



- C** Bail will continue, subject to the condition currently applying, namely that the appellant’s passports be held by the Registrar of the High Court at Auckland, until the day which falls 20 working days after the date of this judgment. However, if the appellant applies for leave to appeal to the Supreme Court against this judgment before the expiry of that period of 20 working days, bail will continue subject to the condition specified above until further order of the Supreme Court. Any application for variation of the condition of bail prior to the expiry of the 20 working day period referred to above may be made to this Court.
- D** We make no award of costs.
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## REASONS OF THE COURT

(Given by O’Regan J)

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## **Introduction**

[1] The appellant appeals against a High Court order committing him to prison for a term of six months for contempt of court. The contempt resulted from the appellant's breach of an interim injunction requiring him not to publish material defamatory of Mr Michael Stiassny and his firm, Korda Mentha. This Court granted the appellant bail pending the outcome of the present appeal.

[2] The principal ground of appeal is that the full court of the High Court (Chisholm and Gendall JJ) wrongly denied the appellant the opportunity to elect trial by jury. This raises some complex issues about the nature of contempt proceedings and their interaction with s 24 of the New Zealand Bill of Rights Act 1990 (NZBORA). We appointed Dr Harrison QC to assist the Court in relation to those issues and we express our gratitude for his very helpful submissions, both oral and written.

[3] In addition, the appellant argues that the proceedings amounted to double jeopardy because he had previously been committed to prison by a High Court Judge for similar breaches of the injunction, and that there was therefore a contravention of s 26(2) of the NZBORA. He also said that the procedure adopted in the High Court amounted to a breach of natural justice: s 27(1) of the NZBORA.

[4] The issues requiring determination are, therefore:

- (a) Was the appellant entitled to elect trial by jury?
- (b) Was there double jeopardy?

- (c) Was there a breach of natural justice?

[5] Before dealing with those issues, we will outline the background to the Solicitor-General's application to commit the appellant to prison and the decisions of the High Court to which the present appeal relates.

### **Decisions under appeal**

[6] The notice of appeal was filed on 20 June 2008, prior to the release by the High Court of its substantive decision. This was because the focus of the appeal was on the ruling made by the High Court during the course of the High Court hearing (which took place on 16 and 17 June 2008) that there would be no jury trial. In fact, there are a number of minutes and decisions which are relevant to the present appeal, particularly:

- (a) A minute of 29 May 2008, in which Chisholm and Gendall JJ noted that the Registrar had alerted them to an email from the appellant indicating that he was under the impression that there would be a jury trial. They noted that he had not made an application for a jury trial and that there did not appear to be any basis for the matter to be dealt with by way of a jury trial.
- (b) A minute of 11 June 2008, dealing with a memorandum of the same date from the appellant asserting his entitlement to elect trial by jury under s 24(e) of the NZBORA. In the minute, Chisholm and Gendall JJ noted that the appellant had not been charged with an offence and said that s 24(e) did not apply. They noted that the inherent jurisdiction of the Court in contempt matters, while civil/quasi-criminal in nature, was dealt with under the civil procedure of an originating application and the involvement of a jury was neither permitted nor appropriate.
- (c) A ruling made on 16 June 2008, during the course of the High Court hearing (Ruling (No 2)), dealing with a further application by the

appellant for trial by jury. The Court quoted from the decision in *Siemer v Stiassny* [2008] 1 NZLR 150 at [9] (CA) where this Court said that the contempt asserted against the appellant was civil in nature. Accordingly, the High Court ruled that the decision set out in the minute of 11 June 2008 stood, and that there would be no jury. This was the ruling which was the specific focus of the notice of appeal filed by the appellant on 20 June 2008.

- (d) The substantive judgment, issued on 8 July 2008 (HC AK CIV-2008-404-472), in which the appellant was found in contempt. The Court held that it was appropriate to impose a term of imprisonment, but not one of indefinite duration, ending only when the appellant purged the contempt by complying with the injunction. A finite term of six months imprisonment was selected. However, the writ of arrest and order committing the appellant to prison was suspended pending further order of the Court. The appellant was given the opportunity to purge the contempt before 1 August 2008.
- (e) A minute of 31 July 2008, in which the Court responded to a memorandum filed by the appellant. In that memorandum the appellant offered to shut down the offending websites permanently in exchange for being allowed his day in Court during the 2008 calendar year on Mr Stiassny's and Korda Mentha's substantive claim against him, including a right to cross-examine Mr Stiassny. The Court ruled that the offer was unacceptable.
- (f) The judgment of the Court dated 1 August 2008. The appellant did not appear when the matter was called on that date, even after the matter was stood down for half an hour. The Court received affidavits to the effect that the offending material on the websites remained, and therefore ordered that the warrant for arrest be activated and that the appellant be committed to prison for six months.

[7] Although the notice of appeal refers only to the 16 June 2008 ruling by the Full Court on the appellant's application for trial by jury, we have treated the appeal as a general appeal against the decisions listed in [6] above.

[8] The statutory basis for the appeal was not stated in the notice of appeal. Civil contempt rulings are subject to appeal under s 66 of the Judicature Act 1908, while criminal contempt rulings are subject to appeal under s 384 of the Crimes Act 1961.

## **Background**

[9] The background to the Solicitor-General's application was summarised in the High Court judgment of 8 July 2008 at [5] – [14]. The summary which follows is adapted from those paragraphs.

[10] Between December 2000 and July 2001 Michael Stiassny, of the firm Ferrier Hodgson (recently renamed Korda Mentha), was receiver of Paragon Services Limited, a company of which the appellant had been managing director. The receivership was triggered by a dispute between shareholders in the company and followed upon the appellant's application. During the receivership and thereafter the appellant was critical of Mr Stiassny's actions as receiver. Ultimately those differences were compromised by an agreement they concluded on 9 August 2001. One of the provisions of the compromise agreement provided that neither Paragon nor Ferrier Hodgson, nor their respective directors, employees or agents, would make any comment to any party about the receivership of Paragon, with some limited exceptions.

[11] Subsequently, the appellant complained about Mr Stiassny to various bodies including the Society of Accountants. A billboard then appeared in central Auckland which depicted an image of Mr Stiassny's face and contained the words "*Michael Stiassny – a true story* [www.stiassny.org](http://www.stiassny.org)". That website contained material relating to the Paragon receivership and was also very critical of Mr Stiassny and his firm.

[12] Mr Stiassny and his firm responded by seeking an ex parte interim injunction requiring the billboard to be taken down and the material removed from the website.

On 8 April 2005, Winkelmann J granted the injunction. The billboard was removed and the website closed down.

[13] The appellant then applied to have the ex parte injunction rescinded. On 5 May 2005, after a full hearing, Ellen France J rescinded the orders made by Winkelmann J: HC AK CIV-2005-404-1808. In their place, she granted an interim injunction (the interim injunction) directing the appellant, Paragon, and their servants, contractors or agents:

- a) [Not to] publish in any form any information containing allegations of criminal or unethical conduct or as to improper personal enrichment on the part of the plaintiffs in relation to their conduct of the receivership of Paragon Oil Systems Limited; any claim that the plaintiffs deliberately over-charged Paragon Oil Systems Limited in the sum of \$10,000; together with information as to the fact of complaints made by Mr Siemer and/or Paragon Oil Systems Limited to ICANZ or to the Serious Fraud Office; and including any information obtained by Mr Siemer or Paragon Oil Systems Limited in the course of discovery in any proceedings pending further order of the Court; and
- b) Not to reinstate the billboard.

