NOTE: PUBLICATION OF NAME OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 139 CRIMINAL JUSTICE ACT 1985.

NOTE: PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF ANY PERSONS UNDER THE AGE OF 17 YEARS WHO APPEARED AS A WITNESS PROHIBITED BY S 139A OF THE CRIMINAL JUSTICE ACT 1985.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA47/2013
[2013] NZCA 255

BETWEEN	DC (CA47/2013) Appellant
AND	THE QUEEN Respondent

Hearing:	16 April 2013
Court:	Harrison, Allan and Clifford J
Counsel:	N J Sainsbury for Appellant M R Davie for Respondent
Judgment:	25 June 2013 at 10.15 am

JUDGMENT OF THE COURT

A The application for an extension of time to appeal is granted.

B The appeal against conviction is allowed. The convictions are quashed. The sentence of community work is set aside.

C The appellant is discharged without conviction on the two counts of assault to which he has pleaded guilty.

REASONS OF THE COURT

(Given by Harrison J)

Introduction

[1] The appellant, Mr DC, was charged in the District Court at Wellington on four counts of assaulting a child, two counts of assault with a weapon, one count of sexual violation by unlawful sexual connection and one count of an indecent act on a child. The complainants were his two sons who were then aged under 12 years.

[2] Mr DC pleaded not guilty. The trial commenced before Judge Harrop and a jury on 12 November 2012. Under cross-examination the two boys either recanted all their allegations or accepted innocent explanations of events. With the Crown's consent, Mr DC was discharged immediately on six of the eight counts.

[3] Mr DC pleaded guilty to the remaining two representative counts of assault on the agreed basis that they related solely to incidents of smacking. Counsel prepared an agreed statement of facts for sentencing which recorded that:

> Between 1 January 2008 and 8 June 2011 [Mr DC] would on occasion smack [his sons] on the bottom for the purposes of correction.

[4] On 19 December 2012 Judge Harrop convicted Mr DC on the two counts of assault and sentenced him to 75 hours community work.[1] Mr DC appeals against his conviction and sentence on the ground that the Judge erred in law in declining to exercise his discretion under s 106 of the Sentencing Act 2002 to discharge him without conviction. In particular, Mr Sainsbury submits the Judge erred in assessing the gravity of the offending; wrongly placed weight on facts which were not agreed; and failed to give due or appropriate weight to the consequences of a conviction for Mr DC's employment.

[5] Mr DC filed his appeal in this Court out of time. The Crown does not oppose an extension which is granted accordingly.

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1 *R v [DC]* DC Wellington CRI-2011-091-3042, 19 December 2012.

Facts

[6] In order to understand the basis for Mr DC's appeal it is necessary to set out the background facts in some detail. In this respect we are grateful to Mr Sainsbury's provision of a full summary.

[7] Mr DC and his former wife, Ms JJ, had two sons, K and T, who were born on 17 May 2000 and 31 December 2001 respectively. Mr DC and Ms JJ lived in the Wellington region. They separated in 2004 and agreed to share custody of the boys. But Ms JJ gradually lost interest. Mr DC assumed the role of fulltime care giver. Ms JJ then moved away from Wellington and her contact with the boys became intermittent.

[8] In mid 2010 Ms JJ returned to Wellington to live but still did not see her sons regularly. She became unwell. At Mr DC's invitation, she returned to live with him and the boys on an interim basis until she recovered her health and found somewhere appropriate to live.

[9] However, the arrangement did not work well. Tensions arose over parenting styles. Mr DC had imposed a disciplined regime upon the boys. He required their attendance at school and completion of homework and household chores as a priority to participation in leisure activity, particularly playing computer games or watching television. Ms JJ's approach provided a sharp contrast. For example, she allowed the boys to do as they wished including being absent from school if they did not want to attend.

[10] It is not difficult to understand the underlying reason for these tensions. Life for the boys with their father was apparently rigid and focussed. Doubtless that was influenced by Mr DC's requirement for a well managed household while he remained in paid employment and acted as fulltime caregiver of his sons. Doubtless also the boys had yearned for their mother's lost love and affection. Her presence would have upset the family dynamics, setting up conflicting emotional responses from the boys.

