IN THE SUPREME COURT OF NEW ZEALAND | SC 37/2012

[2013] NZSC Trans 2

BETWEEN | **VINCENT ROSS SIEMER**

Appellant

AND | **THE SOLICITOR-GENERAL**

First Respondent

Hearing: 14 February 2013

Court: Elias CJ
McGrath J
William Young J
Chambers J
Glazebrook J

Appearances: A J Ellis and G K Edgeler for the Appellant
M F Laracy and A R v Echten for the Respondent

CIVIL APPEAL

MR ELLIS:

I wanted to start at the end, in the conclusion, and then make a few Shakespearean analogies and then go back to the, to the front.

ELIAS CJ:

If you think it would help us, Mr Ellis.

MR ELLIS:

Do I think it will help you?

ELIAS CJ:

If you think the Shakespearean analogies will help us.

MR ELLIS:

Oh, well I think it sums up the case in a, in a nutshell really, but I wanted to start in the conclusion there to say that the right of criticising in good faith and in private or public, but public act done in the seat of justice is, I think, what we're here for for the second day. But as I put in 79, and I don't think anybody will think I've converted to sycophancy, but it is a positive and highly welcome human rights step to be here for day 2 on this. I mean, there's only a few times in your life when you get that warm glow that (inaudible 10:02:28) *Taito v R* [2002] UKPC 15, [2003] 3 NZLR 577 and (inaudible 10:02:31), even, even if you lose, that the Courts listened. You may or may not win, but you're, you get an intelligent decision, you get the intelligent discussion and we move on and in one way or another the law hopefully advances, and that's one of these occasions. And it's very proper that we're back for day 2.

And the Shakespearean analogies that you'll be well aware of, from *Hamlet*, "To be, or not to be, that is the question: Whether 'tis nobler in the mind to suffer The slings and arrows of outrageous fortune, Or to take arms against a sea of troubles, And by opposing end them," is what Mr Siemer was doing. He took up arms against his sea of troubles and hoped to end them, whereas, with respect to the respondent's approach, it's really that pound of flesh, that figuratively harsh penalty that they seek, and that's really where we're at.

So turning to the front, and, again, at paragraph 5, I mean that's the heart of today: the right to criticise. I think what I missed out when I reviewed all this again is, and I, although I have said it's arbitrary if – that, that the right, there's a rights defence as well in both the Bill of –

ELIAS CJ:

Right to...

MR ELLIS:

Defence, to present a defence. Section 25(e) of the Bill of Rights or section 354 of the Crimes Act. And if you're not allowed to certainly raise a defence at the, your second question – I've just missed out, I should've categorised that in the same, in

the same light. That his right to defend himself is being curtailed by not being able to challenge the order. And –

ELIAS CJ:
Doesn't that though beg the question of what the offence is? Because if it's simply publishing, then he can challenge on the basis of, that it was involuntary or that he didn't know or something like that. There are defences directed at that offence. You are begging the bigger question, which is, are you able to get beyond that offence to whether the order was valid?

MR ELLIS:
Yes, very much so, and I suppose the main complaint or a principal complaint is that when the full High Court hearing this case was asked, "Okay, we want to do what you've given us leave to do. We want to say this order – we're allowed to this and we say this order should be set aside and we want to present a defence." And they said, "Well that's possible, but we're not going to do it." Well who better to do it than the Court that was, was hearing, hearing the full details of this? But we were just given the brush off. So we raised these issues before Justices MacKenzie and Justice France and were told no, so the respondents say, well, Ms – I've forgotten her name, was it Ms Penny? Penny something.

CHAMBERS J:
Bright.

MR ELLIS:
Penny Bright, Penny Bright did this and then we sent Mr Siemer along repeatedly to the criminal registry, but they wouldn't allow a hearing to, to rescind this. And I now say, see that the respondent says, "Well, you could judicially review it." Well, that's a lot of good if you're facing a criminal charge at the moment. I mean, there's got to be some reality to be able to raise it as a defence, and if you are going to be raise it as a defence, and if you are going to raise it as a defence, obviously you're going to raise it as a defence before the trial Court that's conducting the hearing.

And over the page at page 3, Professor Smith in his very recent paper for the Attorney-General, very lengthy, detailed and thoughtful paper on the law of contempt, says there's an increasing recognition by the Courts of the need to be sensitive to citizens criticising institutions, including the administration of justice. Well, be

sensitive to Mr Siemer's criticism of the administration of justice, because, because you should be.

And then my friends take, in, in one of the rare passages in their, in their lengthy submissions, they seem to be allowed more pages than, than we are, 36 pages, say, "The appellant raises *Boddington v British Transport Police* [1999] 2 AC 143 (HL), but it's different because in this you're challenging a bylaw but Judges' orders are sacrosanct and you can't challenge them." Well, with respect, this is putting judicial decision making on a pedestal that is beyond challenging. It's a sort of ouster clause, and the submission I made from Bhagwati that, you know, however high you are, the law is higher, is very apt response to that. You should be able to challenge this.

ELIAS CJ:
Well I don't think anyone's saying you can't challenge it. It's just that it needs to, what is being said is that it needs to be directly challenged through judicial review in which the order is the subject of the application.

WILLIAM YOUNG J:
And complied with first. Comply first, argue later. That's the proposition you're faced with, I think.

MR ELLIS:
Yes, but I mean, our, our, our proposition is, as Lord Steyn says, that, you know there's a, if there's a, an abuse of power, you can, you can challenge. Now –

McGRATH J:
Isn't the first question directed to whether the order can be challenged on the basis that can an application be brought to have it varied or rescinded. Isn't that a means of challenging the order that's in issue today?

MR ELLIS:
Question 1, yes. Well the answer to it was no. When Mr Siemer tried, he couldn't. He wanted to challenge –

McGRATH J:

He was a little late in his own application was he not? I mean it was after the contempt proceeding – what stage –

MR ELLIS:

Yes, a little late. Well, as time passes it wasn't early in the – but the order was still valid and why does he have to challenge it on day 1. He's challenging it when he's facing criminal prosecution. He may not need –

CHAMBERS J:

No the point is should he have challenged it prior to breaching it.

MR ELLIS:

Well that –

CHAMBERS J:

It doesn't have to be on day 1, that's not the point.

MR ELLIS:

Right. No, he doesn't, because that then makes the judicial order sacrosanct.

CHAMBERS J:

Not at all, no.

MR ELLIS:

Well –

CHAMBERS J:

Because the proposition is that like any judgment or order it stands until it is set aside.

WILLIAM YOUNG J:

Well obviously there's the *Boddington* argument.

MR ELLIS:

Yes.

ELIAS CJ:

I suppose, and I am sympathetic to there being a practical venue or route to challenge the underlying order, but I suppose the problem you face with the *Boddington* route is that those are really places of ultra vires whereas you don't have an issue with vires in respect of the contempt power.

MR ELLIS:

Well you have a vires issue in that from your judgment in *Lewis v Wilson & Horton* [2000] 3 NZLR 546 (CA) that you need to provide reasons and if you don't –

ELIAS CJ:

Yes, and I suppose on your argument you'd say there's also a vires point in the New Zealand Bill of Rights Act 1990 freedom of speech perhaps but it's an odd use of the concept of vires. It's a, I suppose it's the *Anisminic Foreign Compensation Commission* [1969] 2 AC 147 (HL) use.

MR ELLIS:

Yes, yes.

GLAZEBROOK J:

But there clearly are two rights that are engaged here because there's the right to freedom of speech but there's also the right to a fair trial. Now I know that your argument is that the right to a fair trial was not engaged in this particular order but nevertheless in most circumstances there will be that necessity to, I hesitate to say balance the two rights, because that's not what's happening, but there are two rights engaged here.

ELIAS CJ:

But isn't that the substantive determination. What we're looking about is how you get about –

GLAZEBROOK J:

Oh I understand that but the vires question becomes more difficult when you're actually looking at a balance of rights rather than –

ELIAS CJ:

Yes I understand.

GLAZEBROOK J:
– merely the freedom of expression so it was just directed at that point.

ELIAS CJ:
Yes, yes.

MR ELLIS:
Well yes I'd like to respond to that one that if one takes the view that the starting point needs to be freedom of expression, and if the Judge hasn't considered freedom of expression, it is ultra vires and she's got no power to do it.

GLAZEBROOK J:
Why would that be the starting point in the criminal trial rather than the right to a fair trial which I would have thought, especially given that it's a very time limited suppression order, I would have thought, personally I would have put the right to a fair trial above freedom of speech in terms of time limited orders, if there was a risk to the freedom – risk to the fairness of the trial.

MR ELLIS:
Well following those articles I quote from the text of Judge Bratza where you've got to take a more extensive approach than the approach to fair trial in Article 6. You need to do more, and ask more, when you're considering Article 10 and as I say, the nature of my submissions, what you've just said is the wrong approach.

GLAZEBROOK J:
So you don't start with a fair trial, you start with freedom of speech and then what do you do?

MR ELLIS:
Well then you, then, as you say, it's a balancing exercise and, there's a proportionality or reasonableness test engaged in the freedom of expression analysis and you need to, you do need to engage in this balancing exercise that you're talking about.

GLAZEBROOK J:

Well freedom of expression can be limited in a number of ways. I wouldn't have thought that the right to a fair trial is one that is other than a total right.

MR ELLIS:

Well certainly this Court has said that it's an absolute right but then you do get into a conflict of hierarchy of rights, really, don't you, that we all try to avoid –

GLAZEBROOK J:

Yes but freedom of expression is one of those that can be compromised for other more important rights though isn't it?

MR ELLIS:

Yes but where does the judgment say, I'm doing this to protect fair trial rights. The judiciary doesn't have open slather to avoid accountability and not to give reasons. The law says –

ELIAS CJ:

Mr Ellis, one of the things that occurred to me when reviewing the material is that we don't have all the preceding, I don't think we've got, have we, all the preceding judgments because this is – that the Judge made in terms of suppression orders.

MR ELLIS:

Well I suspect you're right because I don't think we touched – I think we would have touched on them in the High Court. I don't think they were a feature –

ELIAS CJ:

It's just that I wonder whether it's entirely fair to say that this was a decision in which reasons weren't given because it probably harks back to earlier orders made and reasons given.

MR ELLIS:

I can't answer you on that without –

ELIAS CJ:

I'll ask Ms Laracy then.

MR ELLIS:

Yes but the, in a way I think it's not likely to be because you've got, I mean what we're really concerned about is there's a suppression of the fact but you can't have a jury trial and that, it doesn't really matter what came before, it's a separate argument. Why can't the public know why there can't be a jury trial?

ELIAS CJ:

Because the reasons are probably information –

MR ELLIS:

Or that there can't be a jury trial, yes, sorry?

ELIAS CJ:

Yes. It's not the, yes, I understand that point, yes.

MR ELLIS:

And the – it does seem incongruous that we spend all this time and effort on disciplining Mr Siemer, as it were, but the Judge who on the *Lewis* test plainly failed to give reasons and didn't have accountability and nobody says a word about her, she gets off scot free, and Mr Siemer possibly goes to prison. This is not justice or fair. It's totally wrong. This brings the administration of justice itself into disrepute. I'm not suggesting that the Judge should be disciplined but somebody should say, you know, this isn't right. That, well it's the very antithesis of *Lewis*, isn't it? You need to give reasons.

ELIAS CJ:

All of this has been covered in the first day of our hearing. We really would be assisted, I think, if you'd concentrate on the collateral challenge point and the other question that was posed.

MR ELLIS:

I was just responding to questions.

ELIAS CJ:

Yes, I understand.

MR ELLIS:

I mean it's difficult when five of you say something and – anyway. Well in the *Mauritius* case, at the top of page 9 there, that was the – sorry not page 9, paragraph 9, sorry. *Ahnee, Sydney Selvon and Le Mauricien Limited v Director of Public Prosecutions (Mauritius)* [1999] UKPC 11, [1999] 2 AC 294, which I didn't, I don't think I cited before because I hadn't got it, but this derivation of this right to have a defence based on a right of criticising in good faith, and I'm conscious of not answering Justice Chambers first, first day point. Well, there comes a time when power is abused when you have to stand up and be counted. And if, if you, if there are consequences of it, then so be it. But you can't, you can't silence somebody and deny a defence. It would be preferential that you try and rescind or vary the order, but there must be circumstances such as this one when on its face the application, the, the order is ultra vires that you can –

ELIAS CJ:

Sorry, on its face ultra vires. That is because you say the reasons which support the order aren't included, weren't given?

MR ELLIS:

Yes.

CHAMBERS J:

Or because you can't make suppression orders, full stop. That's your primary argument, of course.

MR ELLIS:

Yes.

CHAMBERS J:

And we only get to this question today if you're wrong on that first point.

MR ELLIS:

Yes. Yes, that's very much the case. Yes.

And I certainly thought that, I know this Mauritian case here in the Privy Council is scandalising, but why's there any –

ELIAS CJ:

And it’s direct. It’s not a breach of a Court order.

MR ELLIS:

Well, it’s the principle we’re concerned about, aren’t we? And it’s pretty clear that you’ve got the right to criticise in good faith in public or private what’s done in the seat of justice. So –

ELIAS CJ:

Well I don't think anyone takes exception to that.

MR ELLIS:

Well I, I beg to differ, Ma'am. The Solicitor-General does. You can't do it.

WILLIAM YOUNG J:

Well, the complaint against Mr Siemer is not that he criticised a decision. The complaint against Mr Siemer is that he breached an order in doing so.

MR ELLIS:

Well, that’s semantics. The real thing is, he says, he’s being got at for criticising a Judge. You can wrap it up however you like, but out there for the public, that is a reasonable proposition of, of how it will be seen. And –

McGRATH J:

Well I suggest the public would think that he was being, had been convicted and punished effectively for disobeying an order of Court.

MR ELLIS:

Yes. Yes, I, I, I would agree they would think that too –

McGRATH J:

And that the reason for that is that effective administration of justice requires that orders of Court are obeyed unless they’re properly challenged within the means available in the judicial system, the system of justice.

MR ELLIS:
Yes, well that's a traditional conservative viewpoint that's highly, highly valid. But from –

ELIAS CJ:
Well I think it's a traditional viewpoint. Indeed, the preponderance of authority supports it.

MR ELLIS:
Yes.

ELIAS CJ:
So I think the additional adjective was gratuitous, Mr Ellis.

MR ELLIS:
Well, yes, you may, you may be correct. I don't see it as that.

ELIAS CJ:
But for our purposes what you need to do is persuade us that the preponderance of authority, which I think is against you, is wrong.

MR ELLIS:
Well I, I don't use the adjective "conservative" in any derogatory sense. It's just the traditional view, and what I'm trying to say is we want a liberal, as opposed to conservative, point of view and move the law along to a more rights-based proposition in that, that freedom of expression is the starting point, not the, the right to a fair trial, which wasn't articulated in the judgment, and neither was, neither is it alleged that there was any fair trial right breached.