[14] The appellant unsuccessfully appealed the decision of Ellen France J granting the interim injunction: *Siemer v Ferrier Hodgson* CA87/05 13 December 2005. This Court preferred to uphold the injunction on the basis that it was underpinned by the cause of action in contract (breach of the compromise agreement dated 9 August 2001), and therefore did not rule on the defamation cause of action.

[15] On discovering that that the website had been reactivated, Mr Stiassny and his firm sought an order for the committal of the appellant on the ground that he was in contempt. After a four day hearing, Potter J held that entries in the website [www.stiassny.org](http://www.stiassny.org) breached the interim injunction (and also the ex parte interim injunction granted by Winkelmann J): *Ferrier Hodgson v Siemer* HC AK CIV 2005-404-1808 16 March 2006. Potter J also found that there had been other breaches arising from the distribution of “stickers” and from other communications. The appellant was found to be in contempt of Court. A fine of \$15,000 was imposed and the appellant was ordered to pay the plaintiffs’ costs on a solicitor-client basis (amounting to approximately \$183,000). The fine was paid.

[16] The appellant appealed the decision. The appeal was dismissed: *Siemer v Stiassny* [2008] 1 NZLR 150 (CA). A later application for leave to appeal to the Supreme Court was also dismissed: *Siemer v Stiassny* [2007] NZSC 53. The costs remain unpaid.

[17] The appellant was unmoved. Another application for his committal for contempt was brought by Mr Stiassny and his firm in April 2007. After a further hearing, Potter J found that further breaches of the interim injunction had occurred by virtue of entries on the websites [www.stiassny.org](http://www.stiassny.org) and [www.kiwisfirst.com](http://www.kiwisfirst.com): *Ferrier Hodgson v Siemer* HC AK CIV-2005-404-1808 9 July 2007. These entries were held to have constituted a further contempt. A writ of arrest was issued, and the appellant was debarred from defending the substantive proceedings until he paid the outstanding costs. On 13 July 2007, Potter J committed the appellant to prison for six weeks. He served that sentence. The appellant did not appeal against the debarring order.

[18] From late July 2007, staff at the Crown Law Office began monitoring the websites [www.stiassny.org](http://www.stiassny.org), [www.kiwisfirst.com](http://www.kiwisfirst.com) and [www.kiwisfirst.co.nz](http://www.kiwisfirst.co.nz). Having concluded that material on those websites constituted further breaches of the interim injunction (set out at [13] above), the Solicitor-General applied to the High Court on 29 January 2008 for the appellant to be held in contempt of court, to be committed to prison, and to remain there until further order of the High Court. It was this application that was dealt with in the judgments under appeal.

[19] Since the High Court decisions:

- (a) The appellant has been adjudged bankrupt: *Korda Mentha v Siemer* HC AK CIV-2007-404-7665 6 November 2008;
- (b) The High Court (Cooper J) has found in favour of Korda Mentha and Mr Stiassny in their substantive defamation and breach of contract proceedings against the appellant: *Korda Mentha v Siemer* HC AK CIV-2005-404-1808 23 December 2008. Substantial damages (totalling \$920,000) were awarded against the appellant and the

interim injunction was made permanent. As noted earlier, the appellant was debarred from defending these proceedings.

[20] The Solicitor-General's application to the High Court was made by way of originating application under Part 4A of the High Court Rules (the rules have recently been re-enacted but we refer to those in force at the time).

### **Was the appellant entitled to elect trial by jury?**

[21] We now turn to the first issue raised by the appeal, namely whether the Solicitor-General's application triggered the right to trial by jury provided for in s 24(e) of the NZBORA.

[22] Under s 24, "everyone who is charged with an offence" has the right to the benefit of a trial by jury "when the penalty for the offence is or includes imprisonment for more than three months". The appellant's case is, in a nutshell, that the Solicitor-General's application was criminal in nature and sought imprisonment for an indefinite term. He therefore argues that he was charged with an offence for which the penalty was or included imprisonment for more than three months. Thus, he should have been given the benefit of a trial by jury.

[23] Although the appellant made some submissions on this aspect of the appeal, the substantive argument was made by Dr Harrison. He submitted that the Solicitor-General's application was criminal in nature and that, giving s 24(e) a broad interpretation, the appellant could be said to have been charged with an offence. He argued that the distinction traditionally drawn between criminal contempt proceedings and civil contempt proceedings was outmoded and that any contempt proceedings seeking committal to prison which are initiated by the Solicitor-General should be regarded as criminal. In the alternative, he argued that the primary objective of the Solicitor-General's application was punishment of the appellant and therefore should be regarded as criminal, not civil, in nature.

[24] In order to evaluate these submissions, we will briefly outline the historical approach to criminal contempt proceedings in New Zealand, following which we will address the following questions:

- (a) Is there still a distinction between criminal contempt proceedings and civil contempt proceedings?
- (b) If there is, was the Solicitor-General's application civil in nature?
- (c) If it was, did s 24(e) of the NZBORA apply to the proceedings anyway?
- (d) If it did, was the High Court committal order beyond its jurisdiction?

[25] Two other issues were raised by counsel in argument but, on the approach we take to the case it is not necessary for us to deal with them. Those issues are:

- (a) If s 24(e) applies, is the requirement that the trial be by judge alone a reasonable limit on rights which can be demonstrably justified in a free and democratic society in terms of s 5 of the NZBORA?
- (b) If a jury trial was required, what would the jury do?

### ***Historical background***

[26] In New Zealand, contempt proceedings, even those which are clearly criminal in nature, have been dealt with by the Court summarily. That is clear from the decision of this Court in *Solicitor-General v Radio Avon Ltd* [1978] 1 NZLR 225. In that case, at 229, the Court said:

It is an outstanding characteristic of this branch of the law that it makes use of a summary form of procedure which is unknown to any other branch of the criminal law. Where a contempt occurs in the Court during the hearing of the case (as by someone creating a disturbance), it must necessarily be dealt with on the spot. When the contempt is of a kind occurring out of court the summary procedure takes the form of a motion supported by affidavits, the motion often, but not necessarily, being filed by one of the Law Officers

of the Crown. But unlike other criminal cases heard in the Supreme Court the matter is dealt with by one or more judges sitting without a jury.

[27] The Court in *Radio Avon* rejected a submission that the summary procedure was inappropriate for that case, which involved publication of a report which was found to amount to contempt by scandalising the Court. The Court concluded that it was not possible to prosecute by way of indictment the common law offence of contempt of court. The Court had said this was the effect of s 9 of the Crimes Act 1961, which provides:

**9 Offences not to be punishable except under New Zealand Acts**

No one shall be convicted of any offence at common law, or of any offence against any Act of the Parliament of England or the Parliament of Great Britain or the Parliament of the United Kingdom:

Provided that—

- (a) Nothing in this section shall limit or affect the power or authority of the House of Representatives or of any Court to punish for contempt:

...