[11] Eventually Ms JJ moved out of the house. One day shortly afterwards Mr DC castigated T for rudeness when responding to a direction to complete his homework. T then went to a neighbour's house where K was visiting. T told the neighbour that his father had assaulted him. The neighbour called Ms JJ who took the children away. Eventually a complaint was made to the police.

[12] Mr DC was interviewed by a police officer in August 2011. He denied specific allegations made by the boys. He did, however, admit that from time to time – no more than a dozen times – he had used physical discipline by smacking the boys on the bottom. This conduct was consistent with his own upbringing in the United Kingdom. Once told that this practice was unlawful in New Zealand, he committed to undertake courses and counselling and not to repeat it.

[13] However, based on the boys' allegations the police laid an indictment containing these eight counts:

(1) Assaulting K (representative) including hitting him across the face with a closed fist on a number of occasions;

(2) Assaulting T (representative) including grabbing him by the t-shirt, throwing him into a desk and slapping him across the face;

(3) Assaulting K with a samurai sword;

(4) Assaulting T with a belt;

(5) Sexual violation by unlawful sexual connection with T by placing his fingers into T's anus;

(6) Indecently assaulting T by touching him on the bottom;

(7) Assaulting K by punching him in the face; and

(8) Assaulting T by throwing him on to a table and slapping his face.

[14] The defence theory, as advanced by Mr Sainsbury at trial, was that the boys' allegations were either false or gross exaggerations or distortions of innocent facts. The false allegations were said to be motivated by the boys wish to live with their mother. After being an absent figure for most of their lives, she had returned to play the role of an indulgent parent who used manipulative behaviour to obtain custody.

[15] As noted, by the end of their evidence the boys had either recanted or accepted innocent explanations for events. For example, the charge of sexual violation had its genesis in an unidentified occasion when T was a young child. Mr DC had to apply cream to his anus for medical reasons. While T had been unhappy with this, he accepted that it was done for a proper purpose and was not in any way inappropriate.

[16] Mr Sainsbury advises that following the boys' evidence the Crown agreed to the discharge orders to spare Ms JJ from potentially destructive cross-examination. That event would have done little to enhance the family's future working relationship. By accepting his guilt on the two remaining charges, Mr DC hoped to ensure an immediate resolution of the criminal proceeding and promote a reconciliation with his sons.

[17] Mr DC was on bail pending trial for more than a year. The conditions prohibited him from any contact with K and T who were by then in Ms JJ's custody. She has since retained custody in accordance with an order in the Family Court. Mr DC is now attempting to regain access. The net result, however, is that Mr DC is now estranged from his two sons.

Mr DC

[18] At the time of sentencing Mr DC was 43 years of age. He had no previous convictions. He is an information technology consultant by occupation.

[19] Mr DC swore an extensive affidavit in support of his application for a discharge in the District Court. He traversed his employment history and relationship with his former wife. He had worked in the field of information technology for almost 20 years, starting out as an employee for companies in the

United Kingdom and then, after 1997, in New Zealand. In recent years he has been self-employed. He has worked on projects for government departments consistently since 2003 and for other security conscious organisations such as Datacom and Westpac Trust. These entities have routinely required security clearance including police checks.

[20] Mr DC said this:

> [4] Since [being] charged with these offences it has been extremely difficult for me to obtain work. While I have been able to work on a couple of projects, these have been small projects that have not required security clearance. I have been able to work on them due to prior relationships or particular expertise I could bring to bear in terms of the limited problem that was needing to be solved. Although, for obvious reasons, I have tried to put as positive a face on things in my curriculum vitae in terms of recent work the reality has been there without the ability to get security clearance I have not been able to work full-time.
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> [5] It concerns me that these convictions will continue to prevent me getting work in my chosen field. The reality is that the clients who need my services are either government departments or organisations such as banks or data processing companies for whom security is a high priority.

[21] In an updating affidavit filed in support of this appeal Mr DC deposed that he had been consistently looking for work since sentencing in December 2012. He has applied for over 100 positions including with past employers, recruitment agencies and temporary agencies. He had had only two interviews but neither was successful.

