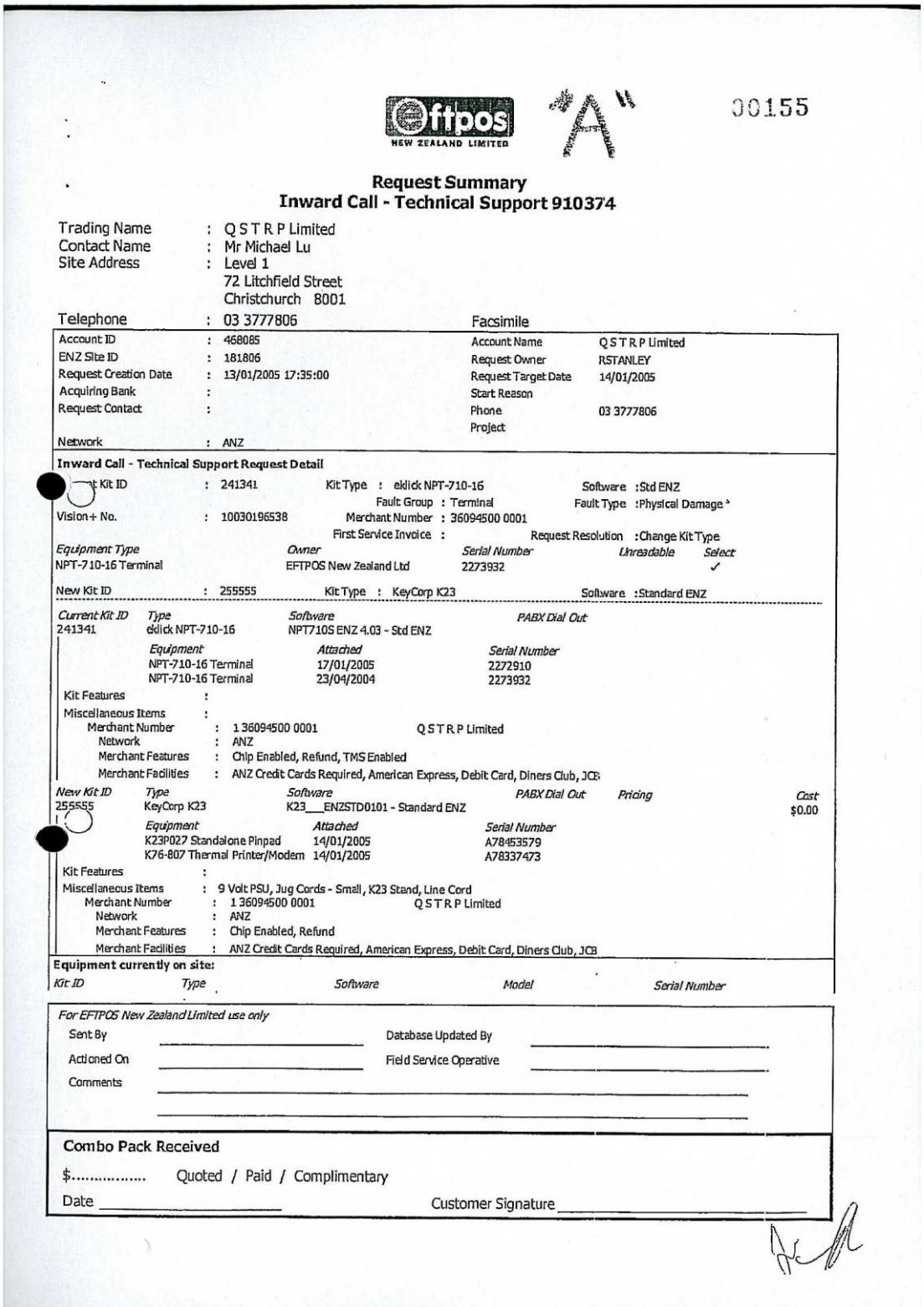


Figure 2


EXHIBIT No. "1"
DISTRICT COURT - DEPOSITIONS
Police -v- A. Mason
No. 5009006005
13.05.15
Registrar
rPost
DOCUMENT
Date 14/01/15
Business Unit No.
Route No. 6082
Delivery Status Codes
1 Delivered
2 Card to Call - Left at Post Shop
3 Card to Call - Returned to Depot
4 No Attempt Before 9am
5 Other Reason
Delivery Type
B = Business
R = Residential
Delivery Employee's Name
Verified by
NON SIGNATURE
rPost
ierpost.co.nz
RR 078 813 577 NZ
SIGNATURE REQUIRED
NAME (PLEASE PRINT CLEARLY)
SIGNATURE
Paterson
SURNAME Frost
(PLEASE PRINT)
SIGNATURE
Received in good order and condition
DELIVERY
5445204 I7
EE 051 443 630 NZ
SIGNATURE REQUIRED
NAME (PLEASE PRINT CLEARLY)
SIGNATURE
Delivery Status
Delivery Type
Delivery Time
Reason for Non Delivery:
Hand-over / Notes
5
6
7
8
9
10
11
12