[28] The Court noted that s 9 had been enacted to give statutory recognition to the decision in *Nash v Nash, In re Cobb* [1924] NZLR 495 (SC) in which the Court had concluded that the codification of criminal law in New Zealand in the Crimes Act 1908 did not remove the Supreme Court's jurisdiction to deal summarily with conduct which was recognised by the common law as amounting to criminal contempt of court. This led the Court in *Radio Avon* to conclude at 236:

The only way in which contempt of court, as such, can be dealt with in New Zealand is by means of the summary process.

[29] *Radio Avon* made it clear that, regardless of whether contempt proceedings were civil or criminal, no question of a right to trial by jury arose. This was so, even though s 66 of the Summary of Proceedings Act 1957 provided for a right to trial by jury for any person charged under Part 2 of that Act with an offence punishable by imprisonment for a term exceeding three months. Part 2 deals with the commencement of criminal proceedings by the laying of an information or the making of a complaint or by a charge being made after arrest. Although the Court in *Radio Avon* did not refer to s 66, the effect of its conclusion that it was not possible

to proceed by way of indictment in relation to criminal contempt was that criminal contempt was not an offence which engaged the s 66 right.

[30] *Radio Avon* is difficult to reconcile with the right contained in s 24(e) of the NZBORA. Counsel for the Solicitor-General accepted that, if we were to find that the present proceedings were criminal contempt proceedings and that the penalty was or included imprisonment for more than three months, then the s 24(e) right to trial by jury would have been engaged in this case. In light of that concession, the issues we have to decide in this case are whether the Solicitor-General's application in this case was a criminal or civil application, and whether the penalty was or included imprisonment for more than three months.

[31] The Solicitor-General's concession also means it has not been necessary for us to address whether the adoption of a summary proceeding for a case otherwise coming within s 24(e) would be a justified limit on the s 24(e) right in terms of s 5 of the NZBORA. Counsel for the Solicitor-General did make submissions in relation to s 5, in the context of an argument that civil contempt proceedings should not trigger the s 24(e) right, but did not make the same argument in relation to criminal contempt proceedings. We do not therefore comment on the availability of a s 5 argument in relation to criminal contempt proceedings and proceed on the basis that, if an application for committal for contempt is criminal in nature and the penalty sought by the applicant includes imprisonment for more than three months, the s 24(e) right would be engaged.

[32] We now turn to the issues identified at [24] above.

***Is there still a criminal/civil distinction?***

[33] Dr Harrison argued that, in determining whether an application for committal for contempt triggered the s 24 rights, it was unhelpful to focus on the distinction between criminal contempt and civil contempt. He accepted that many cases and texts distinguish between civil and criminal contempt, but argued that the distinction should not be determinative of rights under the NZBORA, in respect of which a broad and generous interpretation is required.

[34] We propose to evaluate that submission by considering the approaches to this issue taken in comparable jurisdictions, before considering the state of the law in New Zealand.

## AUSTRALIA

[35] Dr Harrison relied particularly on the decision of the High Court of Australia in *Witham v Holloway* (1995) 183 CLR 525. In that case the High Court determined that the standard of proof beyond reasonable doubt applied to all contempt cases, whether criminal or civil. That is uncontroversial in the New Zealand context. But in the course of that finding, the Court questioned the distinction between criminal and civil contempt.

[36] In their judgment, Brennan, Deane, Toohey and Gaudron JJ discussed the distinction in detail at 530 – 534. At 531 they recited the basis of the distinction, namely the difference between proceedings which are remedial or coercive in the interests of the private individual (civil) and proceedings in the public interest to vindicate judicial authority or maintain integrity of the judicial process (criminal). But at 532 they said that this distinction was not a satisfactory basis for distinguishing civil and criminal contempt. They said there was not a true dichotomy between proceedings in the public interest and proceedings in the interest of the individual because even when proceedings are intended to secure the benefit of an order or undertaking which is not being complied with, there is also a public interest aspect in the sense that the proceedings vindicate the Court's authority: at 533. They similarly rejected the argument that the dichotomy between proceedings in the public interest and proceedings in the interest of the individual could be justified on the basis that some cases involve interference with the administration of justice and others merely interference with individual rights.

[37] Another basis for distinguishing civil from criminal proceedings is that the former are seen as coercive, while the latter are seen as primarily punitive. Their Honours rejected this basis for the distinction as well, reasoning that even where proceedings are intended to secure the benefit of an order or undertaking, a penal or disciplinary jurisdiction may also be called into play, and the penal and remedial

objects are inextricably intermixed. In any event, they observed at 534 that where the punishment is imposed as vindication or for remedial or coercive purposes, it is still punishment. This led them to conclude as follows at 534:

The differences upon which the distinction between civil and criminal contempt is based are, in significant respects, illusory. They certainly do not justify the allocation of different standards of proof for civil and criminal contempt. Rather, the illusory nature of those differences and the fact that the usual outcome of successful proceedings is punishment, no matter whether primarily for the vindication of judicial authority or primarily for the purpose of coercing obedience in the interest of the individual, make it clear as Deane J said in *Hinch [v Attorney-General (Vict)]* (1987) 164 CLR 15 at 49], that all proceedings for contempt “must realistically be seen as criminal in nature”.

[38] McHugh J took a similar approach. He observed at 549 that the case for abolishing the distinction between civil and criminal contempt was a strong one. However, he considered it was not necessary to take that step in order to conclude that a civil contempt allegation had to be proved beyond reasonable doubt.

[39] The quotation from the judgment of the plurality set out at [37] above, taken at face value, indicates a decision to abolish any distinction between civil and criminal contempt. But that is not strictly what the High Court decided. Rather, the decision has subsequently been treated as confined to its specific context (the applicable standard of proof for civil contempt proceedings), particularly in cases dealing with statutory provisions envisaging the continued existence of the distinction, thus leaving the question of the absolute existence of the distinction for other purposes undecided: see *The Broken Hill Proprietary Co Ltd v Dagi* [1996] 2 VR 117 at 173 (VCA) per Phillips JA (but compare the comments of Brooking JA at 142 - 143), *X v Australian Prudential Regulation Authority* (2007) 226 CLR 630 at [51] and *Hearne v Street* (2008) 248 ALR 609 (HCA) at [20] – [24] per Kirby J and at [132] – [133] per Hayne, Heydon and Crennan JJ.

[40] The position in Australia is that, therefore, despite the High Court’s doubts about the validity of its basis, the distinction between civil and criminal contempt survives. In *Hearne v Street*, Kirby J gave this guidance on how to distinguish the two (at [23]):

... the traditional question must be confronted: were the contempt proceedings here essentially punitive (in which they will be classified as “criminal”) or were they remedial or coercive (in which case they will be classified as “civil”)?

[41] That can be contrasted with the apparent rejection of that approach in *Witham v Holloway*: see [36] above.

[42] It is notable that, even in *Witham v Holloway* itself, it was accepted that there was no right to trial by jury in contempt cases, even if they were regarded as criminal in nature. The judgment of the plurality noted at 534:

However, to say that proceedings for contempt are essentially criminal in nature is not to equate them with the trial of a criminal charge. There are clear procedural differences, the most obvious being that the criminal charges ordinarily involve trial by jury, whereas charges of contempt do not.