McGRATH J:
Mr Ellis, your analogy with the, that head of contempt called scandalising the Court, which is a, of course I accept, a controversial issue these days, I suggest that's not an appropriate analogy, because totally different questions arise as to what's needed for the effective administration of justice in the context of scandalising the Court and to what extents freedom of expression can be accommodated. Totally different considerations arise there than they do when the issue is the disobedience of a Court order and what effective administration of justice requires in that context.

MR ELLIS:

Yes. I can understand what you say. I think, Sir, you're wrong, because the administration of justice needs to be looked at in a far wider context.

McGRATH J:

All I'm saying is that I don't see the analogy you draw with scandalising as an appropriate one and I therefore don't see your argument at the moment as a strong one.

MR ELLIS:

Right. I –

McGRATH J:

Because of that distinction.

MR ELLIS:

Yes. I understand that. I'm trying to answer that. I think you're, you're wrong in suggesting the analogy is incorrect. It, it is very correct because the proposition is that we're talking about the administration of justice and it doesn't just apply to scandalising the Court. It must apply to this case too. Is it not bringing the administration of justice into disrepute to allow a Judge to make decisions without reasons in breach of the law and then say you can't criticise it, which has been a long-held right? You can't divide up and saying criticism is only allowed in this very limited way and you've got to go through hoops and go back to the Court and challenge it as soon as possible. No. You have a right to exercise your freedom of expression and the public have a right to receive that information –

CHAMBERS J:

How did you –

MR ELLIS:

– which we haven't got into quite yet, have we? It's not just Mr Siemer's expressing. The other half of it is the public have a right being prevented from receiving this information. Yes Sir.

CHAMBERS J:

Mr Ellis, going away from the facts of this case, assume you have a Court order which somebody breaches. What – how would you define the nature of this new defence that you say there should be? What does the defendant have to establish?

MR ELLIS:

He's, he needs to establish that he's criticising what has happened in good faith.

WILLIAM YOUNG J:

So even if the order was properly made and unchallengably correct, if he's –

MR ELLIS:

I see.

WILLIAM YOUNG J:

– himself may – I mean, there are two or three issues tied up here.

MR ELLIS:

Yes.

WILLIAM YOUNG J:

I thought you were saying, "The defendant's entitled to say the order shouldn't have been made because it trenches on my liberty of expression and therefore I shouldn't be prosecuted for contempt."

MR ELLIS:

Yes, it, it gets a bit complicated, doesn't it, if we've, we move from the facts of this case. If you do the criticism and you're wrong, like I think it was, I'm not sure if it was *Prager and Oberschlick v Austria* (1996) 21 EHRR 1 (ECHR), one of those European cases, you were wrong and you haven't done your analysis properly, then the European Court rejects it. But if you're right – so there may have to be two factual situations. Your criticism is "correct" or it's wrong. So you've got, you've got to do –

ELIAS CJ:

We're not talking about the criticism though. We're talking about the publication in breach of a suppression order.

McGRATH J:

Yes.

MR ELLIS:

Well isn't that the criticism?

ELIAS CJ:

No. The criticism hangs off that. It might've been – yes, it might –

MR ELLIS:

I, I, I don't see it that way.

CHAMBERS J:

He wasn't "prosecuted" for contempt for criticism. He was prosecuted for breaching a Court order by publishing. Indeed, the first time he did it, correct me if I'm wrong, there was no commentary from him.

MR ELLIS:

Well, doesn't it speak for –

CHAMBERS J:

There was simply the publication of the report.

MR ELLIS:

Doesn't it speak for itself? This is, I think this is an air of unreality to suggest that he's not being prosecuted for criticism, because that's what he is being prosecuted for. I just don't accept that you can wrap it up and say the publication isn't criticism. Publication per se is criticism. "Here's, this is not – this is suppressed."

ELIAS CJ:

It's a bit of a –

MR ELLIS:

"Look at this."

ELIAS CJ:

Are you saying that the Law Reports are in itself a criticism? It just seems a bit unreal, the argument that you're making Mr Ellis.

MR ELLIS:

No, I'm not saying the Law Reports are. I'm saying here we are faced with a judgment which suppresses the reasons for why you can't have a jury trial and, and he publishes it. That, in those circumstances, is a criticism. And, and you're hard pushed to suggest that it isn't. That is unreal.

CHAMBERS J:

Well, that isn't so Mr Ellis. If the *New Zealand Herald* had just published this judgment, we wouldn't necessarily have taken it as a criticism. It's just newspapers like to publish things that they think people will be interested in. But even though it might not have been a criticism, the *Herald* would have faced a contempt proceeding.

MR ELLIS:

Well, I suppose that then takes us into the realm of, well, it's almost the motivation for the prosecution, isn't it? But he's being prosecuted because he's done it before and he's a naughty boy.

ELIAS CJ:

Well I don't know how you can make that submission. We're not interested in that. We're only interested in whether there was a defence he should have been allowed to run or whether he could collaterally challenge the order.

MR ELLIS:

Well, he, he tried to run the defence directly in his criminal proceeding and what better way to challenge it than before the Court where all the facts are?

ELIAS CJ:

Well I understand that submission.

MR ELLIS:

Why does he have to collaterally challenge it in a judicial review, which is not going to help him in terms of the time span in defending his criminal charge? And I think in, it was in –

CHAMBERS J:

Well that's not the collateral challenge in the sense we're meaning it. That is a proceeding which could have been taken prior to breach, before the breach occurred. When we're talking about collateral challenge here we're really meaning, "Are you able as a defence to a contempt proceeding which has been brought, are you able as a defence to, at that point, say, 'The order should not have been made and therefore I'm not, can't be held liable.'"

MR ELLIS:

Yes, well, let me try and hopefully make an analogy that is appropriate. In *Attorney-General v Coghill* HC Wellington CP484/93, 15 April 1994, High Court, Justice McGechan, and it related to a judicial review by the Crown in relation to a challenge that had been made in the District Court to do with the registrar issuing a search warrant. And Judge Gaskell had ruled that it was perfectly proper to call the registrar and challenge it there and he didn't have to stop and do a judicial review. And that went, on Crown case stated, to the High Court before Justice McGechan and the District Court unusually sent Mr Upton along to take an active part. And Justice McGechan said, "No, look. You don't have to stop your criminal trial and go off and do a judicial review. That's going to hold up the trial. You can challenge it here." And the Crown lost that judicial review. And that's –

ELIAS CJ:

You mean challenge it on the appeal?

MR ELLIS:

No.

WILLIAM YOUNG J:

No, challenge in the course of proceedings.

ELIAS CJ:

Oh yes. Oh yes.

WILLIAM YOUNG J:

This is whether a search warrant can be challenged in the context of the proceedings.

ELIAS CJ:

Yes, yes, yes. Yes, I understand.

WILLIAM YOUNG J:

As opposed by separate judicial review.

MR ELLIS:

Yes. And, and I'm saying that: that we've got to be able to run the, the criminal proceedings, and Mr Siemer would've thought there was some steamroller ensuring that it, it carried on and there wasn't going to be any adjournment to, oh yes, to, to, to slow things down. And my –

McGRATH J:

This is all part, I presume, of a challenge at the admissibility of evidence obtained under the warrant?

MR ELLIS:

I think it was the, I can't remember, I think it was the lawfulness of the warrant which, yes, we wanted to get out the –

McGRATH J:

You wanted to get the evidence out.

MR ELLIS:

Out, yes. So –

McGRATH J:

But I just don't think – at the moment we're getting a lot of analogies and I'm yet to find one, Mr Ellis, that really seems to apply to the circumstances of disobeying the Court order.

MR ELLIS:

Well, my, my, my learned junior here, very learned today, says of course you can't judicially review the High Court. I mean, how do you challenge Justice Winkelmann? It's quite right, isn't it? You can't judicially review –

WILLIAM YOUNG J:
You have to apply to, for a review of the, to her to set aside the decision or to another Judge if she's not available.

MR ELLIS:
Well, that's what – I mean, he tried to and got nowhere.

WILLIAM YOUNG J:
But only after he'd published.

MR ELLIS:
Well, we're back to –

WILLIAM YOUNG J:
No, no, no, it's just, I just want to get the facts. Yes.

MR ELLIS:
Yes. Yes. You're quite right.

WILLIAM YOUNG J:
Yes.

MR ELLIS:
And, and you say, well you shouldn't be able to do that. Well, leave aside judicial dignity and try and think liberally and say freedom of expression. Do you have to wait to do that? If something is so bad – I suppose it's sort of Lord Cooke, isn't it? You know, Parliament can't do some things type thing. Maybe we've moved on and freedom of expression means what it says. But you have to do that analysis, which has never been done during the course of the case, before you, before you come to a conclusion. And you can't do that if you don't allow the second leg of your question. If you can't defend it you can't get a proper freedom of expression and fair trial analysis because you've limited the amount of defences, and maybe a fair trial is absolute, but then the fair trial of Mr Siemer is also in that light. And please do not forget, I notice nobody took me up on it, the right of the public to receive the information, not just the right of Mr Siemer to do it. So why isn't the Attorney-General reviewing or trying to vary or rescind –

GLAZEBROOK J:

Well he did, actually.

MR ELLIS:

– in the public interest? Well, in a little bit, a little bit. Mr Burns tried to get it changed, didn't he, but wasn't the whole order on the face of *Lewis*? Why has Mr Siemer got to do it? Who's protecting the public interest? The public interest wasn't protected. And in the absence of the public interest not being protected, why can't Mr Siemer have a go as a media person?

McGRATH J:

Well that, I think, is a pretty good argument in favour of the first question?

MR ELLIS:

Yes. Well I'm pleased I've got one point on the board. Yes. All right.

ELIAS CJ:

Well is there really anything more that you want –

MR ELLIS:

You can say?

ELIAS CJ:

– to say to us? Do you want to address any of the case law that the respondent has cited, for example?

MR ELLIS:

Well, I – I, I, I – I mean you've obviously read what I've had to say, and I wasn't clear that from the earlier questions that perhaps my freedom of expression argument trumping the fair comment, fair trial comment from the, the European Court decisions have really got in so if I could look at those. I understand what you're saying –

GLAZEBROOK J:

I'm saying I didn't – do you say the European Courts their freedom of expression does trump a fair trial right or, I'm sorry I didn't quite catch the first part of the –

MR ELLIS:

Well the argument that you should start with freedom of expression and that there should be more, a more liberal approach taken than just to Article 6, the series of papers I put in. Let's take, for –

ELIAS CJ:

But you might be entirely correct that there's a formidable argument that this decision is wrong or even that it's, even to the extent of being potentially ultra vires, even accepting that though, that the issue that we're concerned about in this hearing is whether you get to that or whether we are only concerned with the breach of the Court order.

MR ELLIS:

Well I've got something that is a good argument apparently, point number 1. If I could take you to paragraph 69 in the *Worm v Austria* (1998) 25 EHRR 454 (ECHR) decision of the European Courts and then the bold passage there, "There's general recognition that Courts cannot operate in a vacuum."

ELIAS CJ:

Sorry, what page are you on?

MR ELLIS:

It's page 22, paragraph 69, referring to *Worm* in the European Court, where –

CHAMBERS J:

Do we have that case?

MR ELLIS:

You, yes, you do. I'm not sure –

CHAMBERS J:

I can't see it in your bundle.

McGRATH J:

It was in the first bundle.

MR ELLIS:

It was in the – I put it in as a supplementary submission before the case started in the little bundle.

CHAMBERS J:

Thank you.

MR ELLIS:

In the little bundle of three at tab 1.

CHAMBERS J:

Tab 1 is it, thank you, yes, thank you.

MR ELLIS:

Well perhaps if we just look at that little bundle because I've got a one page submission in conjunction with my paragraph 69. I'll set the scene with the little bundle. The case addresses a contempt of Court by an Austrian journalist –

CHAMBERS J:

Yes, I remember you referred us to this, yes.

MR ELLIS:

Yes and you need to approach this by is it described by law, is it pursued with a legitimate aim, is it necessary in a free and democratic society and *Worm* has been cited by *Fessoz and Roire v France* (2001) 31 EHRR 2 (Grand Chamber, ECHR) and *Kyprianou v Cyprus* (2007) 44 EHRR 27 (Grand Chamber, ECHR), the two Grand chamber cases on freedom of expression and in my paragraph 69 of the current submissions this does not mean there can be no prior or contemporaneous discussion of the subject matter of criminal trials elsewhere, be it in specialised journals, in the general press or among the public at large and I may not have a preponderance of authority in favour of my proposition but I'm saying that you should take account of this and say, yes we can have prior discussion and we don't have to have an application to Justice Winkelmann to vary it. And in – I suppose, I haven't really thought of it like this, shouldn't Justice Winkelmann on her own motion, when this happened, say oh look, I haven't given any – reviewed or varied her order on her own motion, isn't that a judicial responsibility, to protect the rights of the public and Mr Siemer, why has he got to do it? Why doesn't she do it?

McGRATH J:

I think the question really is whether he can do it and on what basis.

ELIAS CJ:

What is your answer on that? What's the basis, is it the inherent jurisdiction of the Court?

MR ELLIS:

Yes I see. My junior says well the inherent power, the problem with inherent power is what is the extent of inherent power in a District Court where most suppression orders are made.

ELIAS CJ:

Well it must be ancillary to –

MR ELLIS:

To, yes.

ELIAS CJ:

Which is an inherent power in any event isn't it?

McGRATH J:

Implicit in the act.

ELIAS CJ:

Yes.

MR ELLIS:

Yes but not in the inherent power, inherent jurisdiction dilemma –

ELIAS CJ:

Yes I understand that because it does have to be consistent between the ventures, yes.

MR ELLIS:

Yes but –

ELIAS CJ:

So in –

MR ELLIS:

Yes Ma'am?

ELIAS CJ:

No, that's fine.

MR ELLIS:

And then the paragraph 39 of my submission where –

ELIAS CJ:

I suppose it is a factor in favour of the view that there's no realistic – that that is not a very realistic approach. That it's not a very opaque process recourse to an inherent power. It's not something that would be immediately in the mind of anyone.

MR ELLIS:

Yes, that must be correct. I suppose the comment that I last made which, seemed to meet with a stony silence, that why didn't Justice Winkelmann on her own motion –

ELIAS CJ:

Well she may not have had – it might not have occurred. If you make an order, you move on, don't you. You wait for people to raise a problem with it.

GLAZEBROOK J:

But the problem was raised then she confirmed it.

MR ELLIS:

But there was a public debate going on about this and –

ELIAS CJ:

But Justice Glazebrook is right. There was an opportunity and it was confirmed.

MR ELLIS:

Yes on the telephone which we said was unlawful because you can't, it's not a public hearing.

ELIAS CJ:

I understand that argument.

MR ELLIS:

But in terms of your question number 2, can he raise a defence, well it's work if – if the Judge makes the order the Crown prosecutor sought a minor variation of the order, they know what the law is too, that the Judge shouldn't have been issuing this without reasons, the Attorney didn't seek a variation or rescission of the order, which in the public interest they should have, then it's –

GLAZEBROOK J:

I don't understand that submission because wasn't it the Solicitor-General, Crown Law, who actually applied to rescind the order?