Figure 3



00155

Request Summary
Inward Call - Technical Support 910374

Trading Name : Q S T R P Limited
Contact Name : Mr Michael Lu
Site Address : Level 1
72 Litchfield Street
Christchurch 8001

Telephone : 03 3777806 Facsimile

Account ID	: 468085	Account Name	Q S T R P Limited
ENZ Site ID	: 181806	Request Owner	RSTANLEY
Request Creation Date	: 13/01/2005 17:35:00	Request Target Date	14/01/2005
Acquiring Bank	:	Start Reason	
Request Contact	:	Phone	03 3777806
		Project	
Network	: ANZ		

Inward Call - Technical Support Request Detail

Current Kit ID : 241341 Kit Type : eklick NPT-710-16 Software :Std ENZ
Fault Group : Terminal Fault Type :Physical Damage
Vision+ No. : 10030196538 Merchant Number : 36094500 0001
First Service Invoice : Request Resolution :Change Kit Type

Equipment Type	*Owner*	*Serial Number*	*Unreadable*	*Select*
NPT-710-16 Terminal	EFTPOS New Zealand Ltd	2273932		✓

New Kit ID : 255555 Kit Type : KeyCorp K23 Software :Standard ENZ

Current Kit ID	*Type*	*Software*	*PABX Dial Out*
241341	eklick NPT-710-16	NPT710S ENZ 4.03 - Std ENZ	

Equipment	*Attached*	*Serial Number*
NPT-710-16 Terminal	17/01/2005	2272910
NPT-710-16 Terminal	23/04/2004	2273932

Kit Features :
Miscellaneous Items :
Merchant Number : 1 36094500 0001 Q S T R P Limited
Network : ANZ
Merchant Features : Chip Enabled, Refund, TMS Enabled
Merchant Facilities : ANZ Credit Cards Required, American Express, Debit Card, Diners Club, JCB

New Kit ID	*Type*	*Software*	*PABX Dial Out*	*Pricing*	*Cost*
255555	KeyCorp K23	K23___ENZSTD0101 - Standard ENZ			$0.00

Equipment	*Attached*	*Serial Number*
K23P027 Standalone Pinpad	14/01/2005	A78453579
K76-807 Thermal Printer/Modem	14/01/2005	A78337473

Kit Features :
Miscellaneous Items : 9 Volt PSU, Jug Cords - Small, K23 Stand, Line Cord
Merchant Number : 1 36094500 0001 Q S T R P Limited
Network : ANZ
Merchant Features : Chip Enabled, Refund
Merchant Facilities : ANZ Credit Cards Required, American Express, Debit Card, Diners Club, JCB

Equipment currently on site:

Kit ID	*Type*	*Software*	*Model*	*Serial Number*

For EFTPOS New Zealand Limited use only

Sent By _____ Database Updated By _____
Actioned On _____ Field Service Operative _____
Comments _____

Combo Pack Received

$..... Quoted / Paid / Complimentary

Date _____ Customer Signature _____

eftpos NEW ZEALAND LIMITED

Request Summary
Inward Call - Technical Support 910374

241341	eklick NPT-710-16	Std ENZ	NPT-710-16 Terminal	2272910
241341	eklick NPT-710-16	Std ENZ	NPT-710-16 Terminal	2273932
255555	KeyCorp K23	Standard ENZ	K23P027 Standalone Pinpad	A78453579
255555	KeyCorp K23	Standard ENZ	K76-807 Thermal Printer/Mod	A78337473

Task: 4500638 **Send Equipment** **Target Date: 14/01/2005**

Kit ID	*Equipment Type*	*Owner*	*Serial Number*	*Unreadable*	*Select*
255555	9 Volt PSU	EFTPOS New Zealand Ltd			✓
255555	Jug Cords - Small	EFTPOS New Zealand Ltd			✓
255555	K23P027 Standalone Pinpad	EFTPOS New Zealand Ltd	A78453579		✓
255555	K23 Stand	EFTPOS New Zealand Ltd			✓
255555	K76-807 Thermal Printer/Modem	EFTPOS New Zealand Ltd	A78337473		✓
255555	Line Cord	EFTPOS New Zealand Ltd			✓