#### UNITED KINGDOM

[43] In the United Kingdom, contempt is now governed by the Contempt of Court Act 1981. That Act did not adopt the recommendation of the Phillimore Committee (*Report of the Committee on Contempt of Court* (1974) Cmnd 5794) at 72 – 73 that all distinctions between civil and criminal contempt in England and Wales should be abolished. As noted in Eady & Smith (eds) *Arlidge, Eady & Smith on Contempt* (3ed 2005) at [3.6]:

Although the distinction between civil and criminal contempt continues to be made, it has to be considered carefully, the two categories have rather more in common than their traditional separation would imply.

#### UNITED STATES OF AMERICA

[44] In the United States, contempts continue to be classified as either civil or criminal. The distinction is determined by reference to the relief sought or the dominant purpose of the relief proceeding: *International Union, United Mine Workers of America v Bagwell* (1994) 512 US 821. The distinction is described in *Chadwick v Janecka* (2002) 312 F 3d 597 at 607 – 608 (3<sup>rd</sup> Circ) in the following terms:

To determine whether a contempt order is civil or criminal, Supreme Court jurisprudence requires an examination of the “character and purpose” of the sanction imposed. *See International Union v. Bagwell...*; *Gompers v. Buck's Stove & Range Co...* Civil confinement “is remedial, and for the benefit of the complainant.” *Gompers*, 221 U.S. at 441, 31 S.Ct. 492, whereas criminal confinement “is punitive, to vindicate the authority of the court.” *Id.* The *Bagwell* Court identified the “paradigmatic coercive, civil contempt sanction” as

involv[ing] [the] confin[ement] [of] a contemnor *indefinitely* until he complies with an affirmative command such as an order “to pay alimony, or to surrender property ordered to be turned over to a receiver, or to make a conveyance.” 221 U.S. at 442.... In these circumstances, the contemnor is able to purge the contempt and obtain his release by committing an affirmative act, and thus “carries the keys of his prison in his own pocket.” *Gompers*, 221 U.S. at 442... (emphasis added) (citations omitted).

Conversely, the *Bagwell* Court observed, “a fixed sentence of imprisonment is punitive and criminal if it is imposed retrospectively for a ‘completed act of disobedience,’ such that the contemnor cannot avoid or abbreviate the confinement through later compliance.” *Id.* at 828-29...

[45] It is notable that the right to a jury trial applying under the US constitution applies to a criminal contempt but not a civil contempt proceeding. The position was discussed by the Supreme Court of Kentucky in *Blakeman v Schneider* 864 SW 2d (1993) 903 at 906:

The conditional nature of sentences renders actions to be civil contempt proceedings for which indictment and jury trial are not constitutionally required. It is not the fact of punishment, but rather its character and purpose that often serves to distinguish civil from criminal contempt. Courts have inherent power to enforce compliance with their lawful orders through civil contempt. The conditional nature of imprisonment, based entirely upon the contemnor’s continued defiance of the court order, justifies holding civil contempt proceedings absent the safeguards of indictment and jury, provided that the usual due process requirements are met. The justification for coercive imprisonment as applied to civil contempt depends upon the ability of the contemnor to comply with the court's order. *Shillitani v. United States*, 384 U.S. 364, 86 S.Ct. 1531, 16 L.Ed.2d 622 (1966).

The purpose of civil contempt is to coerce rather than punish. Ultimately, then, the defining characteristic of civil contempt is the fact that contemnors “carry the keys of their prison in their own pockets.” If the contemnor absolutely has no opportunity to purge himself of contempt, then such imprisonment can be deemed punitive in nature and in the nature of a proceeding for criminal contempt. The United States Supreme Court unequivocally held that a civil contemnor cannot be incarcerated beyond the opportunity to purge himself of his contempt. A contemnor is entitled to representation by counsel and an opportunity to terminate one’s incarceration. *Campbell v. Schroering*, Ky.App., 763 S.W.2d 145 (1988).

## CANADA

[46] The distinction between civil and criminal contempt also endures in Canada, though the distinction has limited importance because in both civil and criminal contempt cases the standard of proof is that of beyond reasonable doubt, and the alleged contemnor cannot be compelled to testify: *Vidéotron Ltée v Industries Microlec Produits Électroniques Inc* [1992] 2 SCR 1065.

[47] Dr Harrison relied on the decision of the Supreme Court of Canada in *Poje v Attorney-General of British Columbia* [1953] 1 SCR 516 as authority for the proposition that there is no strict dichotomy between criminal and civil contempt. In that case Kellock J, giving judgment on behalf of Rinfret CJC, Rand J and himself, noted at 517 that conduct which renders appropriate contempt proceedings in aid of execution may have a criminal aspect as well. At 518 he noted the overlap between civil and criminal contempt where the enforcement of a right or liability as between parties takes on a penal or disciplinary jurisdiction to be exercised by the Court in the public interest. However, at 522 he approved the following passage from *Oswald's Contempt of Court* (3ed) at 36 as a correct statement of the difference between civil and criminal contempt:

And, generally, the distinction between contempts criminal and not criminal seems to be that contempts which tend to bring the administration of justice into scorn, or which tend to interfere with the due course of justice, are criminal in their nature; but that contempt in disregarding orders or judgments of a Civil Court, or in not doing something ordered to be done in a cause, is not criminal in its nature. In other words, where contempt involves a *public* injury or offence, it is criminal in its nature, and the proper remedy is committal – but where the contempt involves a private injury only it is not criminal in its nature.

[48] Nevertheless, in that case he determined that the defiance of an injunction by a large number of workers picketing their employer's premises was, because of the public nature of the defiance of the court order, conduct which was transferred "from the realm of a mere civil contempt... into the realm of a public depreciation of the authority of the Court tending to bring the administration of justice into scorn". This meant that the conduct amounted to criminal contempt: at 527.

[49] Dr Harrison also referred us to *United Nurses of Alberta v Attorney-General for Alberta* [1992] 1 SCR 901 at 931 where McLachlin J observed:

A person who simply breaches a court order, for example by failing to abide by visiting hours stipulated in a child custody order, is viewed as having committed civil contempt. However, when the element of public defiance of the court's process in a way calculated to lessen societal respect for the courts is added to the breach, it becomes criminal.

## NEW ZEALAND

[50] In the New Zealand context, Dr Harrison relied on the observation of Elias CJ and Morris J in *Solicitor-General v W & H Specialist Publications Ltd* [2003] 3 NZLR 12 (HC):

[18] The power to punish for contempt is an inherent jurisdiction of the court specifically preserved by s 9 of the Crimes Act 1961....

[19] The jurisdiction to punish for contempt is criminal....

[51] Taken in isolation, that observation could be seen as an indication that there is now no civil contempt action. But it must be seen in its context: it related to an allegation of pre-trial publicity potentially prejudicing an impending criminal trial, which is unarguably a criminal contempt. We do not consider that the quoted passage gives any guidance on the criminal/civil contempt distinction.