MR ELLIS:

No there was a variation of it, it wasn't – oh, later but not at the beginning when the, your decision on the –

UNKNOWN SPEAKER:

On cross-appeal.

MR ELLIS:

Yes, Mr Burns and the Crown prosecutor's office said no you can't, you can't say that and there was a minor variation but you didn't say, you haven't got any reasons and you've got to – and you need to give reasons because that's what the law says.

GLAZEBROOK J:

Well no, that wasn't the basis, that it wasn't a necessary order and therefore it should be rescinded –

MR ELLIS:

No. I'm trying –

GLAZEBROOK J:

– subject to – I mean, there might've been some – that was my recollection.

CHAMBERS J:

It's your right.

MR ELLIS:

Yes, I'm trying –

GLAZEBROOK J:

So there's no – I mean, he wasn't suggesting for – there was no reasons, that's true. But he was saying the order shouldn't have been made, and it was confirmed in the telephone hearing that –

MR ELLIS:

No.

GLAZEBROOK J:

– you say is unlawful, but nevertheless, it's difficult to criticise the Solicitor-General when in fact that's the very thing that he did do.

MR ELLIS:

No, it's not the thing that he did do. That's not factually correct. He wanted a variation of the order, not a recision of the order, and what I'm saying is not that the Crown prosecutor should have been seeking a variation, the Attorney-General in a related action should have, in the public interest, said, "This order is invalid and it should be rescinded." The prosecutor in this instance only concerned with his Urewera people. I'm concerned, and so should you, with the public's interest, and the public should've been protected by the Attorney-General and they weren't. So in the absence of the public being protected, the error, the ultra vires type thing becomes aggravated by the failure of the Attorney to do anything, so it's quite proper then for ground 2 to apply. The public protector hasn't done anything. So Mr Siemer should be able to, to raise this.

McGRATH J:

But I think, really, if you – you should be looking at ground 2 on the assumption that you've been successful on the first ground, which leaves the way open to a person

who wishes to publish but knows there is a suppression order in force to seek its variation. And if that route is opened, why can't that route be followed on the basis that the order will stand until it's rescinded by the Court? In other words, it stands and will be in force until such time as the Court is persuaded it's inappropriate. If you have a mechanism in the first question, it seems to me that there is no, there is less need for the collateral challenge that you're supporting, the right of collateral challenge.

MR ELLIS:
Well, yes, I think that might be right. But if we lived in a perfect world the public interest would have been protected. But it wasn't.

ELIAS CJ:
So –

McGRATH J:
Well I'm not persuaded really that the, whether some public officer should have done something or not is the point. As I understand it in this case, Mr Siemer knew an order of Court had been made and it seems to me that we should be looking at the collateral challenge, we could, I suppose, technically do it on two bases, but as far as I'm concerned, that if, if a person, knowing an order's been made suppressing material in Court, including a judgment, has the ability to get the order varied, that is the logical route by which that person should proceed.

ELIAS CJ:
If knew. If he knew.

McGRATH J:
If the person knew. Absolutely.

MR ELLIS:
If he knew...

McGRATH J:
What? The order had been made.

MR ELLIS:

Oh, yes. No, we're not pretending he didn't know. He just said, "No, this is a piece of legal nonsense and it should be challenged." I mean, history's full of people challenging what are considered as unlawful actions and he's just one long line of, of persons who's done that. But he happens to be Mr Siemer who happens to have had some skirmish on this particular case before.

McGRATH J:

What concerns me, Mr Ellis, is that I don't think you're really battling with the combined effect of the two issues and you're not battling, in particular, with how a person might be heard. Now that's something that your opponent has grappled with and is suggesting that natural justice requires certain things in an application for review but doesn't require full hearing and the rest of it and so forth. Now those sort of matters could be very important, but you're not, in your submissions, grappling with them, and it seems to me that we're looking to what the law of this country should be, they're quite important and we need some assistance on them. We'd prefer to have some assistance on them.

MR ELLIS:

I think I put in my submissions, did I not, that natural justice, paragraph 17 there, it seemed to be, well, self-apparent that section 27 or the common law right of natural justice must apply. He's not been heard at the first hearing. He's now facing possible criminal penalties. His rights have been affected. He needs to be heard. It's as simple as that, isn't it? So how is he –

McGRATH J:

What sort of hearing should there be in the context of the first issue if there is to be the right, a right in a person who wishes to publish but is ordered not to, to get the order varied? What sort of process should be followed?

MR ELLIS:

The process, one of the processes, would be what Mr Siemer tried to do. Can I, can I be heard on this? In the –

GLAZEBROOK J:

But that was after he'd actually been found guilty of contempt.

McGRATH J:

Yes.

MR ELLIS:

No it wasn't.

CHAMBERS J:

It was. The judgment of the High – well, correct me if I'm wrong, but the judgment of the High Court where he is found to have committed a contempt is dated –

McGRATH J:

I've read something about this. It's in the respondent's submissions?

CHAMBERS J:

It is dated – what is the date of that? Hold on. That's the 4th of July. It's not until – 4th of July 2011. It's not until late August, I think, according to his affidavit, that for the first time he attempts to apply to have it rescinded.

MR ELLIS:

Well...

CHAMBERS J:

And he goes to see Mr Mortimer and that sort of thing. That's all in his affidavit. But that's months after he's been found to be in contempt by the High Court.

MR ELLIS:

Convicted until the sentencing hearing in September.

CHAMBERS J:

Yes, but he'd had his full hearing as to whether he was contempt. The only thing left over was what the penalty was to be. Now you, it's just that you keep saying he had done it before all this happened in the High Court but it was after, at least according to his affidavit.

MR ELLIS:

In the course of the hearing, it may've been at the arrest of judgment hearing, anyway, he asked to be heard on setting aside the order. He wanted a hearing by

those two Judges before he was committed, convicted of contempt. That was fully on the tables. Up front. "We want to challenge this and say this is wrong." And then other avenues –

ELIAS CJ:
Do we have any substantiation of that?

MR ELLIS:
We must do. In the, in the – (inaudible 10:58:14), I don't think it would be disputed.

ELIAS CJ:
Is it not in – is it accepted, Ms Laracy?

MS LARACY:
Look, my memory is probably being stretched about exactly what –

ELIAS CJ:
Well perhaps you could just check the position and if there's anything before us, it might assist us to have the reference to it.

MS LARACY:
Certainly. The Court's decision on this is in the, the case on appeal prepared for this Court, which is the Court of Appeal case on appeal at pages 114 following.

CHAMBERS J:
And certainly if one reads that and sees the issues, this was not one of the six issues that was identified by the High Court that they had to deal with.

MR ELLIS:
Well it might not have been, because they didn't want to deal with it.

ELIAS CJ:
Well if they'd already indicated they didn't have jurisdiction to deal with it, but is there anything that indicates that that is the line that was taken?

MR ELLIS:
Well we'll, we'll have to find it.

ELIAS CJ:
Yes.

MR ELLIS:
But, I mean, we, we were all there. I remember precisely. Yes, here we are. Thank you. On, on page 117 of the blue Court of Appeal casebook at paragraph 7(c), the third matter raised was whether an application can be made for the suppression order to be revoked.

CHAMBERS J:
Yes, but that's after the hearing of the contempt proceeding.

McGRATH J:
The petition summarised in the respondent's submissions, from paragraphs 14 to 17, well actually 14 to 19.

MR ELLIS:
14 to 19.

McGRATH J:
The full Courts finding is in paragraph 15, on 4 July, 14 July Ms Bright attempted to file an application to set aside and then on 25 August the appellant applies, then the sentencing hearing takes place on the 2nd of September so the impression I've got is that the appellant applies very shortly before the sentencing hearing. To have the order set aside.

MR ELLIS:
Sorry Sir, I can't find my – page 14?

McGRATH J:
Of the respondent's submissions I'm referring to. Paragraph 14 on.

MR ELLIS:
I was looking for them. Too many documents here.

GLAZEBROOK J:
These are the 5 February submissions, the latest ones, paragraph 14.

MR ELLIS:

Yes. I just couldn't find them.

GLAZEBROOK J:

I quite understand. I was at the other submissions as well.

MR ELLIS:

Yes so paragraph 14.

McGRATH J:

What I'm saying is that those are the dates that at the moment summarise what's on the record before the Court.

MR ELLIS:

Right.

McGRATH J:

The 4th July holding, was saying that the High Court held the appellant in contempt of Court, that is actually the date judgment was delivered by the full Court and the High Court. The hearing had been back in June, 9th and 10th of June, and then you – so it's after that finding another person applies 10 days later on the 14th of July, looks as though sentencing is scheduled for the 2nd of September, and about a week before that the appellant applies for rescission of the order. Now that's what we've got at the moment, before us.

CHAMBERS J:

There is a bit more than that because if one looks at the judgment of the High Court at page 114 of the blue bundle, one also sees that on the 22nd of July, presumably you Mr Ellis, filed a document described as application for arrest of judgment and/or dismissal for want or process. Now that's after the High Court decision. And it would appear, from page 116, paragraph 7, that at that point you were raising three issues of which the third was an application for the suppression order to be revoked. Now I don't know that it would appear, if one looks at the two judgments of the High Court, that that wasn't one of the six issues the first time, that that became an issue after the hearing and was an issue on the 2nd of September.

ELIAS CJ:
I wonder if this is right because at page 86, which is the judgment in which he's found in contempt, it said in paragraph 1 that Mr Siemer defends the allegation primarily on the basis that there's no power in the High Court to make the orders he allegedly breached.

WILLIAM YOUNG J:
But that wasn't an application –

GLAZEBROOK J:
That was a power rather than –

CHAMBERS J:
That's a power not –

ELIAS CJ:
Well –

CHAMBERS J:
That's the jurisdiction order to make the –

ELIAS CJ:
Yes, yes, I see, sorry, yes.

GLAZEBROOK J:
Which, of course, is probably understandable because if there was no power then clearly there was no contempt.

ELIAS CJ:
Yes.

GLAZEBROOK J:
So one can understand that is a primary argument.

MR ELLIS:
I'm sorry if I'm a bit slow this morning. We had an unexpectedly, jury were out until about, after 7.30 and I didn't sleep very well so I'm a bit slow this morning. But I

thought I said, when we started this discussion, that I raised it at the arrest of judgment argument.

CHAMBERS J:

Ah, well that's fine, that's fine.

MR ELLIS:

I'm sure I said that.

CHAMBERS J:

Yes, okay.

ELIAS CJ:

What is the?

CHAMBERS J:

At the arrest of judgment, that is, post the hearing of contempt.

ELIAS CJ:

I see.

CHAMBERS J:

Okay. That's fine.

McGRATH J:

Page 114.

MR ELLIS:

But there can be –

GLAZEBROOK J:

So you say it was raised fairly quickly after having lost on the king hit jurisdictional point –

MR ELLIS:

Yes.

GLAZEBROOK J:

And that it was logical to deal with the king hit jurisdictional point –

MR ELLIS:

First.

GLAZEBROOK J:

– because that was a king hit point in terms of if there was no power to make an order then there couldn't be contempt. That's the proposition?

MR ELLIS:

I think so and we were never being – it would have been better, in hindsight, to say I'll go and challenge it but Mr Siemer says in his affidavit, he's quite – I've just had no faith that anybody listened to me and that's the reality of what happened and then he said well let's try somebody else and this fight to try and see if we get the same, you know, get the same – he doesn't say that –

CHAMBERS J:

No he doesn't.

MR ELLIS:

– but that's what we were doing. That's what we were doing, trying to see if – because he says, look, they won't treat me fairly, they won't try to –

McGRATH J:

But all this is after he's been found in contempt?

MR ELLIS:

But the order is still in force and Ms Bright wanted to – she did –

ELIAS CJ:

Are you saying that if he'd applied beforehand it would have been the same answer –

MR ELLIS:

Yes.

ELIAS CJ:

– so that there was no effective way to review the order?

MR ELLIS:

Yes.

CHAMBERS J:

But how do we know that?

MR ELLIS:

Well because he says so.

CHAMBERS J:

But Ms Bright's application was accepted. Presumably the reason –

MR ELLIS:

It wasn't.

CHAMBERS J:

–the – sorry?

MR ELLIS:

It wasn't Sir.

WILLIAM YOUNG J:

It was physically accepted.

MR ELLIS:

Oh physically accepted and then –

CHAMBERS J:

And the Judge said no and presumably that's why Mr Mortimer then said no because he was relying Justice Brewer's decision which we know he asked for because Mr Siemer tells us that in his affidavit.

MR ELLIS:
Yes but Mr Siemer applied in the civil – criminal jurisdiction and thought, well I'll have a go in the civil jurisdiction to see whether anybody's going to accept that and, you know, whether Mr Siemer was right, that he's been victimised or not, he – so if somebody else did it. But either way there appeared to be no jurisdiction but the more important point, I thought, was why don't these two Judges who are hearing the case, hear this, because it's an integral part of the defence, but you're denied it.

GLAZEBROOK J:
Well it wasn't at the time they found him in contempt though, it was only later as we've established.

MR ELLIS:
Well in the way that you just described, yes.

GLAZEBROOK J:
Yes.

ELIAS CJ:
Well I would have thought the most use that that can be put to is that it indicates there – it is not clear that there was a route for a third party to challenge the order and that that pushes you to being, raising it in the contempt proceedings as being the only effective way to do it because there must be an ability to – for parties who are affected, as he was in the end, to challenge the order.

MR ELLIS:
Yes, that sounds a very logical result from what had happened, yes, and I think I'd go one step further in saying, the only effect that I'd say, it is the most proper way of dealing with it in terms of judicial resources and –

ELIAS CJ:
But under the new legislation, for example Mr Ellis, will you be able to make this submission? Under the new legislation there is a right for a third party to apply to set aside an order.

MR ELLIS:
Mr Edgeler, this is a criminal procedure?

ELIAS CJ:
Yes.

MR ELLIS:
Mr Edgeler wrote the Law Society submissions on that and he knows more about that than I do so I'd have to ask him to respond to that. I can't remember to be honest.

ELIAS CJ:
Well Ms Laracy in her submissions has said that that's the route you can now go.

MR ELLIS:
Yes but I don't think –

ELIAS CJ:
But just assuming that that's true then what would be the need for challenge in the contempt proceedings?

MR ELLIS:
Well if we could just backtrack one step. I don't know that it is true because it doesn't appear to deal with common law contempt, common law suppression.

ELIAS CJ:
Yes, of course, I'd forgotten. Yes, yes.

WILLIAM YOUNG J:
But are the suppression powers more extensive in section – in the Criminal Procedure Act 2011 or not?

MR ELLIS:
Ms Laracy says they cover the same, the same ground. But there is a higher penalty, yes. But then – I'm not quite sure how we got to here.

ELIAS CJ:
Well we were trying to work out how, even if you're right that there wasn't an effective route, how that bears on the argument that you're seeking to advance here. But I think I understand how it may apply. I think that's what I put to you.