Task: 4500639 **Awaiting Equipment** **Target Date: 21/01/2005**

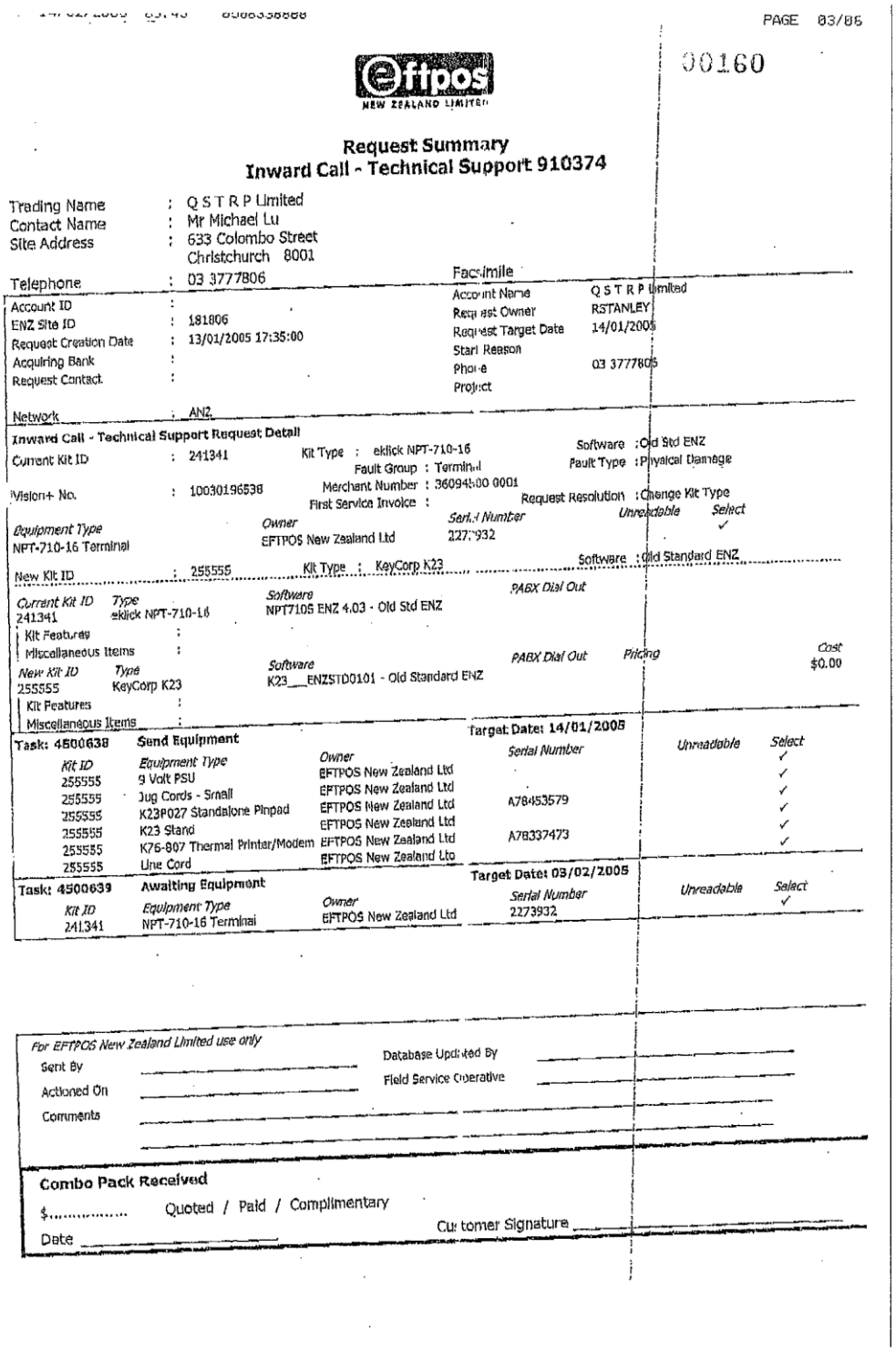
Kit ID	*Equipment Type*	*Owner*	*Serial Number*	*Unreadable*	*Select*
241341	NPT-710-16 Terminal	EFTPOS New Zealand Ltd	2273932		

EXHIBIT NOTE

This is the annexure marked **"A"** referred to in the within affidavit of **ADRIAN NICHOLAS MASON** and sworn at Christchurch this 1st day of February 2006 before me:

A Solicitor of the High Court of New Zealand

Figure 4



PAGE 03/05

00160

eftpos NEW ZEALAND LIMITED

Request Summary
Inward Call - Technical Support 910374

Trading Name : Q S T R P Limited
Contact Name : Mr Michael Lu
Site Address : 633 Colombo Street
Christchurch 8001
Telephone : 03 3777806
Facsimile