[52] The position in New Zealand is complex because of the codification of criminal law in the Crimes Act. We have already referred to s 9 of that Act (at [27] above). Section 384 of that Act provides different rights of appeal in relation to findings of criminal contempt. For criminal contempts committed in the face of a court, the right of appeal is restricted to the sentence imposed: s 384(1) and (2). But where the finding of criminal contempt was made by the High Court and the contempt was not committed in the face of the Court, there is a right of appeal against both the finding of criminal contempt and the sentence imposed: s 384(3) and (4). For such an appeal Part 13 of the Crimes Act (which deals with criminal appeals) applies "as if the finding that he or she is guilty of criminal contempt of court were a conviction".

[53] There is also a statutory power to punish for contempt of court set out in s 104(1) of the Crimes Act, but the situations dealt with by that section are not relevant to the present case.

[54] Dr Harrison argued that, with one possible exception, the rights of appeal in s 384 are the only rights of appeal available in relation to contempt of court findings or penalties in cases where the contempt is properly categorised as “criminal” in nature. The one exception is where the contempt finding arises in the context of an interlocutory application in civil proceedings, made by a party to those proceedings, for enforcement of a court order. Dr Harrison submitted that this is the only situation in which a finding of contempt will be a civil proceeding. He argued that the scope of s 384, when read with s 9, supported the categorisation of all contempt proceedings (with the exception of the interlocutory applications just referred to) as intrinsically criminal in nature.

[55] We do not see s 384 as helping us to determine whether a distinction between civil and criminal contempt remains and, if it does, where the boundaries are. Section 384 applies to “criminal” contempts, which begs the present question. Dr Harrison’s acknowledgment of the exception referred to in [54] above supports the proposition that there remains a species of contempt that is civil in nature in New Zealand. In principle, there is no reason why decisions made in the High Court in relation to civil contempt applications should not be subject to appeal under s 66 of the Judicature Act. That means there are different appeal paths for civil and criminal contempt decisions. The fact that there were similarly different appeal paths in New South Wales was the basis for the High Court of Australia’s conclusion in *Hearne v Street* that the civil/criminal distinction survived in that jurisdiction (see *Hearne v Street* at [21] and [132]).

[56] The contempt proceedings commenced by Mr Stiassny and his firm against the appellant fell within the exception identified by Dr Harrison, and both this Court and the Supreme Court have confirmed that those proceedings were civil in nature: [2008] 1 NZLR 150 at [9] (CA) and [2007] NZSC 53 at [5].

## CONCLUSION

[57] Drawing these threads together, we conclude there is still a distinction in New Zealand law between criminal and civil contempt. In reaching this conclusion, we acknowledge the cogency of the criticisms levelled against the bases for the distinction. It is noteworthy, however, that despite these criticisms, in all of the jurisdictions surveyed the terminology of civil and criminal contempt remains in use; and, more importantly, the classification exercise often will have substantive legal effects. For this reason, the distinction may well be material to determining whether the rights provided for in s 24 of the NZBORA apply to the alleged contemnor in particular contempt proceedings.

[58] It is, thus, necessary for us to proceed to the next issue, which is to determine whether the proceedings in the present case are properly characterised as civil or criminal. This issue requires an analysis of the application made by the Solicitor-General in the High Court and, separately, of the Court's judgment.

### ***Was the Solicitor-General's application a civil proceeding?***

[59] The proceedings commenced by Mr Stiassny and his firm which led to Mr Siemer being fined and, subsequently, imprisoned because of his continued flouting of the interim injunction were civil in nature (see [56]). The present proceedings were not, however, commenced by a party to the court order that was alleged to have been breached. Instead, they were brought by the Solicitor-General, the public official who (amongst other functions) carries responsibility for the conduct of criminal prosecutions. The question which arises is therefore whether this fact leads to a conclusion that the proceedings were criminal in nature.

[60] Dr Harrison argued that the involvement of the Solicitor-General in the present proceedings differentiated them from those conducted by Ferrier Hodgson/Korda Mentha and Mr Stiassny. He highlighted in particular:

- (a) The Solicitor-General's application was a substantive proceeding, not an interlocutory application in an existing civil proceeding.

- (b) The application was brought by the Solicitor-General by virtue of his office, not by the beneficiary of the interim injunction.
- (c) The Solicitor-General asserted his right to bring the application on the basis that the appellant's continued publication of material on the websites "constituted a deliberate, persistent, and unjustifiable disregard for the... injunction and an assault on the authority of [the] Court". This was said to be such a serious and ongoing contempt that an indefinite term of imprisonment was required.
- (d) The sanction sought was a punitive measure, not in the interests of the beneficiaries of the injunction but in the public interest and the interests of the administration of justice.

[61] Dr Harrison's argument in relation to this aspect of the case was that the comments of the High Court of Australia in *Witham* indicate that, even if there is a distinction between criminal and civil contempt, it is not a true dichotomy. He argued that, even if the object of the Solicitor-General's application was essentially coercive, it was undoubtedly also seeking a penal or punitive sanction which could be seen as having the characteristics of a criminal proceeding, at least in the context of the NZBORA, where a generous interpretation in favour of the rights of a citizen was required.

[62] Notwithstanding the comments in *Witham*, we see the distinction between criminal and civil contempt as being potentially significant when determining the scope of s 24(e) of the NZBORA in relation to particular proceedings. We do, however, accept Dr Harrison's point that many of the safeguards applying in cases of criminal contempt also apply in cases of civil contempt such as the requirement that the breach of the court order be proved beyond reasonable doubt and the non-compellibility of the party alleged to be in breach of the court order to give evidence.

[63] In our view, if the Solicitor-General's application was in substance designed to coerce compliance with the court order, then it is properly classified as a civil contempt. We say that notwithstanding Dr Harrison's argument that the Solicitor-

General's application has as its primary objective the punishment of the appellant for his persistent defiance of the injunction. We also note the comments made in *United Nurses of Alberta* (see [49] above) that disobedience of a court order, undertaken in a public way and intended to lessen respect for the courts, constituted a criminal contempt. We accept the position outlined in the American cases, particularly the passage quoted from *Blakeman v Schneider* (referred to at [45] above), correctly identifies the boundary between civil and criminal contempt. The purpose of civil contempt is to coerce, rather than punish. Where the disobeyed order remains current and able to be obeyed, and the sanction is designed to ensure obedience and comes to an end when that objective is achieved (i.e. the contemnor "carries the keys of the prison in his own pocket"), the sanction is properly classified as civil. That is so, notwithstanding the obvious fact that any imposition of a sanction such as imprisonment has a punitive or penal aspect to it.

[64] We do not accept Dr Harrison's submission that the form of the application made by the Solicitor-General to the High Court was expressed in a manner which indicated it was criminal in nature. It relied on the inherent jurisdiction of the Court and rr 458D(1)(b), 546, 608 and 609 of the High Court Rules. The last two (now rr 17.88 and 17.85 of the High Court Rules that came into force on 1 February 2009) are those empowering the Court to issue an arrest order (r 608) and to commit a person to prison for disobedience of a court order (r 609). (We would note, however, that the form that an application takes will not be determinative of its proper classification as civil or criminal: *Mafart v Television New Zealand Ltd* [2006] 3 NZLR 18 at [31] (SC).) It is clear from the submissions made on behalf of the Solicitor-General to the High Court that he sought an indefinite term of imprisonment that would end when the appellant complied with the interim injunction and provided an undertaking not to breach it again in the future. In other words, it was proposed that the appellant should, if in prison, have the keys of the prison in his pocket.