MR ELLIS:

Right. So – and I, and I'm saying too, with hopefully some force, that there's this strong public interest too, and Justice McGrath doesn't seem to be persuaded that there's a case for a public officer to do something about this judgment. But I, I persist.

ELIAS CJ:

Well, it's – that's not necessarily adverse to the position that you take, because if there was an effective supervision –

MR ELLIS:

Yes, sure.

ELIAS CJ:

– by the Solicitor-General, then the need to be able to challenge matters in the proceedings might diminish. I'm not sure that it's not irrelevant, really. I think –

McGRATH J:

That's the point. Yes.

ELIAS CJ:

I think Justice McGrath probably couldn't resist the suggestion that there are officials who must come in and supervise the operation of the law in each particular case.

MR ELLIS:

I hope you're not saying, I might be misinterpreting, that the public interest –

ELIAS CJ:

No, no. I'm not saying that the public interest doesn't require Solicitors-General to sit up and take notice. No I'm not.

MR ELLIS:

Right. Okay. Now...

ELIAS CJ:

But, so, does that really –

MR ELLIS:

Yes it does.

ELIAS CJ:

– complete the submissions that you want to make to us, Mr Ellis?

MR ELLIS:

Yes, I think so. If I could just have a look at my conclusion and... No, I think you've grasped what I'm trying to say. Thank you. Do, do, do you want to hear on the Criminal Procedure Act? Unless – actually, it might take five minutes.

ELIAS CJ:

Perhaps if you could just tell us very briefly, Mr Edgeler, what is the position under the... probably better if Ms Laracy can then respond to it. Just very briefly. We don't need anything.

MR EDGELER:

Yes Ma'am. The –

ELIAS CJ:

We did look at this at the first hearing. It's just I – it's gone out of my mind a bit.

MR EDGELER:

Yes. I, I – briefly. I understand.

The concern I had when looking at it was it might be how Your Honours use this. Of course Mr Siemer's is a common law suppression order, so if those continue post the Criminal Procedure Act, then this Court will need to craft the types of remedies of access if someone, given that the Parliament has recognised that the media has greater rights now under the Criminal Procedure Act against statutory suppression orders, whether it's appropriate for this Court to say if the rights in respect of common law suppression orders are more limited at the moment, should rights of challenge to those be extended in line of what we have in the Criminal Procedure Act? Because Mr Siemer certainly, if this was post Criminal Procedure Act and the same sort of suppression order was made, which is a non-statutory one, the rights of hearing in the Criminal Procedure Act wouldn't be of direct assistance.

ELIAS CJ:
No. But the Court is likely to look to it, to look to the statute for guidance as to what the common law should require.

MR EDGELER:
Yes, it certainly is. A concern as to how the Court, if the Court is going to see, perhaps, in its decision what section 210 means, and certainly Courts below would take guidance of that, some of the concern that the Court may limit it somewhat, my friend refers to paragraph (b) in subsection (1) as being in respect of non-media, and, with respect, I think that paragraph, as any other person reporting on the procedures with the permission of the Judge, and my friend says that that gives a Judge a discretion to allow non-media to be heard. Rather, my understanding of what it is, and it was the submission I had the Law Society put, I think that's why it's in there, was, this is non-accredited media, and that would include Mr Siemer but would also include organisations. I understand for a very long time the *National Business Review* wasn't subject to the Press Council. Foreign media. I know of instances of –

ELIAS CJ:
So it's discretionary as to whether it will be entertained. Is that what you're saying? It's not a...

MR EDGELER:
No. I'm saying if a person is covering proceedings with the permission of the Judge, so if anyone who is covering proceedings, so some of the major trials, I know, at the –

ELIAS CJ:
Do we have the Bill? Sorry, the Act?

WILLIAM YOUNG J:
Electronically.

MR EDGELER:
We have the section in the Crown submission. I know for, the Scott Guy trial, I know the journalist, there was someone wearing gold trousers, Ms McQuillan, and she's a, writes for the Australian Associated Press. When the New Zealand Press Association stopped functioning they needed to get it from somewhere and they hired

some of their former journalists. Now, Ms McQuillan was covering that as a journalist. She would not come within section 210(1)(a). The Australian Press Association –

CHAMBERS J:
But she clearly would within 210(1)(b), wouldn't she?

MR EDGELER:
That's what I'm saying. But I'm saying –

ELIAS CJ:
Where is the text?

MR EDGELER:
At page 11 of my friend's submissions. And that's my point, I'm saying that she does come within 210(1)(b), and having been allowed to cover it, she then has a right to be heard. She's a person who is covering with the permission of the Judge, until briefly she was –

CHAMBERS J:
Why would it be so limited? It's just anyone who wants to say what happened in a proceeding who feels constrained by a suppression order, they would simply apply under section 210 to have that order varied and they would simply explain what their interest was.

MR EDGELER:
That would be our view, yes. But from my reading of –

GLAZEBROOK J:
So you say it's not discretionary, it's an absolute –

MR EDGELER:
It's not –

GLAZEBROOK J:
– right to –

MR EDGELER:

It's an absolute right.

GLAZEBROOK J:

– apply in the same way that an accredited media person has absolute right to apply?

MR EDGELER:

Yes. And, and a lot of these people are accredited but not accredited, perhaps, in New Zealand, and Ms McQuillan was a New Zealand citizen. If she was to publish something it would be only published in Australian newspapers but it would be on the internet, so she herself would be potentially in contempt of Court or breach of a suppression order for something she was doing even if the, the, she was only writing for a foreign media. So –

CHAMBERS J:

I don't think I have followed the point, Mr Edgeler. What, why wouldn't she simply be able to apply for variation of the suppression order?

MR EDGELER:

We submit you can, but my reading of the Solicitor-General's submissions is that she could only do so with leave. And I may have misunderstood the points they've been making on that aspect.

CHAMBERS J:

And where do they say the leave – I didn't take it –

ELIAS CJ:

Well it is a person reporting –

GLAZEBROOK J:

Well if they take –

ELIAS CJ:

– on the proceedings with the –

CHAMBERS J:

Ah.

ELIAS CJ:

– permission of the Court.

MR EDGELER:

Yes. And –

ELIAS CJ:

So it's not just anyone –

CHAMBERS J:

I see.

ELIAS CJ:

– who might want to report.

MR EDGELER:

Yes. And that's certainly a – but the decision in this case was a reserved judgment, and it came out to the parties and was released. So when this decision, this, the, the Urewera decision on the jury trials was released no one was reporting on it.

CHAMBERS J:

But doesn't this rather go against the argument that you and Mr Ellis have been presenting, Mr Edgeler, because Parliament has turned its mind to what may have been a hazy area under the law prior to the Criminal Procedure Act, and Parliament has decided that the only people who should be able to have the right to apply for recision of a suppression order are those who are within the mainstream media and others reporting on the proceedings with the permission of the Court. Now, if Parliament has decided that's as far as it should go, what is the basis for us to say, "Oh, well at common law we'll let other people do it wider than that."

ELIAS CJ:

Well, we're not. We're being asked to – it feeds into the argument that there is no other avenue to challenge and that therefore somebody who is, is at risk of imprisonment for contempt must be able to raise it in those proceedings.

MR EDGELER:

Precisely.

McGRATH J:

But I think that your argument really is that Mr Siemer does fit within 210 –

MR EDGELER:

He does but he certainly –

WILLIAM YOUNG J:

There's a sort of a run of the case reporting element to section 10, isn't there? That's assuming that the orders are being made as to what's happening in Court, with someone sitting there, taking a note and publishing it –

MR EDGELER:

Yes.

WILLIAM YOUNG J:

– rather than someone coming along later and saying, crikey that's a bad judgment, I want to publicise it.

MR EDGELER:

Yes, it doesn't seem to apply to the release of reserved judgments. On its face and I would that it would be extended so that it could but –

WILLIAM YOUNG J:

There's no statutory power to suppress judgments?

MR EDGELER:

No.

ELIAS CJ:

No.

WILLIAM YOUNG J:

Because these are really a sort of reiteration in perhaps a more – reiteration of the existing Criminal Justice Act 1985.

MR EDGELER:

Yes, very much so.

McGRATH J:

Which are the focus on trial concept.

MR EDGELER:

Yes which is why when we're saying, we only get to this if there is a power to suppress judgments which, of course, we argued last time but –

WILLIAM YOUNG J:

But there's no right of appeal, someone who is in within section 210 doesn't have a right of appeal, is that right?

GLAZEBROOK J:

They do now.

MR EDGELER:

I think they –

WILLIAM YOUNG J:

Do they?

CHAMBERS J:

They do now.

GLAZEBROOK J:

They didn't before but they do now.

WILLIAM YOUNG J:

Right.

GLAZEBROOK J:

But my understanding of the Crown's argument was that they say this, they read with the permission of the Court not the reporting of the permission of the Court but that

there's a discretion for any other person to apply but it's probably semantic in these circumstances.

MR EDGELER:
It may well be, yes.

ELIAS CJ:
Yes, I suppose a comma might make all the difference there.

GLAZEBROOK J:
Yes, because you often don't have specific permission of the Court to report, you just sit in the press benches or not –

MR EDGELER:
Until someone kicks you out.

GLAZEBROOK J:
– or you have permission to take notes but –

MR EDGELER:
Yes, yes and –

GLAZEBROOK J:
Whereas now mostly people would get permission to take notes I think if there's a –

MR EDGELER:
Yes, I would hope so.

WILLIAM YOUNG J:
Sorry, where's the right of appeal?

MR EDGELER:
283.

WILLIAM YOUNG J:
Sorry, 283?

MR EDGELER:

Yes and page 12 of my friend's submissions.

GLAZEBROOK J:

It's a new one because at common law you didn't have that power.

MR EDGELER:

No, nor at –

GLAZEBROOK J:

Well because you had to have a statutory power.

MR EDGELER:

Yes.

McGRATH J:

So if you make it under section 210, you've got a right of appeal.

MR EDGELER:

Section 210, if you have the right to be heard under 210, you have the right to appeal under 283.

McGRATH J:

Thank you.

MR EDGELER:

But the reason why we need to get to this is having presumably to get to this question lost the first day's argument which means that judgments can be suppressed. That's a much wider suppression than suppression or names or particular facts as they come up in Court and given that a lot of judgments that might be suppressed are reserved judgments where no one was present when it was released, there needs to be a process for people who want to be able to publish that judgment, which they find out about later, to be able to do so, and although in this case it was Mr Siemer tried to do that later, our submission is that the application he made, the going to the Court, the filing in the criminal jurisdiction, I want to be heard to amend this or rescind or vary this order, the process he used, although he perhaps in the Court's view used it late, that process is the process someone should use

when we're looking at the new ground of appeal one we're discussing. If you can do it the process he used could have done it. Imagine he hadn't published it at all but filed the same documents in the Court that he filed a couple of months later and those documents, then he filed with those documents a copy of the High Court decision in this case which said, it is open to anyone, including Mr Siemer, to apply for a variation or rescission of the order. I'm, that's paraphrased, but it's something very close to that in the High Court's judgment and he took that judgment with him to the Court and said, "Here, the High Court says I can do this, please accept my application and set it down for hearing," and the High Court wouldn't. And that process of making an application in the criminal jurisdiction, which he did, I'd like to have this heard, and obviously you'll need to contact the parties, the prosecutor and the defence lawyers who want to say that they want this suppression to remain and only to be heard, because obviously they do have an interest as well.

ELIAS CJ:

Sorry I'm getting lost in the submission that you're making Mr Edgeler. What's the point of it?

MR EDGELER:

In respect of the first question, the new question –

ELIAS CJ:

Yes.

MR EDGELER:

– is how do you do that.

ELIAS CJ:

Yes.

MR EDGELER:

What Mr Siemer did, he went to the Court –

ELIAS CJ:

Yes, I understand what he did, what's your answer to that? What he did, that's the process?

MR EDGELER:

That is what he should be able to do.

ELIAS CJ:

Yes, yes.

MR EDGELER:

And the High Court in the *Siemer* decision under appeal said it was open to him to do that and the High Court wouldn't let him do that and –

McGRATH J:

On the 25th of August?

MR EDGELER:

But it wouldn't let him do that on that date but it shouldn't matter when he does it, that is the process he should use. That is the process anyone who wants to publish a suppressed judgment, whose case shouldn't have been suppressed, if they want to publish that judgment, that's how they go about it. If we're saying that there should be a process, and we think there should be a process for people to challenge that, anyone with an interest, which will be anyone who wants to publish their judgment.

ELIAS CJ:

Well we're not going to conduct – concoct a process here. I'm sorry, I'm not sure what the submission is –

CHAMBERS J:

Well we've gone way beyond the Criminal Procedure Act which we were going to hear you on.

MR EDGELER:

We certainly have gone way beyond the Criminal Procedure Act but that would be, it's the –

McGRATH J:

You're really now moving into supporting the first – the answer, a –

MR EDGELER:

I suppose I am.

McGRATH J:

– positive answer to the first question.

ELIAS CJ:

Yes, I'm sorry, yes. You did say that.

MR EDGELER:

Yes.

McGRATH J:

I think it maybe that when, in reply, your reader or you will have something from the Crown as to what the process should be to respond to, so that might be the time to develop what you're saying now.

MR EDGELER:

Our general submission is, the process he used, and he used it at the wrong time perhaps, the process he used, file an application in the criminal jurisdiction in the Court, I'd like it varied, and that's the appropriate way for someone who wants to vary a common law suppression order to take and they should be able to be heard.

ELIAS CJ:

Yes, thank you.

McGRATH J:

But the reason question then maybe what does natural justice require in these circumstances.

MR EDGELER:

Yes and it would have to be tested against freedom of expression and open justice. Someone who wants to publish a judgment who's been prevented from publishing a judgment should be able to be heard and natural justice and those other aspects strongly weigh in that factor because otherwise they'll never be able to publish the judgment. While the suppression order remains.

CHAMBERS J:
That's the point of the suppression order I guess.

MR EDGELER:
Yes. But while it remains, yes.

COURT ADJOURNS:11.27 AM
COURT RESUMES: 11.50 AM

MS LARACY:
May it please the Court, I appreciate that the Crown's submissions are lengthy are I certainly don't propose to cover in a general way the ground that is addressed there. What I do propose to do, in this order if the Court's happy with it, is to first address very briefly a couple of facts and documents that are in the case on appeal, second, talk for a short period of time about the Criminal Procedure Act covering some of the ground which is at page 11 of my submissions, and third, discuss again reasonably briefly the position of new media and the Law Commission issues paper on that, which I haven't referred to in my submissions but which it would be proper to draw to your, to your attention. It's only an issues paper. It's not a concluded recommendation.

In terms of the first thing I wanted to cover, which is a few documents which are in evidence. They are in the pink volume before Your Honours. The point of this is that it has been a concern for my learned friend that reasons were never given and the suggestion has been made that we can't even be sure that, that the context of the suppression order was the Judge's concern to ensure a fair trial, and in the absence of reasons, that makes the order problematic. And I do just want to remind Your, Your Honours of a couple of documents which are in that case on appeal.