[22] Of particular importance, earlier this year Mr DC applied through an agency for a position with the Department of Internal Affairs. He produced an email declining his application on the basis of insufficient appropriate experience and the existence of the two criminal charges. Mr DC has failed to obtain even low level employment with chain retailers and food suppliers. He has always disclosed his convictions when applying and is not even being interviewed for positions.

[23] The probation officer reported that Mr DC had addressed family violence issues by completing two directed programmes, had attended grief counselling (as a result of his prolonged inability to see his children) and had confronted his own depression with professional help.

District Court

[24] When sentencing Mr DC, Judge Harrop recited the background facts before recording that the first question for consideration was whether Mr DC should be discharged without conviction.

[25] In addressing that question the Judge said this:

> [9] ... It is a three stage test. The starting point before that is that the law says that I must not discharge you without conviction unless I am satisfied that the direct and indirect consequences of entering a conviction would be out of all proportion to the gravity of the offence. That test speaks for itself. It is a high test to meet and obviously it involves, in the three stages, assessing the gravity of the offending, assessing the consequences that would follow from entering a conviction, as best that can be done, and weighing them up to see whether that level of disproportion is met.

[26] The Judge considered first the gravity of the offending. He twice accepted that Mr DC had smacked the boys for the purposes of correction before adding what he understood was Mr DC's acceptance that what he did went beyond acceptable correction. He observed that inappropriate smacking "... creates not only physical pain but obviously a gross breach of trust".[2] He concluded that, while the smacking did not go beyond the bottom or perhaps an occasional "clip around the ear",[3] the physical offending had:[4]

> ... quite significant mental consequences against young, vulnerable, dependent boys who were at an age that they could not do much about it and as I say it was repeated over a period of time, so there was an element of a regime of pain and fear at a certain level. So in terms of gravity, I would assess it in the low to medium category.

[27] The Judge then considered the consequences of entering convictions. Having summarised Mr DC's own evidence about his recent employment difficulties, the Judge said that he was unable to reach a conclusion about what the consequences might be.[5] As a matter of impression, he doubted that convictions for minor assaults would have a direct bearing on Mr DC's ability to work. It was unclear to the Judge whether disclosure of these convictions when applying for a security clearance

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2 At [13].
3 At [14].
4 At [14].
5 At [17]–[20].

would have an adverse bearing given Mr DC's extensive and wide ranging history of working for government departments.

[28] In view of this conclusion, the Judge did not undertake the third or proportionality enquiry or consider whether there was a proper basis for exercising his discretion to discharge Mr DC without conviction. He did, however, accept that the charges had arisen "... in a context of considerable relationship difficulty";[6] and that Mr DC had already suffered serious consequences from the charges over the previous 18 months, both in difficulties in obtaining employment and in the loss of his relationship with his sons.[7]

[29] In the circumstances the Judge considered a sentence of community work was appropriate.

Appeal

[30] Before considering the specific grounds of appeal advanced by Mr Sainsbury, we summarise what are now settled principles. A sentencing Judge has a discretion to discharge without conviction a person who has pleaded guilty to an offence.[8] However, that discretion must not be exercised unless the Judge is satisfied that the direct and indirect consequences of the conviction would be out of all proportion to the gravity of the offence.[9]

[31] The inquiry is two staged. At the first stage it is necessary to consider the gravity of the offence, the direct and indirect consequences of a conviction, and whether those consequences are out of all proportion to the gravity of the offence. In a composite way, this is a jurisdictional test. The second stage of exercising what is a residual discretion is only engaged if that jurisdiction is established.[10]

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6 At [22].
7 At [25]–[26].
8 Sentencing Act 2002, s 106(1).
9 Sentencing Act, s 107.
10 *R v Hughes* [2008] NZCA 546, [2009] 3 NZLR 222 at [10]–[11]; *Z (CA447/2012) v R* [2012] NZCA 599, [2013] NZAR 142 at [27].