[65] We are satisfied that the application made by the Solicitor-General fell on the civil side of the boundary between criminal and civil contempts. We do, however, accept that the issue is a finely balanced one and that the Canadian authorities tend to support Dr Harrison's argument. Ultimately, we prefer to adopt the American

approach over that of the Canadian courts. For reasons to which we will come, this conclusion will not be determinative of the outcome. If it had been, it would have been necessary for us to consider whether the need to approach issues relating to the NZBORA in a generous way would have required us to treat the Solicitor-General's application as, in substance, amounting to charging the appellant with an offence for the purposes of s 24(e) of the NZBORA.

***Did s 24(e) of the NZBORA apply to the proceedings?***

[66] There are a number of indications in the High Court judgment which support the proposition that the matter was dealt with in the High Court as a civil application, but some aspects of the decision indicate that the Court treated the application as criminal in nature. We propose to analyse the Court decision in order to determine whether, in fact, its decision was essentially criminal in nature.

[67] The Court itself identified the proceedings as being civil in nature in its judgment of 8 July 2008. That was, of course, its reason for declining the appellant's application for the matter to be heard by a judge and jury: at [17]. Later, the Judges repeated their understanding that the proceeding is civil in nature: at [42].

[68] At [43], the Court described the objective of the proceedings in the following terms:

Obviously, compliance with Court orders and preventing future breaches should be the primary aim of the Court. However, the Court can only punish for past breaches and those that are continuing at the time the punishment is imposed. While that may act as a deterrence [sic] against future offending, the Court cannot punish breaches that have not occurred, and might not occur.

[69] However, at [46], the Court described the primary purpose of the Solicitor-General's application, and any order the Court might make, as "to punish Mr Siemer for wilful defiance of the law, through breach of the injunction". The Court made it clear that the case was not concerned with the rights of the plaintiffs (Mr Stiassny and Korda Mentha) in the civil proceedings against the appellant: the fact that the

proceeding might enforce the plaintiffs' rights under the injunction was seen as only an indirect "allied effect".

[70] When the Court came to consider the appropriate penalty, it observed at [91]:

As we have said, the purpose of these proceedings is twofold, namely, to impose a penalty or punishment upon Mr Siemer for his serious continuing defiance of the authority of the Court and the law and, secondly, as an adjunct to that, to secure compliance with the law so that Mr Siemer no longer infringes the injunction.

[71] At least on the face of it, that appears to promote the punitive objective above the coercive objective.

[72] At [96], the Court said that the imposition of a finite term of imprisonment would punish the appellant for breaching the court orders, provide a message to him that he is obliged to obey court orders, persuade him to comply by removing the offending material from the websites and act as a general deterrent to those in the community who would defy court orders.

[73] All of these observations reflect the obvious point that where a court determines that a failure to comply with an order constitutes contempt, and applies a sanction, coercing compliance by, and imposing punishment on, the contemnor will both be elements of the court's objectives. As the Supreme Court observed in *Siemer v Stiassny* [2007] NZSC 53 at [5], disobedience of a court order by a person involved in litigation is treated as a civil contempt "even though the conduct may have a criminal character and the Court's orders may be punitive in their effect".

[74] That passage from the Supreme Court's judgment cites as authority *Arlidge, Eady & Smith on Contempt* at [3.1] and [3.17]. Later in that text, at [3.78], the authors observe:

Although coercion is an important element in the law of civil contempt, the jurisdiction is often exercised also with a view to punishment or deterrence.

[75] This point was also made clearly by the United States Supreme Court in *Shillitani v United States* at 369 – 370:

Despite the fact that [the appellants] were ordered imprisoned for a definite period, their sentences were clearly intended to operate in a prospective manner – to coerce, rather than punish. As such, they relate to civil contempt. While any imprisonment, of course, has punitive and deterrent effects, it must be viewed as remedial if the court conditions release upon the contemnor's willingness to [obey the court order]. See *Nye v. United States*, 313 U.S. 33, 42-43, 61 S.Ct. 810, 812-813, 85 L.Ed. 1172 (1941). The test may be stated as: what does the court primarily seek to accomplish by imposing sentence?

[76] We do not see the High Court's characterisation of the objectives of the proceedings as compromising the essentially civil nature of the application made by the Solicitor-General. However, the sanction ultimately imposed by the Court differed in kind from that which had been sought. Although the Court gave the appellant the chance to purge the contempt before any order for imprisonment applied to him, it ultimately imposed a fixed term of imprisonment. Thus, once the order of 1 August was made, the appellant was required to serve the full term of imprisonment (subject to mandatory early release under the Parole Act 2002) even if he had, during the term of imprisonment, complied with the interim injunction and provided an undertaking as to continued compliance. In other words, the Court did not provide that the appellant would have the keys of the prison in his pocket. This makes the present case similar to those where the court order that has been disobeyed is spent, so the sole aim of contempt proceedings against the contemnor is punishment, because compliance is no longer possible. Such cases are cases of criminal contempt.

[77] In our view, the imposition of a sanction that was not contingent on continued defiance of the court order provides a stronger basis for arguing that the sanction was a criminal rather than civil sanction, at least for the purposes of the NZBORA.

[78] As noted earlier, Dr Harrison's argument that there was no longer a dichotomy between civil and criminal proceedings did not necessarily rely on there being no distinction between them at all. Rather, his argument also encompassed the proposition that, notwithstanding the distinction between civil and criminal contempt, any contempt proceedings which exposes the alleged contemnor to a

possible sanction of three months imprisonment or more should trigger the s 24(e) right.

[79] This is essentially a different way of presenting the argument that the distinction between civil and criminal contempt proceeding no longer exists or that, at least for the purposes of the NZBORA, it is of no significance. Much of the discussion outlined in relation to the civil/criminal distinction therefore applies equally to this aspect of the case. In a nutshell, the argument is:

- (a) Even in civil contempt proceedings, one of the objectives (not necessarily the primary objective) is punishment;
- (b) If the sanction sought by the applicant includes a term of imprisonment of more than three months, the jeopardy faced by the alleged contemnor is the same, whether the proceedings are civil or criminal in character;
- (c) The reference to being charged with an offence in the introductory wording of s 24 should be interpreted so as to ensure that the right is applied generously;
- (d) The Courts have already recognised these principles by applying safeguards borrowed from the criminal law, such as the requirement that the applicant prove the contempt beyond reasonable doubt.

[80] We accept that where the sanction sought in an application for civil contempt includes a finite term of imprisonment of more than three months, there is a valid argument that the rights given by s 24, including the right to elect trial by jury, should apply.

[81] In the present case, however, the sanction which was sought was an indefinite term, but with the important proviso that the imprisonment would come to an immediate end if the appellant complied with the court orders and gave an undertaking to continue to do so. Thus, to use the words of the American cases, the

appellant would have the keys of the prison in his pocket. Whether the time in prison would exceed three months would be entirely in the appellant's own hands. In those circumstances, the coercive purpose would be manifest. In our view, the American approach summarised in *Blakeman v Schneider* should apply equally in New Zealand. Applying that approach, where the relief sought by the applicant is a term of imprisonment which will come to an end as soon as the Court order is complied with:

- (a) The proceeding is civil;
- (b) The sanction is not and does not include a term of imprisonment of more than three months for the purposes of s 24(e) because the length of the imprisonment will be a matter of choice for the contemnor.