The first is in various places but I, I suggest the easiest place to find it is the decision of Justice Winkelmann of 21 December, and that's at page 110 of the case on appeal. This was an exhibit that was before the High Court as part of the evidence.

ELIAS CJ:
Sorry, what is this document?

MS LARACY:

This is the – this –

CHAMBERS J:

Court of Appeal's decision.

MS LARACY:

No, sorry, this is the ruling of Justice Winkelmann.

CHAMBERS J:

Oh. I'm looking at the wrong thing. It's in the blue volume, is it?

MS LARACY:

It's in my pink volume.

WILLIAM YOUNG J:

No. No, this is the Court of Appeal decision.

McGRATH J:

Our one's – you've got basically starting at paragraph 11 is the Court of Appeal judgment in our volume.

MS LARACY:

That's unfortunate. Mine's in the pink volume and it's at page 110 and it's the, the case on appeal, which includes High Court document, contempt application, affidavit of Bridget Frances Fenton. That was the evidence which was –

McGRATH J:

I think that may be – is that page 5 of our one?

WILLIAM YOUNG J:

Page 5 of our pink one?

McGRATH J:

That's the affidavit of the 22nd of December 2010, Ms Fenton?

MS LARACY:

Yes, and this was a, an exhibit to that. It was exhibit L, part of exhibit L.

ELIAS CJ:

Well it's hard to find exhibit L.

MS LARACY:

In my case on appeal it's numbered –

GLAZEBROOK J:

I haven't got an exhibit L, according to this affidavit.

CHAMBERS J:

I think we have. If you look at the – exhibit L is supposed to be between pages 75 up to 104.

ELIAS CJ:

I don't have exhibit L referred to in the affidavit.

McGRATH J:

Is page 100 exhibit L?

MS LARACY:

Page 100 is the first page of exhibit L. That was the certificate of the registrar confirming that this was indeed a true copy of Justice Winkelmann's minute. And then –

McGRATH J:

And then page 101 is the telephone conference minute?

MS LARACY:

The telephone conference minute. Yes.

McGRATH J:

I think that we do have.

ELIAS CJ:
We do have that.

MS LARACY:
Yes. So...

McGRATH J:
May not have – your 110 may, possibly was 101?

MS LARACY:
Yes. Possibly Sir. As Your Honours, I'm, I'm sure are aware, was the minute that came in response to Mr Ross Burns, the prosecutor who was in charge of the Operation 8 trials pretty much throughout, applying to the Court for the suppression order that Justice Winkelmann had made on 9 December, so approximately 12 days earlier to be varied. Now, before I take Your Honours to a couple of passages in that ruling, could I just ask you to turn over to exhibit M, which on my copy of the case on appeal is page 103?

So the original suppression order, which was just as, as you know, the annotation at the top of the, the judgment was 9 December and it required the entire judgment to be suppressed, including the outcome of the decision. This email from Mr Ross Burns, which was part of the evidence before the Court, was addressed to April Ng, who was the registrar at the, at the High Court, and in paragraph 2, Mr Burns says that it's come to his attention that Mr Siemer has previously published suppressed material and that Crown Law has compelled him to remove it in this very case. The scope of the suppression orders had been clarified by Justice Winkelmann and Mr Burns is concerned that he appears to have breached it again.

The next paragraph, if I could just ask you to look at it, is the one starting, "I should note". "The reason for suppression that applies to all judgments to date, namely to preserve fair trial rights by ensuring non-contamination of the jury pool, no longer exist," and that's because substantially the Judge had ordered a Judge alone trial, albeit in the very decision that, that was suppressed, Her Honour did order severance of a couple of the accused and they were to have a jury trial, so that has to be borne in mind and it could be that one might think the Crown were somewhat forgetting that there was still the jury trial to go ahead in relation to some people in the Operation 8. But Mr Burns says here, and remember here he's the representative for the Crown

on this, "I intend to apply for orders rescinding the suppression orders in the New Year," and then he goes on to explain what he's particularly concerned about. "It seems to me that the decisions as to mode and location of trial, as opposed to reasons, cannot possibly prejudice the fair trial rights of accused and are a matter of genuine public interest. I raise these matters at this time to ensure that the Crown cannot be criticised for on the one hand raising the breach of the orders and on the other hand apply at some future time for these orders to be rescinded or varied."

The actual application made by Mr Burns was an oral one, so you don't have that before you. But he expressed his concerns to the Judge and what we have is her ruling on that, and so that's the previous document at page 101. Paragraph 3, Justice Winkelmann notes that the concern is that the judgment be edited to preserve the fair trial rights of the defendants. So I know I'm perhaps being a bit basic in my approach, but there can be no question that the Judge was concerned about fair trial rights. That was the very application before her and the last words of paragraph 3 confirm that, that the Crown would like, "the suppression to be adjusted to the greatest extent possible consistent with the preservation of the right of the accused to a fair trial."

Then in paragraph 4 Her Honour sets out the counsel for, the position of counsel for all of the accused, and what's interesting in this case is that all of the accused's counsel were very concerned about the Crown's suggestion that the suppression orders in the form they were should be limited, should be varied so as to make suppression more limited. And some weight, it doesn't meant that it's, that it's right and that the Court should do whatever counsel for the accused perceive to be in the best interests of their client, but considerable weight must be given to the fact that I think it was nine counsel, aware of the complex procedural and publicity behind this case, were very worried about further publicity, and Her Honour was plainly influenced by that, and that's what paragraph 5 reflects.

So she revised the orders allowing the outcome of the judgment to be published, which were the decisions about who got a jury trial and the fact of a Judge alone hearing at this stage for the rest. She was very cognisant that the matter as likely to appeal, be appealed, as it eventually was, and that there could be a jury trial for everyone.

That was really – in my submission those – that material's important both to confirm the fair trial context in which the suppression order was originally made and which all the orders in this case were originally made as Mr Burns confirms, and –

CHAMBERS J:
Do we have any evidence as to whether by this date, 21st December, any of the accused had indicated that they were going to appeal the Judge alone decision?

MS LARACY:
The hint of that, I think there's a hint of that in, in this judgment here. I –

GLAZEBROOK J:
Paragraph 4, pending appeal of my judgment of 9 December.

MS LARACY:
Yes. Yes.

CHAMBERS J:
Sorry? Oh, yes. Yes. Yes.

ELIAS CJ:
Para 4 of...

GLAZEBROOK J:
Of the December –

CHAMBERS J:
Of the judgment of –

ELIAS CJ:
21?

CHAMBERS J:
21.

GLAZEBROOK J:
21 December.

ELIAS CJ:

Oh yes. I see.

MS LARACY:

There's no suggestion that, that the Judge wasn't very well aware that this was likely to be appealed. Indeed, she's, as, as Your Honour notes, she's expressed there, she's obviously had that indication.

CHAMBERS J:

Well, that suggests that an appeal had been filed by then, and indeed, it would probably have had to have been, because you've got a short time for appeals.

MS LARACY:

10 days. So Your Honour's right.

CHAMBERS J:

Yes. And her decision was –

MS LARACY:

9 December.

CHAMBERS J:

– the 9th of December.

MS LARACY:

I can't recall whether that appeal was filed in time or not, but in a case like that it would have been technical.

GLAZEBROOK J:

Well she, she obviously, the submission had obviously been appealing and, pending appeal, fair trial rights, there is still a possibility of a contamination of a jury pool –

MS LARACY:

Yes.

GLAZEBROOK J:

– because there is still a possibility of a jury trial for all accused.

McGRATH J:
That's really what Mr Harrison was apparently putting to the Court.

MS LARACY:
So I did also want to use this to illustrate the point that while the Crown doesn't shy, while the Solicitor-General on this appeal doesn't shy away if, if asked, from accepting that Justice Winkelmann's decision of 9 December would ideally have contained its own brief statement of reasons, however this matter is looked at, it was pretty implicit what the reason was, and by 21 December, only a very short period of time later, the Judge had articulated her concerns and that her reason and her motivation was to ensure a fair trial in a case where everyone involved in it, and, and this Court and, and the High Court have always been very aware of the particular aware around the extreme publicity, including a contempt prosecution earlier brought by the Solicitor-General, so it was a difficult case to manage and publicity was always an issue.

CHAMBERS J:
Well, what – now that we know the facts, Mr Burns' application was entirely premature and one can understand why defence counsel were all opposed to it. Because at least one of them, if not more, were intending to appeal the decision. And it, hoping to still get a jury trial.

MS LARACY:
Well this is where we get into the, the difficulty on a contempt matter of trying to reconstruct the submissions and considerations that were before the, that would've been taken into account by the Court at the time of making a suppression order. I certainly take your point. I suppose the answer is that it's arguable. What the Crown would be doing is saying it's not simply a matter of saying there's a vulnerable trial that needs to be protected. The Court also has to say, "Does everything", to enquire, "Does everything that's been suppressed need to be suppressed in order to ensure the trial is protected?" And Mr Burns' view, which the Judge agreed with, ultimately, in her decision of 21 December, was that she didn't need to suppress the mode of – the, the result, the mode of hearing. As long as the, the reasoning and the summary of the evidence and the, the statements in the judgment about, "The Crown alleges –

CHAMBERS J:

No, but Mr Burns' suggestion went much further than that, and the Judge correctly, in my view, didn't go along with it. He was suggesting the reason for suppression that applies to all judgments to date no longer exists. Well, it did still exist while there was a possibility of appeal.

MS LARACY:

Exactly.

CHAMBERS J:

And the Judge, correctly, did not go along with that suggestion.

MS LARACY:

Exactly. And the, the, the point I made earlier is that it appears that Mr Burns, in making even that suggestion in the email, has forgotten that in the very decision of 9 December Her Honour did direct a jury trial for some of the accused. So regardless of the outcome of the appeal against the mode of trial decision, there was necessarily going to be a jury trial for some of the accused.

McGRATH J:

And those were the ones in relation to whom severance order had been made, were they?

MS LARACY:

Yes.

McGRATH J:

So there were severance orders but the trials were going to be, were going to remain by jury?

MS LARACY:

They were going to be jury trials. That's right.

McGRATH J:

Yes.

GLAZEBROOK J:

In fairness to Mr Burns, he did put it on two bases. He seems to have given, if you look at paragraph 3, he gave a detailed memorandum saying, "These are the bits that I think need to be suppressed to preserve fair trial rights if there is an appeal, and if there isn't going to be an appeal then the whole thing should." So in fairness to him, he did put it on two bases.

CHAMBERS J:

Oh, sorry. Is there something else other than page 103?

GLAZEBROOK J:

Paragraph 3 of page 101, his submissions are set out and it was on two bases. "If there is going to be an appeal, then these are the bits that still need to be suppressed –

CHAMBERS J:

Oh I see. Yes.

GLAZEBROOK J:

"– and if there isn't going to be an appeal, then nothing." But as Ms Laracy said, there was still going to be a jury trial for two of the seven accused, so that had possibly been overlooked.

MS LARACY:

And I should, scrutinising this now I, I appear to have erred in saying that Mr Burns only made an oral application. He may indeed have made an oral application but paragraph 3 of the 21 December minute records that he prepared a detailed memorandum which went through the judgment and identified bits that should be edited, that, in his submission, could be edited. But that was never part of the, the contempt hearing and I don't have that, that document.

GLAZEBROOK J:

It may have been just an annotation on the judgment anyway, possibly.

MS LARACY:

Yes. Yes.

So I say that this is useful because it shows that the Court did provide reasons, albeit somewhat later than, than is ideal and that was a point we made in the Court of Appeal, but I also suggest that it illustrates the dangers of individuals who are very much third parties to the proceeding taking upon themselves to decide what is in the public interest. And the criticism that has been made is that the Crown, the Solicitor-General, the Attorney-General, didn't step in and do what the public interest required, which is to give full effect to the section 14 right, to require the judgment to be published. My submission is that the Court was best placed to assess what the public interest required and in this case the public interest required that the primary focus remain on the public's interest in a fair trial, and toe the extend that could accommodate the public's interest in receiving information, so be it. To the extent it couldn't, the New Zealand law has always been that that section 14 interest must temporarily give way to a fair trial.

The second thing I wanted to, to cover was the Criminal Procedure Act. We've addressed this to a limited extent in the submissions. It really is for, for the point that the Court's noted that Parliament has turned to the genuinely interesting policy interesting policy issues and balances that do arise when, as a society, we need to look at to what extent third parties should be entitled to engage with the criminal process so as to ensure the public receives proper information about Court processes. So Parliament has looked at that, albeit in a limited context, in the context of criminal proceedings.

One of the points, and it's not made in order to limit discussion on this, but I do suggest that it is a highly policy dominant area and the different approaches in the different jurisdictions set out in my submissions for how, how law deals with third parties perhaps suggests it is an area best left to Parliament.

One thing I, I think it is important to note is that I haven't given Your Honours the definition of media, and it might've been useful if I had. That's in section 198 of the Criminal Procedure Act, and it's identical to the, to section [*sic*] (1) of section 210. So you've got 210 there on page 11, which is the provision dealing with standing of the media. And the definition of "media" in section 198 is identical with that. So it includes, "any other person reporting on the proceedings with the permission of the court."

What I say the effect of section 210 is –

ELIAS CJ:

Sorry, can you just tell me again where it is?

MS LARACY:

It’s in section 198.

ELIAS CJ:

Yes, I know, but where do we find...

MS LARACY:

Oh, in my submissions it’s page 11.

ELIAS CJ:

Oh, in your submissions. Yes, thank you. We don't have the statute. Yes, thank you.

MS LARACY:

What I suggest the effect of section, of the CPA really, with respect to media is, is that it gives special privileges. It, it gives and codifies special privileges to people who qualify under that definition as media. And those privileges are that they may initiate proceedings. That would mean that they could file a judicial review application, they could apply for suppression, which would be unusual, but they apply for a suppression order to be revoked, they could apply for it to be changed in its terms, and that applies both to the media and any person who was reporting on the proceedings with the permission of the Court. So they can initiate. More importantly, it suggests also that they have a right to be heard. Not just a right to apply to be heard, but a right to actually be heard and make submissions in a hearing that is properly tailored to the limited interest of a third party, but a right to be heard. And section 283, which is at page 12 of my submissions, provides for a right to appeal.

Having reread my submissions I’m a bit concerned that I may have been unclear about the extent of that right. On reflection it would seem that, given the definition of media, the right to appeal would apply to anyone who fell within that definition of media, so both media who are subject to a code of ethics, so, so the subsection (a) part of 210, but also the right to appeal would apply to anyone who was reporting on the Court proceedings with the permission of the Court.

The question then, it seems to me, that's most interesting is what does –

GLAZEBROOK J:

Whereabouts is that in your submissions? Just so that I can make a note on that. Oh, it's at paragraph 31? Is that right?

MS LARACY:

Paragraph – yes. Well, 33 really. It's, it's just a bit ambiguous, I, I suggest.