(a) Gravity of offending

[32] Mr Sainsbury submits that the Judge failed to take into account all mitigating factors relating to the offending and to Mr DC personally at the first stage of assessing gravity. He relies particularly on this Court's decision in *Z (CA447/2012) v R* (the decision was delivered on the day of sentencing but was not available to the Judge or counsel).[11]

[33] In response Mr Davie submits *Z (CA447/2012)* is authority for the proposition that, providing all relevant factors are considered, it is unlikely to matter at which precise stage of the s 107 analysis they are taken into account. In this case, Mr Davie says, the Judge did take into account Mr DC's guilty plea, the courses he had completed and his prior good character. He acknowledges, however, that the reference to the latter two factors was in the context of determining the length of the sentence of community work. But, he says, the Judge would have turned his mind to them in any event when deciding whether to exercise his power to discharge without conviction.

[34] In *Z (CA447/2012)* this Court accepted that its earlier decision in *Blythe v R*[12] was confusing in two material respects.[13] The Court then said this:

> [26] *Blythe* is, we accept, unclear on the proper approach to aggravating and mitigating factors in relation to ss 106 and 107. The best sense that we can make of *Blythe* is that the Court considered that the aggravating and mitigating factors in relation to the *offending* were relevant to step one, the gravity of the offence, and the mitigating and aggravating factors in relation to the *offender* came into play in step three, the disproportionality analysis. As we have said, that was the approach the Divisional Court took in *Brown*. It is also the approach that Judge Perkins took in the present case.
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> [27] For our part, we consider that there is much to be said for the approach adopted by the Divisional Court in *A (CA747/2010)*. That is: when considering the gravity of the offence, the court should consider all the aggravating and mitigating factors relating to the offending and the offender; the court should then identify the direct and indirect consequences of conviction for the offender and consider whether those consequences are out of all proportion to the gravity of the offence; if the court determines that they are out of all proportion, it must still consider whether it should exercise its residual discretion to grant a discharge (although, as this Court said in

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11 *Z (CA447/2012) v R*, above n 10.
12 *Blythe v R* [2011] NZCA 190, [2011] 2 NZLR 620.
13 *Z (CA447/2012) v R*, above n 10, at [24].

> *Blythe*, it will be a rare case where a court will refuse to grant a discharge in such circumstances).[14]
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> [28] The approach just outlined seems to us to fit best with the structure of s 107 and to provide the most helpful framework for analysis. While we are conscious that the Court in *Blythe* expressly disapproved it, we do not consider the approach to be wrong in principle. What we do consider to be wrong in principle is to leave the consideration of personal aggravating and mitigating factors out of the s 107 analysis and to address them only in the context of the s 106 discretion. We do not see how the disproportionality analysis required by s 107 can be undertaken without taking into account the offender's personal aggravating and mitigating circumstances. However, while consideration of these circumstances must, in our view, be carried out in the context of the s 107 analysis, whether this occurs at the first or third step of that analysis is not of great significance. Provided that all relevant factors are considered in the s 107 context, the precise point at which they are considered is unlikely to be material.
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> (Original emphasis.)

[35] With respect, we adopt the *Z (CA447/2012)* approach as correct. As a result, all relevant aggravating and mitigating factors relating to the offending and the offender come into play when considering the gravity of the offence. They find statutory recognition in ss 9 and 10 of the Sentencing Act.

[36] In his written submissions in the District Court, prepared without the benefit of the decision in *Z (CA447/2012)*, Mr Sainsbury had himself identified the same confusion in *Blythe* about the factors to be taken into account in assessing the gravity of the offending. He submitted that despite this confusion the mitigating factors specified in s 9 were directly relevant to the gravity of Mr DC's offending.

[37] In the District Court, and again on appeal, Mr Sainsbury particularly emphasised these mitigating factors:

(1) Mr DC entered a guilty plea at the earliest reasonable opportunity. He has throughout admitted smacking the children for the purposes of correction. But the disparity between that admission, and the allegations made by the children reflected in the eight charges originally included in the indictment, would necessarily have

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[14] *Blythe v R*, above n 12, at [13].

precluded any acceptance of pleas before trial based on Mr DC's admission of relatively minor offending.