[82] However, once the “keys in the pocket” aspect to the proposed sentence is removed, the position changes. In *Shillitani v United States*, two men refused to answer questions before a grand jury and were found in contempt and imprisoned for two years or until they answered the questions. The Supreme Court held that because the proceedings were civil, the justification for imprisonment depended on the ability of the contemnors to purge their contempt. Thus, once the grand jury had been finally discharged, they could no longer be imprisoned because there was no opportunity to purge their contempt.

[83] In the present case, the High Court gave the appellant a period of grace in which he could have complied with the injunction and avoided a prison term. But once that period had elapsed, the term of imprisonment imposed on the appellant was fixed. Even if the coercive objective of ensuing compliance with the injunction was achieved, the appellant would still be required to serve his sentence (or, more correctly, half of it, given the release date set by s 86 of the Parole Act, which applies to any person subject to a term of imprisonment for “disobedience of a Court order or contempt of court”: s 9). When combined with the factors noted at [60] above, that leads us to conclude that, in the present case, the Court did apply a punitive sanction, which meant the proceeding did have a criminal character for the purposes of s 24(e) of the NZBORA.

***Was the High Court committal order beyond jurisdiction?***

[84] Because the Court imposed a fixed term of imprisonment for six months (even though it was after providing the appellant with the opportunity to comply before that term commenced), this was not a case where the contemnor had the keys of the prison in his pocket. We are satisfied that that is what the Crown sought, and if the Court had included a condition in the sentence which provided for the imprisonment to cease at the time of compliance, then the case was properly conducted without triggering the right in s 24(e). But as the sentence actually imposed was a finite term of six months, we consider that such a sentence could only have been imposed after the appellant had been provided with the election of trial by jury.

[85] That raises the question of what should be done about that now. For the Crown, Mr Horsley submitted that the appropriate course was for this Court to alter the sanction imposed on the appellant to bring it within the High Court's jurisdiction, reducing the fixed term of imprisonment to a term of three months or less. An alternative would be to add a condition to the proposed sentence of six months imprisonment providing for the sentence to come to an immediate end if the appellant complies with the injunction and gives an undertaking to continue such compliance. Mr Horsley argued that this was similar to the situation which arose where a judge in a criminal proceeding imposed a sentence beyond jurisdiction. In that event, he said, the appropriate response for an appeal court was to quash the sentence and impose a sentence which was within jurisdiction.

[86] The alternative view is that the trial should be conducted again, after an election to have a trial by judge and jury is given to the appellant. The argument is essentially that, having imposed a finite term of imprisonment which is punitive in nature, the Court has converted the proceedings into criminal proceedings (or proceedings with such similarity to criminal proceedings that s 24(e) is engaged), and the whole process having been conducted by a court without proper jurisdiction should be quashed.

[87] This requires some consideration of the exact meaning of s 24(e) in circumstances where there is no defined maximum penalty as is the case for offences under the Crimes Act, Summary Proceedings Act and other criminal law statutes. In the criminal context, the question which must be asked when determining whether s 24(e) is engaged is the potential jeopardy faced by the accused, which is determined by reference to the maximum penalty provided for in the relevant statute. Obviously, that methodology cannot be adopted where there is no statutory process and therefore no maximum penalty provided.

[88] In a case where no maximum penalty is provided, it seems to us that the only way s 24(e) can be effectively applied is by reference to the remedy actually sought by the applicant in the civil contempt application. Where that remedy is a sanction other than imprisonment, imprisonment for three months or less, or imprisonment for a period greater than three months but subject to a condition which allows the contemnor to bring it to an immediate end at any time, we consider that the right to elect trial by jury is not triggered. Thus, it will only be in cases where a sentence for a finite term of more than three months is sought that the trial by jury issue will arise.

[89] The situation in this case has many similarities with that faced by Canadian courts considering the application of the trial by jury right in s 11(f) of the Charter of Rights and Freedoms. In Canada, this right applies where the penalty is five years imprisonment or more (in contrast to only three months imprisonment in s 24(e)).

[90] In *R v Cohn* (1984) 13 DLR (4<sup>th</sup>) 680, the Ontario Court of Appeal considered the right to a jury trial under the Charter. At 703 – 705, the Court examined the position in the United States, noting that the right to trial by jury under the American Constitution is not subject to any express limitations. The American courts have, however, developed the “petty offence” exception. Under this exception, it has been held that an offence cannot be deemed “petty” where the authorised imprisonment is more than six months. However, in the case of contempt, where there is no legislative maximum, it is the actual penalty imposed that governs. Thus, an ex post facto determination is required.

[91] The Court then noted at 705 that the Canadian Charter's guarantee of a right to trial by jury is subject to an exception for offences which have a maximum penalty of less than five years. The Court considered that the American approach, requiring an ex post facto analysis, involved "an element of unfairness to the contemnor. He is not certain of the maximum sentence which may be imposed on him in the summary proceedings."

[92] In conclusion, the Court held at 705 that:

... the courts of Canada, in the exercise of their inherent jurisdiction and having regard to the provisions of s. 11(f) of the Charter, must impose a sentence of less than five years' imprisonment where summary procedure has been invoked in the trial of a charge of contempt of court. That being the case, an alleged contemnor is not entitled to a trial by jury. In the event that the judge presiding at a contempt proceeding imposes a sentence of imprisonment for five years or more, it will be the sentence that is unlawful and not the proceedings.

[93] *Cohn* was effectively followed by the British Columbia Court of Appeal in *MacMillan Bloedel Ltd v Simpson* (1994) 113 DLR (4<sup>th</sup>) 368, although the Court did not express a concluded view on whether contempt was an offence for the purposes of s 11 of the Charter.

[94] However, the reasoning adopted in *Cohn* was disapproved of in *Attorney-General for Manitoba v Groupe Quebecor Inc* (1987) 45 DLR (4<sup>th</sup>) 80, where the Manitoba Court of Appeal held that contempt was not an offence within the meaning of s 11 of the Charter. That Court decided that s 11 was never intended to catch contempt proceedings.

[95] We adopt the *Cohn* analysis. Applying it to the present case, we consider that the Court did have jurisdiction to deal with the application made by the Solicitor-General, given the nature of the sanction which he sought. But we consider that the Judges then exceeded their jurisdiction in imposing a finite term of imprisonment of greater than three months which did not have the proviso that it would come to an end at the time of compliance, because such sanction was available only if the appellant had been offered the election of a jury trial. This was probably an oversight on their part, because it is clear from the decision itself that

they were seeking to impose a less onerous sanction than that which was sought by the Solicitor-General.

[96] In those circumstances, we consider the appropriate appellate remedy is to quash the term of imprisonment for six months imposed by the High Court and replace it with a term of imprisonment of a maximum of six months, subject to the proviso that the term of imprisonment will come to an immediate end if the appellant complies with the injunction and provides an undertaking to the Court that he and Paragon will continue to comply with it. Thus, the appellant will have the keys of the prison in his pocket.