Account ID :
ENZ Site ID : 181806
Request Creation Date : 13/01/2005 17:35:00
Acquiring Bank :
Request Contact :

Account Name Q S T R P Limited
Request Owner RSTANLEY
Request Target Date 14/01/2005
Start Reason
Phone 03 3777805
Project

Network : ANZ

Inward Call - Technical Support Request Detail

Current Kit ID : 241341 Kit Type : eklick NPT-710-16 Software : Old Std ENZ
Fault Group : Terminal Fault Type : Physical Damage
Vision+ No. : 10030196536 Merchant Number : 360945 00 0001
First Service Invoice : Request Resolution : Change Kit Type

Equipment Type	Owner	Serial Number	Unreadable	Select
NPT-710-16 Terminal	EFTPOS New Zealand Ltd	227[illegible]932		✓

New Kit ID : 255555 Kit Type : KeyCorp K23 Software : Old Standard ENZ

Current Kit ID	Type	Software	PABX Dial Out
241341	eklick NPT-710-16	NPT7105 ENZ 4.03 - Old Std ENZ	
Kit Features :			
Miscellaneous Items :			

New Kit ID	Type	Software	PABX Dial Out	Pricing	Cost
255555	KeyCorp K23	K23___ENZSTD0101 - Old Standard ENZ			$0.00
Kit Features :					
Miscellaneous Items :					

Task: 4500638 **Send Equipment** Target Date: 14/01/2005

Kit ID	Equipment Type	Owner	Serial Number	Unreadable	Select
255555	9 Volt PSU	EFTPOS New Zealand Ltd			✓
255555	Jug Cords - Small	EFTPOS New Zealand Ltd			✓
255555	K23P027 Standalone Pinpad	EFTPOS New Zealand Ltd	A78453579		✓
255555	K23 Stand	EFTPOS New Zealand Ltd			✓
255555	K76-807 Thermal Printer/Modem	EFTPOS New Zealand Ltd	A78337473		✓
255555	Line Cord	EFTPOS New Zealand Ltd			✓

Task: 4500639 **Awaiting Equipment** Target Date: 03/02/2005

Kit ID	Equipment Type	Owner	Serial Number	Unreadable	Select
241341	NPT-710-16 Terminal	EFTPOS New Zealand Ltd	2273932		✓

For EFTPOS New Zealand Limited use only

Sent By _____ Database Updated By _____
Actioned On _____ Field Service Operative _____
Comments _____

Combo Pack Received

$..... Quoted / Paid / Complimentary
Date _____ Customer Signature _____

00161

Request Summary
Inward Call - Technical Support 910374

Dispatch Detail

Receive Equipment: **Site**

Dispatch To : Warehouse Wellington Store
: 69 Tory Street
Wellington 6001

Kit ID	Type	Software	Model	Serial Number

Date Returned : Courier Out : Cap 00444733

Send Equipment: **Site**

Dispatch To : Other Manager
: 59 Keighleys Rd
Bromley
Christchurch 8001

Kit ID	Type	Software	Model	Serial Number

Dispatch Date : Courier Out :

Send Equipment: **Site**

Dispatch To : Site Q S T R P Limited
:

Kit ID	Type	Software	Model	Serial Number
255555	KeyCorp K23	Old Standard ENZ	K76-607 Thermal Printer/Mo	478337473
255555	KeyCorp K23	Old Standard ENZ	K23PD27 Standalone Pinpad	478453579

Dispatch Date : 14/01/2005 Courier Out : sh 17391061 sat 01659433

Send Return Box:

Dispatch To : Site Q S T R P Limited
Level 1
72 Litchfield Street
Christchurch 8001

Description :

Call History

Call Type: Scheduled Call	Rating:	Status: Completed	Created	25/01/2005 11:12:00
Call Note		Contact: disconnected	By	ALYON
disconnected - sent a E11 with rtd ticket.			Updated	25/01/2005 11:13:00
			By	ALYON
Call Type: Awaiting Equipment	Rating:	Status: Completed	Created	14/01/2005 16:43:00
Call Note		Contact:	By	RSTANLEY
Phone disconnected-not in directory			Updated	17/02/2005 14:02:00
			By	REIDK
Call Type: Inward Call	Rating:	Status: Completed	Created	13/01/2005 17:35:00
Call Note		Contact: Bruce	By	RSTANLEY
split alchol over terminal, several buttons stiff, not working; "Saturday Sticker & Delivery" 59 Keighleys Rd, Bromley. Ch.Ch. Please swapout a full kit K23 & stand. Cheers		Send to:	Updated	14/01/2005 16:43:00
			By	RSTANLEY