GLAZEBROOK J:

Yes. I certainly read it the other way. So...

CHAMBERS J:

Does this mean if, if I happen to be sitting in Court just out of interest but later decided I'd like to do a report about that, an article about the case, I could, after the event as it were, apply to the Court to become, as it were, a person who wanted to report on the proceedings and then also seek to have a suppression order varied?

MS LARACY:

I suggest that's a really interesting question and it will no doubt have to be looked at by the Court. My submission would be, it's a bit speculative, but probably that the Court should engage that type of retrospective consent process. When the purpose of this is looked at, Parliament appears concerned to make sure that people who get these special privileges are people who are either guaranteed to be responsible to a degree because of the regulatory framework in which they, they work, code of ethics complaints process, or someone that the Court presiding over the matter has specifically assessed and says, "Yes, I'm, I'm confident allowing you to report these proceedings and therefore you can have the special privileges that flow." So as long as the Court can still exercise that control and grant that permission, the fact that permission might be retrospective would not, in my submission, mean that it couldn't be granted. The, the normal route that appears to be envisaged would be, of course, that permission would be granted prior and then the proceedings are reported on, and then the subsequent applications to judicially review, to apply to vary, to appeal, would follow. But...

CHAMBERS J:

Isn't it –

McGRATH J:

Well that's a purposive approach that you're, you're taking to the section, but can I just come back to the basics? What's – who, in the normal course, would this language apply to? Who would be seeking permission to report as opposed to taking notes or something of that type?

MS LARACY:

Someone like, for example, I forget the name of the particular organisation, but David Farrar, who made a submission to the Select Committee on this. He's –

WILLIAM YOUNG J:

Kiwiblog.

MS LARACY:

He's Kiwiblog.

McGRATH J:

So bloggers would be in this category?

ELIAS CJ:

The language is capable of being read very broadly, but the headings, well I suppose it depends on the definition of media.

MS LARACY:

Of media.

WILLIAM YOUNG J:

Yes.

ELIAS CJ:

And what did you say the definition of media is?

WILLIAM YOUNG J:

Circular. Repeats it.

CHAMBERS J:

It's in 198. It's in exactly the same terms.

MS LARACY:
It's, it's –

ELIAS CJ:
Oh I see.

MS LARACY:
And it's identical to 210(1). So...

WILLIAM YOUNG J:
Yes. So it just takes it to –

CHAMBERS J:
Isn't it really just a –

ELIAS CHAMBERS J:
So it's any person reporting?

CHAMBERS J:
Yes. Isn't, isn't it –

WILLIAM YOUNG J:
With permission.

GLAZEBROOK J:
With the permission of the Judge.

CHAMBERS J:
Isn't it really just an attempt to keep control over busybodies engaging the Court's time in that essentially if you want to apply to have a suppression order revoked you have to get effectively the permission of the Court unless you're a member of a mainstream, the mainstream media, where you can do it as of right?

MS LARACY:
What the background material on this shows is that it was a concern to clarify what the media, the traditional accredited media, should be entitled to do, but Parliament was conscious that nowadays the new media perform an important role in a

democracy and provide useful information in a format that a lot of, a lot of members of the public read, so they had to be accommodated as well, and the control on them was the provision requiring the permission of the, permission of the Court. I would go so far as to suggest that section 210 should not be read as a code governing all applications.

ELIAS CJ:

Yes. Well it can't be. In fact, it doesn't even constitute these applications. It's a recognition of standing. I'm just wondering, really, whether it's arguable that this, that despite this provision which makes it clear that people reporting in the circumstances identified have standing and so therefore are not busybodies, whether it can be seen as exhaustive. And I suppose the question relevant to this case is why should not someone against whom contempt proceedings are taken apply for revocation of the suppression order in those proceedings?

MS LARACY:

Well, if, if Your Honour's happy with this, I think a simpler but, but equally direct way of, of addressing that is to leave aside the contempt but just focus on whether that third party who is, say, a mere blogger or a mere interested member of the public, and I mean "mere" in the sense that they haven't got prior permission from the Court to report. What does it say about them? Does it exhaust the, the circumstances in which anyone may, may have access to this standing and right to be heard? My submission is that it doesn't. There's nothing that suggest it was meant to address the other areas that, that were, that had been covered by the common law. And were that the case, then if you have the situation such as *Victim X v Television New Zealand Ltd* [2003] 3 NZLR 220 (CA) –

ELIAS CJ:

Sorry, what was your answer in terms of blogging?

MS LARACY:

Well, so, so, so I would –

ELIAS CJ:

Mere bloggers?

MS LARACY:

My submission is that for people who don't fall within 210, they're not media and they haven't got permission, the common law pertains. So a victim, Mr – the, the victim in *Victim X* shouldn't be excluded from the right that he exercised in the High Court to go along and say, "I've got an interest in this suppression and I want to be heard on it." If section 210 were read as a complete code, then, then it would suggest that perhaps that person doesn't have a, doesn't have a right to apply to be heard. So what I would say is that the common law leaves in place the right of people who don't fall within 210 to apply to the Court to be heard. It doesn't give them the special privilege of a hearing.

CHAMBERS J:

Yes. Well, rather in support of the proposition the Chief Justice put, isn't the true significance of the section for current purposes is it does indicate that Parliament considered an application to renew, vary or revoke was possible? This then puts out certain people who will definitely have standing, but it doesn't preclude the fact that others may also have standing. But the true significance is you can apply for – certain people at least can apply for variation or revocation of suppression orders.

MS LARACY:

Certain people, that's right, have got a, a guarantee that they will be heard and that they will have a right to appeal.

WILLIAM YOUNG J:

Yes, but other people might have a right to be heard but they presumably don't have a right of appeal?

MS LARACY:

They would have a – well, my –

CHAMBERS J:

Yes they would I think, because they would be –

MS LARACY:

My assessment of the common law, that's right, is that they would have a right to apply to be heard but they wouldn't have to appeal, and that's the significance of the *Fairfax New Zealand Limited v C* [2008] NZCA 39, [2008] 2 NZLR 368 decision.

WILLIAM YOUNG J:

And does the section 283, isn't that confined to people who are under –

CHAMBERS J:

An applicant for a suppression order. Well they would become an application if the Court – they would become an applicant if the Court decided to grant them standing outside section 210. *Victim X.*

WILLIAM YOUNG J:

But I thought section 283 confined the review right –

GLAZEBROOK J:

Yes, to just the people, to media.

WILLIAM YOUNG J:

– of appeal to those who were within section 210.

GLAZEBROOK J:

Yes.

WILLIAM YOUNG J:

Not necessarily addressing the *Victim X* case, but...

MS LARACY:

Yes, exactly. Exactly.

CHAMBERS J:

The persons who may appeal are the applicant for the suppression order, the prosecution, the members of the media.

GLAZEBROOK J:

So it's only gives a right of appeal to media, not to third parties who don't –

CHAMBERS J:

Oh I see.

GLAZEBROOK J:

– come within that definition of media.

MS LARACY:

That's right.

CHAMBERS J:

Yes, I see.

GLAZEBROOK J:

So if they haven't that permission to report, although I must say in a practical sense you probably don't give people permission to report, although I suppose if a blogger wishes to report then, and wishes to available him or herself of that, then they'd be advised to ask the permission to report and thereby bring themselves within the definition of media.

MS LARACY:

I think that's right, Your Honour. If they don't do that then they risk the Court saying either, "I don't have jurisdiction or I'm not prepared to retrospectively grant permission," or they are simply at the – they're back in the position of the common law where they can apply to be heard but there's no entitlement beyond that. So if you have a sufficient interest in a case, it behoves bloggers and members of the public and media now to come within section 210, and what that does is it gives them a degree of certainty about the process they will get in Court and what their entitlements are.

McGRATH J:

Well in other words, the extent of their natural justice rights.

MS LARACY:

That's right.

McGRATH J:

So it must reflect the statutory context.

MS LARACY:

Yes.

McGRATH J:

Which may not be the same if you're just coming in under the general wide common law.

MS LARACY:

Yes Sir.

GLAZEBROOK J:

Although there's still the issue of the judgments not coming within the Criminal Procedure Act.

MS LARACY:

That's something my learned friend raised. I hadn't considered it. Again, it's a matter for argument another day, isn't it? But –

GLAZEBROOK J:

Well it's probably relevant to the earlier argument that there's no jurisdiction.

MS LARACY:

Section, section 210 and section 38 [*sic*] in their own terms don't say that they only apply to suppression orders made under the Criminal Procedure Act.

GLAZEBROOK J:

Oh, all right. So you say they could be more general? So they deal with standing more generally in relation to suppression orders? Although how do –

MS LARACY:

I certainly think it's arguable that you could –

GLAZEBROOK J:

Yes, how do suppression, how are suppression orders defined, I suppose, is the only other thing we might have to look at.

MS LARACY:

I don't think they are defined. I don't think they are. I believe that it doesn't change from the Criminal Justice Act, which didn't define a suppression order.

GLAZEBROOK J:

So you say they're just more general and could apply to common law suppression orders as well?

MS LARACY:

Yes. And –

GLAZEBROOK J:

In terms of giving standing.

MS LARACY:

Yes. Sometimes the language of suppression is used in the Criminal Procedure Act, but equally the Court, the Act talks about prohibiting publication. In terms of its scope, it's not really directly relevant to, to this hearing, but in terms of its scope the Criminal Procedure Act covers the same ground of what can be suppressed, but it does make some material differences, say, to the threshold for making a suppression order and it certainly changes the penalties for breach.

In terms of the –

ELIAS CJ:

Sorry, the right of appeal may be simply to make it clear. If you were affected, wouldn't you have, by a decision, wouldn't you have your rights of appeal under the Judicature Act?

MS LARACY:

Well, only if –

ELIAS CJ:

What's the –

MS LARACY:

– if there was an irrelevant appeal provision, so that's really the significance of this Court's decision in *Mafart v Television New Zealand Ltd* [2006] NZSC 33, [2006] 3 NZLR 18, where the Court, the Court said, "We're not going to extend the civil jurisdiction to appeal in section 66 of the Judicature Act 1908 to cases which are in substance criminal. If they can be classed as in substance civil, albeit they occur in

the context of a criminal proceeding, then section 66 may apply." So search of Court records was deemed to be civil and section 66 of the Judicature Act applied. But the Court made it very clear that if the, if the application is in substance criminal then the criminal appeal rights, which are all codified in statute, apply, with the result that if there is no applicable appeal provision the applicant has no appeal remedy. And that's where the significance of some of the points I make about section 27 of the Bill of Rights come in and the cases that confirm that section 27, not only does it, is it not a – I think it's, the language in *Television New Zealand Ltd v R* [2001] 1 NZLR 641 (CA) [*Mahanga*] is it's not a self-executing right to review. Instead, section 27 reflects – section 27(2) which gives a right to judicial review harkens back to, to common law and statutory provisions about judicial review, and it certainly doesn't create a right to appeal.

WILLIAM YOUNG J:

Can I just pause there? Suppression order is defined in section 194 –

MS LARACY:

Is it? Sorry.

WILLIAM YOUNG J:

– and it's confined by reference to the statutory orders.

CHAMBERS J:

So it doesn't include what we're dealing with here.

GLAZEBROOK J:

What was the letter – what was the section?

WILLIAM YOUNG J:

194.

GLAZEBROOK J:

Thank you.

MS LARACY:

My submission is that it, still leaves, that the, it would always have to leave the common law because there are people under the –

GLAZEBROOK J:

But you say there's no common law right of appeal?

MS LARACY:

No common law right of appeal. That's right. And not only was that the Court of Appeal's conclusion in *Fairfax*, that was the, the very thing that led to the European Commission in, in *Hodgson v United Kingdom* (1987) 10 EHRR 503 (EComHR) saying there's, there's got to be some process by which the media can be heard on suppression. And that –

ELIAS CJ:

What about the incommensurality between or lack of equivalence between District Court and High Court suppression orders? Because the District Court suppression orders would be subject to judicial review.

MS LARACY:

Yes. Those concerns about imbalances or inequities in challenge procedures were discussed in both *Victim X* and *Mafart.* I suggest that the, the answer on that is explained and as articulated in those cases is that to a degree the law just has to accept that there are, there are imbalances. That where an area is covered by, by statute it may be more closely regulated than where an area is not and there is the judicial review and then the general section 66 right, which is far broader than anything available in the criminal jurisdiction, and it does lead to sections that may seem to be very unfair for a person with a very legitimate interest in suppression such as Mr Victim, the, the victim in the, in the *Victim X* case.

WILLIAM YOUNG J:

Can I just – in the broadcasting case which concerned the sentencing hearing the Court of Appeal heard that not as the Court of Appeal but as, as effectively three High Court Judges. So they recognise in that case, and I think there wasn't a right of appeal or probably wasn't.

MS LARACY:

Yes. And that's commented on I think in the, in the *Lewis* or the *Victim X* case, and what the Court says there, perhaps a bit conveniently, is that the only way to reconcile that with a High Court Judge having made an order, given that another, another sitting of the High Court can't review the, a final decision of a, of a, of another

High Court Judge, is that that High Court, the first High Court order had to be seen as interim.

WILLIAM YOUNG J:

Well it – but I mean, an order of – that has continuing effect, is presumably subject to review while it continues to have such effect.

ELIAS CJ:

And therefore a revocation can be made at any time, even in the course, perhaps, of a contempt proceeding.

MS LARACY:

Some of the statutory provisions will bear on that.

ELIAS CJ:

No, sorry, what's the answer to that though? I mean why should – if there is – if the statutes proceed on the basis that people affected or that there is the ability to get revocation, what's wrong with permitting it to be applied for in the course of the contempt proceedings?

WILLIAM YOUNG J:

But there's nothing. It's just that it's not a defence. A subsequent –

McGRATH J:

It's not, it's not retrospective in effect.

ELIAS CJ:

Well, I'm not sure of the – I'm not sure of that, because in some of those public law cases it is treated as retrospective when you, when there's questions of criminal enforcement. It's not a – I think that there is authority.

McGRATH J:

The *Boddington* type case, or wider?

ELIAS CJ:

Yes, the *Boddington* case, but some of those – yes. It just seems wrong. It seems wrong that there can't be a review at some stage.

MS LARACY:

My response to that is that it doesn't seem wrong when it’s appreciated that exactly the same application could have been made immediately after the 9 December decision to Justice Winkelmann by Mr Siemer prior to breaching it. It seems wrong that he can entertain an entitlement to have never gone back to her in a timely fashion and raise that as a defence in a different Court in the context of a different decision where the parties to the order that he is challenging are not present and the limitations of even counsel who have been involved in this matter like, like myself are totally evident in that. You know, I wasn’t sure what Mr Burns had put before Justice Winkelmann. That can't be the role of the contempt Court to revisit the detail and the dynamic of the, of what was going on at the time that another High Court Judge was –

ELIAS CJ:

Well it wouldn't be an appeal. It wouldn't be the Court deciding that the decision was right or wrong. It would have to be, it would have to be more significant than that.