(2) Mr DC cooperated fully with the police.

(3) The existence of the more serious allegations underlying the indictment deprived Mr DC of the opportunity to request the police to invoke their discretion under s 59(4) of the Crimes Act 1961 not to prosecute. Mr Davie makes the point that this express provision is merely declaratory of police practice generally – that is, they have a discretion not to prosecute where they consider that the offence is so inconsequential that there is no public interest in proceeding with a prosecution. He is correct to say that we can only speculate as to whether the police would have invoked that discretionary power here if they had known the full circumstances. Nevertheless, Mr Sainsbury is correct that Mr DC lost more than a remote or fanciful opportunity. He has also lost an opportunity to participate in a diversion programme.

(4) Since he was charged Mr DC has undertaken a number of programmes and courses designed to improve his parenting and anger management skills.

(5) Mr DC is otherwise of good character as reflected by his lack of previous convictions and the favourable references tendered in his support at sentencing.

[38] We agree with Mr Sainsbury's evaluation. In our judgment these factors are directly relevant when assessing the gravity of Mr DC's offending. He is entitled to have all of them taken into favourable account. With respect, the Judge erred in failing to give them any weight.

[39] Also, we accept Mr Sainsbury's submission that the Judge gave weight to an incorrect fact. He understood erroneously that Mr DC accepted that his smacking of

the boys went beyond acceptable correction. That factor is important because the Crown agreed to a carefully circumscribed admission expressly limited to smacking "for the purposes of correction". As Mr Sainsbury observes, this limited admission was designed to highlight the fact that Mr DC's conduct would not have been criminal before the enactment of s 59 of the Crimes Act on 21 June 2007. That provision, from the date of enactment, prohibited the use of force for the purpose of correction.[15] The Judge's emphasis of what he misunderstood was an agreed fact leads to the inference that the form of physical discipline used by Mr DC went beyond what had been until 21 June 2007 a lawful and arguably common parenting practice. This error was, we accept, material.

[40] Mr Sainsbury identifies another error. He notes the apparent weight given by the Judge to what he called "... an element of a regime of pain and fear at a certain level".[16] This was said to be a consequence of Mr DC's physical discipline. We accept that smacking a child occasionally on the bottom would be unwelcome. But any resulting pain would only have been fleeting and moderate given that the smacks were inflicted by hand. Similarly, the Judge's description of a climate of fear with "quite significant mental consequences" seems exaggerated without independent evidence or victim impact reports from the boys themselves.[17]

[41] In summary, we are satisfied that the Judge erred materially in his evaluation of the gravity of the offending.

(b) Consequences of offending

[42] Mr Sainsbury says the Judge also erred materially in his evaluation of the consequences of a conviction. The Judge was left in a state of doubt or uncertainty about what the consequences would be or whether they would be disproportionate. He did, however, express an opinion that a prospective employer was unlikely to give a conviction for assault adverse weight in view of its relative unimportance, both in nature and type relating to Mr DC's employment.

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15 Crimes Act 1961, s 59(2).
16 At [14].
17 At [14].

[43] With respect, we consider that the Judge's approach was wrong. The sentencing Judge must decide, not to any legal standard of proof, what the consequences of the offending will be. The Judge does not have to be satisfied that the direct and indirect consequences will inevitably or probably occur; it is sufficient if he or she is satisfied there is a real and appreciable risk of such consequences.[18]

[44] A criminal conviction is of itself a black mark on a record especially for somebody with no previous history. That adversity is compounded for a person who works in an area where a security clearance is routinely requested with the necessary consequence that criminal convictions must be disclosed. It is an insufficient answer to say, as Mr Davie submits, that Mr DC's wealth of experience and diverse skills place him in a better position to succeed in spite of his convictions than someone just starting out. The same answer applies to Mr Davie's submission that, even if some entities for which Mr DC has previously worked have an absolute rule against hiring people with convictions, there will be many more which do not. Nor is it a persuasive answer, as the Judge found, that the convictions are not of a nature which logically bear on Mr DC's suitability for information technology and business roles.