#### ***Application of s 5 of the NZBORA***

[97] Dr Harrison suggested that, if the Court considered s 24(e) was applicable, it would be necessary to consider whether denial of an election for a jury trial in the present case was justified in a free and democratic society in terms of s 5 of the NZBORA. As noted earlier, we do not consider it necessary to engage with this issue, given our views on the appropriate appellate response in this case and the concession made by the Solicitor-General in relation to criminal contempt proceedings.

#### ***What would the jury do?***

[98] Our earlier conclusions make it unnecessary to deal with this issue.

#### ***Conclusion: trial by jury***

[99] We conclude that the Solicitor-General's application was a civil contempt application and that it did not trigger the s 24(e) right to trial by jury. However, the order for committal was beyond the jurisdiction of the Court. The appropriate appellate response is to modify the order to bring it within the Court's jurisdiction.

## Was there double jeopardy?

[100] The second ground of appeal was that the High Court proceedings amounted to double jeopardy and were therefore in breach of s 26(2) of the NZBORA, which provides that:

No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.

[101] Because this provision is expressed to apply to people who have been acquitted or convicted of “an offence”, it is arguable whether it covers findings of civil contempt. However, even if it is not technically applicable, the common law right to be free from double jeopardy must extend to civil contempt: see *Arlidge & Eady* at [3.39].

[102] The appellant’s argument focussed on the following passage from Potter J’s 13 July 2007 judgment in which he was committed to prison for six weeks:

[23] Mr Siemer’s breaches of the Court injunction have been serious, continuous, deliberate and contumacious. His breaches of this Court’s injunction have been proved beyond reasonable doubt as has been found in the two judgments dated 16 March 2006 and 9 July 2007. ... Mr Siemer leaves the Court no alternative but to impose on him a term of imprisonment which reflects his past *and continuing breaches* of this Court’s injunction, the aggravating features submitted by the plaintiffs (which I accept), and the absence of any mitigating factors such as remorse or an undertaking not to continue his offending actions in future.

(Emphasis added)

[103] The appellant submits that italicised phrase shows that the punishment imposed extended to all future breaches of the injunction.

[104] We do not regard the word “continuing” as carrying this meaning. In her judgment of 9 July 2007 Potter J identified the appellant’s breaches of the injunction that constituted contempt of court. The writ of arrest issued in that judgment relied, at [53], on both “the conduct of Mr Siemer in continuing to publish material in breach of the injunction” as well as “his previous conduct which gave rise to the finding of contempt in the [16 March 2006] judgment”. Given that context, it is clear that the past breaches of the injunction referred to were those for which the

appellant was found in contempt by Potter J in her 16 March 2006 judgment. The continuing breaches were those that occurred after that initial finding of contempt and were dealt with in the 9 and 13 July 2007 judgments. The six week term of imprisonment imposed on 13 July 2007 was plainly not intended to (nor could it) cover breaches of the injunction which occurred after that date. After all, such a result would effectively grant the appellant a licence to breach the injunction in the future, so rendering a valid court order unenforceable against the party to whom it is directed.

[105] The present proceedings concern breaches of the injunction that occurred after 13 July 2007 and for which the appellant had not previously been tried. The fact that some of these breaches relate to material that may originally have been posted on the appellant's websites prior to 13 July (and then left there) is not material. Leaving such information on the websites constituted further, new breaches of the injunction. The rule against double jeopardy therefore is not engaged.

**Was there a breach of natural justice?**

[106] The third ground of appeal is that the High Court hearing breached the appellant's right to natural justice, as guaranteed by s 27(1) of the NZBORA. The appellant's assertions in support of this ground reduce to claims that the High Court:

- (a) Failed to set out its reasoning in reaching the conclusion that the appellant had breached the injunction;
- (b) Refused to consider the lawfulness of the injunction; and
- (c) Acted as both prosecutor and Judge, and was therefore not impartial.

[107] These claims can be disposed of briefly.

[108] With respect to the first claim, the appellant argues that Court failed to identify both which part of the injunction was breached as well as those published

words that constituted a breach. These arguments are untenable: at [8] the Court set out the relevant passage of the injunction at issue; and at [63] and [64] there are multiple quotations from the appellant's websites that plainly breach the terms of the injunction. By way of example, the appellant's claims (at [63]) that Mr Stiassny "was about to be publicly exposed for falsely labelling a company insolvent in order to personally steal its technology" and was guilty of "seemingly criminal malfeasance" plainly breach the order that the appellant not "publish in any form any information containing allegations of criminal or unethical conduct" in relation to Mr Stiassny.

[109] The second claim is equally untenable. As the High Court specifically noted at [56], this Court has already rejected a challenge to the lawfulness of the injunction: *Siemer v Ferrier Hodgson* CA87/05 13 December 2005. Furthermore, as this Court has held previously, "[i]t is no answer to an allegation of contempt of court involving breach of an injunction to assert that the injunction was wrongly granted": [2008] 1 NZLR 150 at [13].

[110] The third claim is that Chisholm and Gendall JJ's reasons demonstrate that they did not act impartially. In particular, the appellant's written submissions draw attention to [91] of the High Court judgment. In this passage the Court describes the purposes of the proceedings as twofold: to impose penalty on the appellant and to secure future compliance with the injunction. The appellant complains that by articulating the first of those purposes the Judges revealed what they saw as their true role in the proceedings.

[111] We see this passage as unexceptional. It comes under the heading "What sanction/penalty should be imposed for the contempt?" and follows on from the Court's finding that the contempt had been proved beyond reasonable doubt. As we have already noted, punishment is a legitimate objective of contempt proceedings, whether civil or criminal. The fact that the objective of punishment is stated before that of coercion may indicate the proceedings are criminal rather than civil. But that does not make the fact that the Court saw the sanction imposed on the appellant as having a punitive (as well as coercive) objective a matter of concern.

## **Result**

[112] We allow the appeal in part. As the sentence imposed in the High Court was beyond the jurisdiction of the High Court, we quash the term of imprisonment for six months imposed by the High Court and replace it with a term of imprisonment of a maximum of six months, subject to the proviso that the term of imprisonment will come to an immediate end if the appellant complies with the injunction and provides an undertaking to the Court that he and Paragon will continue to comply with it.

## **Costs**

[113] As neither party has been wholly successful in the argument before us, we make no award of costs.

## **Bail**

[114] This Court granted the appellant bail pending the hearing and determination of his appeal to this Court, subject to two conditions. The second of those conditions (that he attend the hearing of the appeal) has now been superseded by events. The first was that he surrender his passports to the Registrar of the High Court at Auckland.

[115] We anticipate that the appellant may wish to seek leave to appeal to the Supreme Court against this decision. We consider that it is appropriate that bail continues until the end of the time within which an application for leave must be made and, if an application for leave is made during that period, until further order of the Supreme Court.

## **Postscript**

[116] There are a number of difficult issues relating to the nature of contempt proceedings and the application of the NZBORA to contempt proceedings which this

judgment highlights. Consideration should be given to legislative reform in this area of the law as happened in the United Kingdom.

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