MS LARACY:

What you can say is that the, the High –

ELIAS CJ:

There would have to be an – the decision would have to have been an error of law.

MS LARACY:

Well the – what, what the law does say you can do in a contempt case is you can raise as a defence that the order was made without jurisdiction; that it’s an unlawful order. Not because you’re dissatisfied with the terms of it or the Court’s process, for instance that reasons weren’t given, but that there is, that the order is a nullity and therefore legal consequences cannot flow from it, including punitive consequences. So –

ELIAS CJ:

But how do you, how do you reconcile that with the law post *Anisminic*? I mean, those cases are from a time where there were, there was more categorisation in the law, but we’re now at the point where error of law is jurisdictional. So if this was an error of law, why should it not be able to be reviewed at any time? Because it is a continuing order.

MS LARACY:

Well, it can be reviewed at any time in the sense – I don't say Mr Siemer couldn't, couldn't do this. I do say that he should have put it before Justice Winkelmann.

ELIAS CJ:

Well, except that I thought there was an indication in the submissions that it could either have gone to her or to another Judge. Isn't there...

MS LARACY:

I would – I may well have made that concession. I would certainly accept that there has to be some allowance in the law for another Judge to look at it. So, for instance, when the Judge that made the order is simply not available or has died. There must –

ELIAS CJ:

And it's not a rehearing, is it? It's a – well, at least the statutory power envisaged is much wider than that.

MS LARACY:

Well what I, what I suggest is – that's right. What I suggest is that the difference in this case is that the context in which the, the order is being sought to be revisited is in a contempt proceeding happening in Wellington with totally different parties, none of the accused there, the Crown is not represented, the Solicitor-General is not the face of the Crown as the person responsible for indictable prosecution when he's bringing a contempt proceeding. So the Crown is not represented and the nine people who had an interest in the order and can, may be in the best position to say what can be said in defence of it are not there.

ELIAS CJ:

But that's so if it were an appeal. I can quite understand that. But if it's an error of law on the face of the record, if it's, if it carries its death wounds in its head or whatever, why should it not be able to be challenged? Because you don't need to hear from all those others affected.

WILLIAM YOUNG J:

But the effect – when this was heard, weren't, wasn't the prosecution of the remaining defendants in the Urewera case still before the Court?

MS LARACY:
Oh yes.

ELIAS CJ:
But I mean –

WILLIAM YOUNG J:
So to set this –

ELIAS CJ:
– that's a merits point. I'm worried about how you get to the thing before a Court to consider it. I'm not worried about the outcome so much. I think there's probably a lot to be said for the Crown position.

MS LARACY:
Well what I would say in terms of the outcome is that, and I have, have got a wee summary in my notes here, and I'm sorry if I'm covering old ground and I do hope I address Your Honour's position here, is that infringement of a section 14 right doesn't require the right that the person concerned has a right to a hearing in order to have that infringement addressed by the Court, but, consistent with the European Court decision in *Mackay v United Kingdom* (2011) 53 EHRR 19 (Section IV, ECHR), I suggest that what they have is a right to a clear process to put their concerns before the Court and ask for them to be considered. I'd say New Zealand accommodates this in that there is no rule of standing in New Zealand which ousts the third party from the outset and says – there is no case that says, that I know of, that says third parties cannot even properly file their application with the Court. They can do that. They have standing to do that. They can apply then to the trial Judge or the trial Court to ask to be heard on the decision made by that Judge or in the context of the Court's criminal jurisdiction in which the order was made if the Judge is not available.

GLAZEBROOK J:
Can I just – and so – I just want to check that you're making the concession that Justice Brewer's indication that there was no jurisdiction was actually wrong?

MS LARACY:
Yes. Yes, I think it's probably too, too broad.

GLAZEBROOK J:

Making that – sorry, I just needed to –

MS LARACY:

The difficulty Justice – no, I think that's a fair point. The difficulty for Justice – and, and so certainly my submissions are directed at what the legal framework in New Zealand can provide for someone who wishes to bring a third party claim. They're not focused on whether or not Mr Siemer had, had the right process afforded him. But the difficulty for Justice Brewer was that, that he was also addressing an application that was expressly made in the Court's civil jurisdiction. But –

CHAMBERS J:

Well why couldn't this be – that's a point I wanted to get clear. Clearly – let's just assume the Criminal Procedure Act were already in place. Now that, that gives a statutory procedure, but we all agree that, on your argument, there are going to be some orders outside suppression orders as defined. And let's assume you're right about that for the moment. Now, you accept that there should be a like procedure to the statutory procedure for someone to be able to apply to have it varied or revoked. Why shouldn't that be considered an application in the civil jurisdiction of the Court, which would then give rise to a right of appeal in terms of *Mafart v Television New Zealand*?

MS LARACY:

On the analysis in *Mafart* it seems to me that one of the difficulties for the law is that, depending on the timing of that third party application to review or revoke an order, conceivably it could be considered to be criminal at one point and civil at another. And if I can explain that, that, the reason being is that one of the things that influenced the Court in *Mafart* is that it was the third, it was a media in the context of an application and a concern that had nothing to do with the trial in which, in which the, the, the order governing the, the material was made many years down the track, for reasons of public interest, where there were no fair trial concerns any longer, asking to have access to the material, and the Court said, "We consider in that context this should properly be seen as civil. It's sufficiently removed from the underlying criminal proceeding." And that's where the warning from the Supreme Court about not, not making the test was this order made in a criminal case. It needs to be a more subtle and expansive consideration than that, than that.

McGRATH J:
And current test.

MS LARACY:
That's right.

So it's a difficult question, but where a suppression order is made in the context of a criminal case and the criminal case is still before the Court, as it was here, my suggestion would be that on the *Mafart* analysis the third party's application to, to speak about the appropriateness of their order would almost always be considered to be criminal. But I do take, I do accept that it could be that if an order was not a permanent order in the sense that it could be revisited by the Court, and many years down the track someone with a, a genuine interest in the matter applied to the Court and said, "Look, I'd really – I think this no longer needs to be suppressed," maybe the Court would say, "Well, balancing all those considerations in this particular instance it should be considered civil," and then if you're not happy with the Court's order the person might have the right under section 66 to appeal.

CHAMBERS J:
Why does it have to be years down the track though? Because under section 283 the media would be able to appeal immediately –

MS LARACY:
Yes.

CHAMBERS J:
– even in the context of an ongoing criminal case.

WILLIAM YOUNG J:
But that's on the basis of statutory appeal.

MS LARACY:
Exactly.

CHAMBERS J:
I know. I know.

WILLIAM YOUNG J:

But section 66 doesn't apply to criminal cases, section 66 of the Judicature Act. And that was the problem that was addressed in *Mafart*.

MS LARACY:

So, so your, your question to me as I understand it, Your Honour, is, "Would it necessarily always be criminal?" In short my answer is almost always criminal, which would mean that the right in section 66 to appeal would not apply, but conceivably there could be a case where it could be deemed to be civil, but I think that would – the most obvious situation where that would arise would be where the criminal trial was very much a thing of the past.

ELIAS CJ:

Isn't – it's a long time since I've looked at this, but I just really wonder whether that's the right way to look at it in terms of it being civil or criminal. Isn't the criminal jurisdiction a statutorily codified carve-out, if you like, and what is left is the jurisdiction of the Court. In other words, if you can't actually classify contempt as criminal or civil. It's civil. It's not civil but it's within the residual jurisdiction. I might be –

MS LARACY:

I'm sure –

ELIAS CJ:

– quite astray in that, but I've always thought that these labels are quite unhelpful.

MS LARACY:

They're certainly very difficult. I think what, what can be taken from *Mafart* is that it is an extremely difficult exercise in lots of situations to classify an application as either civil or criminal. There is no bright line and reasonable minds will, reasonable judicial lines will properly differ on, on that. But *Mafart* does indicate that if the application is properly classified as criminal, then you're stuck with the rights of review or appeal that apply in the criminal context, and when it comes to appeal, they will be a matter of statute. And if the statute doesn't assist, that's the end of the, the end of the road. If, however, the application, albeit made in the context of a criminal case, is by other factors substantively able to be categorised as civil, then it shouldn't –

ELIAS CJ:

Or is not criminal, I would suggest. But –

MS LARACY:

Well, yes, possibly. And then your, Your Honour's particular question referred to contempt. Of course, there we've had that issue in this, in this Court in the context of another case involving the Solicitor-General in *Siemer v Solicitor-General* [2011] NZSC 32, (2011) 25 CRNZ 522, and this Court issued a minute where – the very issue there was costs. Costs on an application for contempt that had been brought by the –

ELIAS CJ:

Is that the procedure reports reference in your –

MS LARACY:

No. I don't think so. No, that's the one involving *Siemer v Heron* [2011] NZSC 133, [2012] 1 NZLR 309 where this Court said that section 66 should be interpreted broadly, covering anything that could properly be defined as a judgment, order, decree. No, I haven't given Your Honours the one about contempt, but it was, it arose from a previous breach by Mr Siemer of another order of Justice Winkelmann made in the Operation 8 of that case, and the Solicitor-General filed proceedings. Very late in the piece Mr Siemer and the Solicitor-General agreed that if he withdrew the material from the internet we would withdraw the contempt application, so that happened, but it was on the morning of the trial and a lot of work had been done, so the Solicitor-General applied for and got indemnity costs. And it was the issue of indemnity costs that came to this Court. The costs had been awarded under the High Court Rules and the argument made by Mr Siemer is that in the substantive jury trial hearing we had had in this, this Court, an entirely different proceeding again, this Court was satisfied that the Bill of Rights criminal protections in terms of the fair trial right applied, and so Mr Siemer said, "That means it's a criminal case and all contempt is criminal. Therefore if it's criminal the costs on this other contempt shouldn't have been made under the High Court Rules because that only applies to civil cases." And the, the minute of this Court, which is reasonably brief, just says, look contempt is, is sui generis. It's neither substantively criminal nor civil. But that does mean that, that rules that govern procedural matters such as costs can take their, can follow through from ordinary civil rules.

And the Judicature Act itself allows this. Section 16 of the Judicature Act preserves contempt of Court, and the, the law essentially is that to the extent that the procedure for contempt of Court is covered by the High Court Rules it should apply, even if it's substantively criminal, and to the extent it's not, then the Courts should adapt the High Court Rules to, to make it, make it apply. So it is a hybrid, it is sui generis, and it's difficult.

CHAMBERS J:

Can I put this proposition to you? What *Mafart* said, looking at paragraph 36 of the Supreme Court's judgment, is that the reason the application to search the application to search criminal files was civil was because what was being exercised was the civil right to information, freedom of information in public records. Now, couldn't it be said here that whenever somebody wants to publish something which is currently suppressed, then what they're seeking to do is the right to exercise their civil right to impart information and that that therefore is a civil right. Accordingly, they would have a right to appeal, at least if they were a non-party to the criminal proceeding, under section 66. Like many civil appeal rights, section 66 yields where there is a specific statutory right of appeal, and there are heaps of examples of those, and of course it would yield to section 283. But in circumstances where section 283 did not apply, section 66 would be available to the applicant for lifting of the suppression order. Do you accept that as an accurate statement?

MS LARACY:

I accept it would, it could probably be argued, but –

ELIAS CJ:

I should say I'm tempted to regard it as an accurate statement. So if there's anything that you have trouble with I'd be grateful to hear what it is.

MS LARACY:

The facts are very important to the outcome in the *Mafart* decision and some of the –

CHAMBERS J:

I don't see why you're arguing against this proposition.

MS LARACY:

Well, I don't see *Mafart* as, as suggesting that whenever a third party applies on the basis that they, that they're exercising their right to freedom of information in any case, civil or criminal, that that should be seen as an exercise of a civil right. I, I – in my submission *Mafart* suggests that in the *Victim X* case, which did look at a third party application in a criminal context, *Mafart* suggests that *Victim X*, in certain passages, the Court of Appeal may have somewhat simplified the test, asking did this relate to or rise in criminal proceedings, and that that is not a sufficient question to ask when seeking to clarify a proceeding as civil or criminal. But beyond that, *Mafart* doesn't cast doubt on the outcome in, of *Victim X*, which was that a third party application to, to appeal or review a suppression order was criminal, substantively criminal. And I also suggest that in the judgments, when, when read as a whole, weight is put on the fact that this was – the application here was many years after and entirely outside the criminal process and that the decision could have been different had it been made at the time, in the context of a criminal proceeding.

CHAMBERS J:

I'm obviously missing something here because I can't see what's contrary to the Solicitor-General's stance in the proposition of law I put to you. Because the more there is a right of review of suppression orders and a right of appeal of suppression orders, the less, I suggest, the Court would have to strain to give a defence right during contempt proceedings. If you got full civil rights to challenge prior to – of the suppression order, the less you need to give the right of collateral challenge at the time of a contempt proceeding based on that suppression order. But is – am I missing something?

MS LARACY:

I appreciate that what you're saying could, in one sense, be of assistance to the Solicitor-General. The Solicitor-General, however, relies on the consistent body of law in terms of collateral challenges to suppression orders, especially those from the higher Courts set out in my submissions. So the, the justification for not allowing those collateral challenges already in, in the law and the rationale for it's there, and my submission is that we don't need to go extending the rights of legitimate third parties or busybody third parties or whoever to make, to have a right to be heard and to appeal simply in order to limit the extent to which challenge can be raised in the very rare occasions that contempt proceedings are brought. There's very few of these. It would seem a distortion of the law if, if, if one –

ELIAS CJ:
Well that –

MS LARACY:
– area greater –

ELIAS CJ:
That cuts the other way though, because what's the harm? I mean you have a continuing right to apply to revoke or vary or whatever that seems to be, you seem to accept is available and it's certainly consistent with the Criminal Procedure Act. Is it really right to characterise this is a collateral challenge if it's raised? I mean, subject to the question as to whether it's void ab initio or void, you know, at a later stage. Things that I thought we'd got past. But what's the problem with that?

WILLIAM YOUNG J:
Well it, it does go beyond the substance of the file, which did not address what happened in the context of a criminal case. Left that. And –

GLAZEBROOK J:
Is one of the – oh, sorry.

WILLIAM YOUNG J:
Sorry. And it may be that doing it would have implications which are sort of difficult to come up with on the hoof.

GLAZEBROOK J:
Well I –

MS LARACY:
For instance, Your Honour, if I can assist on that, the – one of the points made in *Victim X* and *Mafart* is that you then end up with other inequities in the process, so where there's a clear statutory right of appeal to the parties on certain bases or certain grounds, they're stuck with that. If you're a third party, you've got the section 66 Judicature Act right, which is far, far broader. So, for instance, a pre-trial appeal requires leave in the criminal context from a suppression order to be heard in the Court of Appeal. Section 66, there's a right to be heard. So it simply creates inequities and potentially far greater rights and, and scope for third parties who

simply don't have quite the same interest in the proceedings to distract the Court and have their say, far greater than is available to the parties themselves. And that's one of the risks, which is why I think it's the decision of Justice Eichelbaum at the end, he essentially says, look, this is, this is –

ELIAS CJ:
Sorry, what's this? *X*?