[45] In our judgment there was sufficient material before the Judge on which he could reach the necessary level of satisfaction about the consequences of the offending. It was, with respect, inevitable that Mr DC's convictions would have real consequences for his employment. He would have to disclose convictions when applying for any position. Disclosure would have an adverse effect on a prospective employer regardless of whether the convictions were directly relevant to the field of information technology. Its existence would of itself either operate as an immediately disqualifying factor or elicit an inquiry, at the very least, with an attendant obligation to explain.

[46] We are satisfied the circumstances before the Judge were more than sufficient to raise a real or appreciable risk that convictions would have direct and adverse consequences upon Mr DC's prospects of obtaining employment in his field of expertise.

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[18] *Iosefa v Police* HC Christchurch CIV-2005-409-64, 21 April 2005 at [34]; *Alshamsi v Police* HC Auckland CRI-2007-404-62, 15 June 2007 at [20]; and *Currie v Police* HC Auckland CRI-2008-404-307, 27 May 2009 at [49].

(c) Disproportionality

[47] As a consequence of his preceding conclusion, the Judge did not consider whether the likely consequences of a conviction were out of all proportion to the gravity of Mr DC's offending. In view of our conclusion that the Judge erred in that respect, and in his assessment of the gravity of the offending, we must undertake that exercise for ourselves.

[48] In our judgment the consequences of a conviction for Mr DC are out of all proportion to the gravity of offending. His offending lay in his administration of about a dozen smacks in total to his two sons in the two and a half year period covered by the offending. He used his hand, not a weapon. He administered the blows for correctional purposes only. He did not participate in gratuitous violence. And what he did had been lawful for most of the boys' lives.

[49] Mr DC pleaded guilty as soon as was reasonably possible. He cooperated with the police and was remorseful. He understands that the administration of corporal punishment as a means of disciplining children is now unlawful. He has participated fully in anger management and parenting skills programmes. He has no previous convictions and is otherwise of good character.

[50] Mr DC was, as we have noted, a solo parent working in paid employment to support himself and his sons. His former wife had left the family unit for some years, and left him responsible for rearing the children at formative stages in their lives. It is obvious that Mr DC loves and cares for his sons. We are prepared to infer that some of the offending occurred after Ms JJ's return, which had led to a deterioration and change in the boys' behaviour and contributed to the family tensions.

[51] Our recital of these events is not to be construed as condoning Mr DC's conduct. But it does introduce a degree of perspective and context. We are satisfied that his conviction for relatively minor offending in the family environment will have an adverse affect on his prospects of future employment which in the circumstances will be out of all proportion to the gravity of that offending.

(d) Discretion

[52] As this Court noted in *Blythe*,[19] the case will be rare where an offender who has satisfied the s 107 jurisdictional threshold is not then discharged under s 106(1).

[53] Approaching the sentencing exercise afresh, as we must, we are satisfied that our residual discretion to discharge without conviction should be exercised in Mr DC's favour. In addition to the favourable factors relevant to the jurisdictional inquiry, we accept Mr Sainsbury's submission that Mr DC has already paid a disproportionate personal price for his offending. He has faced the ordeal of a trial for serious offending based on unfounded or grossly exaggerated allegations made by the sons he had reared. His act of kindness to Ms JJ has resulted indirectly in his loss of custody of and estrangement from his sons. He has been out of regular employment for an extended period. All those factors combine to constitute a major penalty in themselves.

[54] Finally, it is not inappropriate for the criminal law to assist in the reparation of Mr DC's relationship with his two sons, which would not be promoted by the existence of convictions for assaulting both of them.

Result

[55] Mr DC's appeal against conviction is allowed. His convictions are quashed. The sentence of community work is set aside. He is discharged without conviction on the two counts of assault to which he has pleaded guilty.

[56] We wish to acknowledge the professionalism and commitment of Mr Sainsbury's representation of Mr DC throughout, which have been in the best traditions of the bar.

Solicitors:
Crown Law Office, Wellington for Respondent

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[19] *Blythe v R*, above n 12, at [13].