MS LARACY:
Yes, at – sorry, Justice Eichelbaum –

McGRATH J:
Mafart.

MS LARACY:
– which is the final decision in *Mafart*, he, he says, finds it very, very difficult, is very concerned with the idea that on the Court's analysis potentially at some times such applications in some circumstances might be civil, in others they might be criminal. He says that's just far too much –

CHAMBERS J:
That's not the majority judgment.

MS LARACY:
No, Sir. But, but the, but the point is that –

CHAMBERS J:
But can I, I – have I – are you saying that the new Criminal Procedure Act gives a right of appeal, a right of appeal, to the media against a suppression order, but the parties have to seek leave?

MS LARACY:
No. The, the, the applicant for suppression and the prosecutor have, have that same right in 283. So the parties and the media –

CHAMBERS J:
Well, so the parties do have a right of appeal. They don't need leave.

MS LARACY:

Okay. I was trying more to assess – I wasn't specifically commenting in the context of 283, but that concern about saying, "Well, why can't we address all third parties and treat it as civil and look at the right under section 66?" my point is simply that there's a very high likelihood that doing that creates its own imbalances and inequities in appeal rights and review rights as against the parties who generally are, do have a regulated procedure by which their, their rights are governed. And you may well be, you may well be – so...

GLAZEBROOK J:

Well it does – it might seem odd that a party that a party to have a suppression order lifted or varied, that would be a civil proceeding when it's in the course of a criminal trial. Because that seems slightly odd.

MS LARACY:

And another –

GLAZEBROOK J:

Because that seems very much related to the criminal trial, and I suppose one of the other concerns is that you could actually have a whole pile of third parties derailing the criminal trial through, through these processes, and in fact presumably the parties themselves, and including the accused, would have to be heard in the course of these, a civil proceeding for the very reason that their fair trial rights might be compromised, and so therefore in a natural justice sense they would have to be heard. So they'd be running criminal and civil proceedings at the same time.

MS LARACY:

Those –

GLAZEBROOK J:

That might be able to be dealt with by saying, "Well, yes, you do have this right but we don't have to deal with it before the criminal trial."

CHAMBERS J:

We're not going to hear it yet. Yes.

MS LARACY:

Yes. One of the anomalies that's just occurred to me, in answer to Your Honour Justice Chambers' question, would, even on the civil, on the Criminal Procedure Act appeal right, could be that – how, how would that – I was thinking – no, I, I – it was a hypothetical that I'll steer clear of.

I think the, the only – the point I simply wanted to make is that the special privileges that the Criminal Procedure Act gives appear to be a right to be heard to people who fit within that definition and a right to appeal. People who don't fit within that definition don't have that right to be heard. They have the right to apply to the Court. I was going to say that they have a right based on the Court of Appeal's decision in *Lewis v Wilson & Horton*, which is in my bundle. They have a right to have their application probably determined by a judicial. It's a judicial decision. So not to have it ousted at the start on the basis of no, no standing to make the application. Registrars in the summary jurisdiction only have a, have a statutory power to deal with suppression. Again, that points to the fact that it's a very limited statutory power. It only arises in the summary jurisdiction on a particular type of application and that's dealt with in *Fairfax* and *Lewis v Horton*, but there's a right to have it determined by a Judge. And what I suggest is that the Judge has the duty to determine that application judicially. And what that means is that if there's nothing apparent in the, in the, in the application that causes the Judge to consider that a duly made order by that Judge or by another Judge warrants reopening, the section 14 right has been exercised and has been given effect to. It doesn't require more than that.

McGRATH J:

What you're really saying is that natural justice, the scope of natural justice can be very small?

MS LARACY:

Yes.

McGRATH J:

In such a matter. Is that what that –

MS LARACY:

Yes.

McGRATH J:

Is that one way of putting what you're arguing?

MS LARACY:

Yes. And if the application reaches the threshold that does give concern on a proper judicial assessment, and, and there shouldn't be any preciousness about revisiting decisions made, if it does give concern, a hearing should be held and all the parties and the third party should be entitled at that point to be heard. And the section 14 right is then given greater content. So yes, yes Your Honour.

McGRATH J:

Would it be open to the Judge to ask for written submissions in support first from the applicant before deciding what it's going...

MS LARACY:

It would, it would certainly be open. And my submission is that the law provides this framework, and one of the advantages of this is that when the whole scheme of the process is looked at, this is actually far more advantageous to the system than a process that allowed any third party to be heard when a suppression order was made, to judicially review it and, and then to actually have a right of hearing and a right of appeal under section 66. Were that the case, Your Honours, Justice Glazebrook's point about disruption and slowing down and cost and expense to the criminal process very much come to the fore.

ELIAS CJ:

I'm sorry, I don't quite – we should take the adjournment, but I don't quite understand why you say that they wouldn't be entitled to bring – you did say earlier that they're entitled to bring the proceeding and to have it determined, have the application determined. What's the limit you put –

MS LARACY:

A Judge, a Judge should read the application. The third party should be able to file something and have a Judge read it and understand that there's a person that who –

ELIAS CJ:

But how it's dealt with is a contextual assessment for the Judge to make.

MS LARACY:

Yes. Yes.

ELIAS CJ:

Yes.

MS LARACY:

And it may not result – when we talk in this, my submissions about challenge, it may be that that's the extent of the challenge. It may be that the person, quite properly, never gets a right to get up in Court and make oral or substantive written submissions on that. The Judge may be satisfied that the order was properly made and nothing in the application warrants a reopening of it and a causing of cost and inconvenience and burden for the parties.

COURT ADJOURNS: 1.01 PM
COURT RESUMES: 2.19 PM

MS LARACY:

For completeness sake, I did want to refer the Court to the fact that in late 2011 the Law Commission put out an issues paper which concerned how new media should be treated in terms of news media. The Law Commission has suggested that New Zealand should maintain the privileged status of media as we know it, as surrogates of the public in Court proceedings, but would recommend that that privilege be extended to new media such as bloggers. They do so on the basis that they should, however, be subject to equivalent standards of reporting and I won't do any more than just summarise the recommendation which is currently in the public arena and this is the Law Commission's recommendation at page 8 of that report.

ELIAS CJ:

Sorry, where we find that?

MS LARACY:

Sorry, it's not in my submissions, had I considered this when we were finalising –

ELIAS CJ:

No, that's fine.

MS LARACY:
– I refer to it in the footnote.

ELIAS CJ:
Page 8?

MS LARACY:
Page 8 of the Law Commission's 2011 report. The Court might just be interested to know that this is what –

GLAZEBROOK J:
Sorry 4000?

MS LARACY:
Sorry 2011.

GLAZEBROOK J:
The report is 2011, sorry, I thought you were giving a page number.

MS LARACY:
No, it's just on page 8 of the report but the report's not before you. So this is what the Law Commission has recommended the public consider. "For the purposes of the law the news media should include any publisher in any medium who meets the following criteria. One, a significant proportion of their publishing activities must involved the generation and/or aggregation of news information and opinion." So there's a proportionality requirement, this has to be a large part of the person's business, it would suggest. Not necessarily a commercial business but their regular activity. "Two, they disseminate this information to a public audience. Three, publication must be regular. Four, the publisher must be accountable to a code of ethics and a complaints process." And the report talks about what's most important is that new media who would like to have the privileges of news media should always be subject to a requirement of fair and accurate reporting. So no doubt that will affect future policy when Parliament, if it does, comes to look at this area again.

I also wondered if it was useful for me to touch on the *Boddington* area briefly. I acknowledge Your Honour's point that the line of administrative law cases since *Anisminic*, which is a 1960s case, have accepted that errors as to jurisdiction and as

to the validity of a provision, a statutory or a regulatory provision, can be challenged in the criminal process. So not just jurisdiction but matters that might go more to the validity rather than to the jurisdiction. My submission is really as set out in the submissions where I've dealt with this and I do recommend that the Court carefully reads *R v Domm* (2006) 111 CCC (3d) 449 (ONCA), because it's a very useful, and in my submission, compelling summary of the reasons against treating suppression orders differently from bylaws and regulatory – and statutory provisions which create offences but there are distinctions and essentially this, this is the distinction in my submission. In the administrative, in the case of the administrative challenge, well, the challenge in the criminal proceeding to an administrative decision in the nature of say a bylaw or a regulatory provision or a statutory offence provision, there is at that time no other Court seized of the matter, unlike here. There is not dispute before the Court in which the merits of the provision which is in question is being challenged. In this case, for instance, the order was made in a proceeding which is before the Court and which I say at common law there is a method for people who are interested to go to the Court and ask to challenge it. So there already was a cause before the Court. In those other cases there isn't.

This is the second point, members of the public invariably have had no, in practice, no prior occasion to enquire into the validity of a bylaw or a regulatory provision which creates an offence, and that's because at the time these bylaws or offence provisions are promulgated. Most members of the public have no particular occasion to pay attention to them and consider whether they would or should commence judicial review proceedings. The first time the member of the public comes up against the problem of the bylaw, or the offence provision, is when they're facing a criminal charge. So that is the only occasion upon which it can –

WILLIAM YOUNG J:

Well they might know the bylaw is there but intend to defy it on the basis they want to challenge it collaterally later.

MS LARACY:

There maybe exceptions but that's where –

McGRATH J:

But you're really saying the reality is there is no other way they can challenge it other than by committing the offence?

MS LARACY:

In most cases. Well not, in most of these cases they've already committed the offence and they're challenging it in the offence proceeding but unlike, for instance, the case of Mr Siemer, they didn't have prior knowledge that there was a legal mechanism – there was a legal order out there requiring them to conduct themselves.

ELIAS CJ:

They might have.

MS LARACY:

They might have but that's why in the –

McGRATH J:

As I understood the way of putting your argument is that there is, whereas for Mr Siemer there was a way within the –

MS LARACY:

Yes.

McGRATH J:

– criminal proceedings in which the order was made to challenge it.

MS LARACY:

Yes, yes.

McGRATH J:

If you're in the *Boddington* type of situation you really had to commit the offence, get yourself prosecuted, or find yourself prosecuted, before you realistically could have been challenging the validity.

MS LARACY:

Yes.

McGRATH J:

It just wasn't realistic to think in terms of going along and bringing a sort of prospective judicial review application.

MS LARACY:
That's right. It puts an unrealistic burden on the public.

ELIAS CJ:
Well that is, of course, the argument that was made in *Boddington* and rejected, that they should have gone and challenged it by way of judicial review. Is that the one where Steyn says, well that's just quite unrealistic. Is that *Boddington*? I can't remember.

MS LARACY:
Yes it is. But even on the *Boddington* and *Brady v Northland Regional Council* [2008] NZAR 505 (HC) line of cases you do not necessarily get to have a collateral challenge. Those cases make it clear that there is an enquiry as to whether it's appropriate in the criminal context to challenge the bylaw or the provision in that proceeding. And that's not too different from what happens in the criminal process. There's an enquiry from the Judge upon application by the third party as to whether the Judge should hear the third parties interest. When, if the proper procedure is followed there's an enquiry at that point. All we're saying is that in the case where the person waits until they are found in contempt for breaching the order, especially in Mr Siemer's case, he knew about the order and what it required to do, and there was a proper process for him to challenge that, that he knew about, well that was available to him in law, prior to breaching it. As I've said the summary in the *Domm* case on this is concise and, in my submission, correct.

Unless there are other matters that the Court would like me to address the only matter I wanted to finish with is a very small correction to a couple of references in my footnotes that might be confusing. There – sorry I'll just find my submissions. Sorry, yes, on page 33 of my submissions, which is on the issue of *Boddington* and the New Zealand decision of *Brady* and challenges to bylaws, footnote 132 says "at 44" that's incorrect, that should be a reference to *Domm*, which is at tab 19 at 465B. And at footnote 133, which says "at 46" is also incorrect. It's a reference to *Domm* at 465E. And the next footnote is wrong as well. It should be 466 at A. With respect, those are my submissions.

ELIAS CJ:
Yes, thank you Ms Laracy. Are we going to have two replies or just one? Thank you. Thank you Mr Ellis.

MR EDGELER:
Not a great many matters Your Honours but I've taken a few notes during my friend's submissions. My friend at the outset of her submissions spent a reasonable amount of time going through the, how we could know the reasons and why the suppression order in this case was about protection of fair trial. Two points in response to that, of course, at times it was referred to as a judgment, so the public would know, and of course it was a minute that was delivered only to the parties and not – the reasons were never contained in judgment.

WILLIAM YOUNG J:
You mean this is the 21 December –

MR EDGELER:
Yes, 21 December. The earlier one is the decision on the jury trial point and reasons about that and the only reason – the only mention of suppression in the entire judgment was the caption above the judgment on the front page. This is a – there is a suppression and so the public reasons for their being a suppression and these types of orders are made for protection of a fair trial but the idea that that would be generally known or publically stated in this case isn't the case. And of course in this proceeding the Crown has never alleged, the Solicitor-General has never alleged, that Mr Siemer's actions in any way interfered with the fair trials rights of anyone, which even if we do know the general reason why these types of orders are made in criminal cases, the fact that in this case the Crown doesn't consider his actions did in fact raise –

ELIAS CJ:
Why would it be necessary for him to suggest that. I mean it was overtaken, wasn't it, here?

MR EDGELER:
Well the – for a large amount of time, and perhaps this is contrary to Mr Siemer, but all that was unsuppressed in December was the result. The, okay, we can now tell people that there is going to be a, these people have been denied a jury trial and for

a very long time after that Mr Siemer's the judgment was still on Mr Siemer's website and so even though there was a variation in the suppression order he was certainly still publishing the whole judgment as it previously was until it was taken down at around the time of the contempt proceedings.

CHAMBERS J:
So what's the submission that derives from that?

MR EDGELER:
That any suggestion that his – the reason why his actions didn't interfere with fair trial right was because the Crown, the Court recognised that fair trial wasn't important and relaxed the suppression order so it was only a short one. His – the fact that no one alleges there was a breach of fair trial right –

CHAMBERS J:
But they do. All the defendants are certainly opposed any relaxation.

MR EDGELER:
Yes.

CHAMBERS J:
And indeed the Judge on reconsideration effectively agreed with the defence.

MR EDGELER:
That's mostly true. I would note it wasn't all the defendants –

CHAMBERS J:
I think it was –

MR EDGELER:
– it was all the defendants present –

CHAMBERS J:
– didn't she say?

MR EDGELER:
– at the telephone conference, which wasn't all of them.

McGRATH J:

I thought it was –

MR EDGELER:

They were not all represented.

McGRATH J:

Didn't you get, wasn't there a complaint that the order involved an interference with due administration of justice which you managed to knock out on the pleadings?

MR EDGELER:

There was – on the pleadings there was – I don't believe so. At the conclusion of the –

McGRATH J:

You objected to reliance on one head of contempt.

MR EDGELER:

Yes. That head of contempt was collateral attack on – if it were – had approached on the argument of he was alleged to have breached an order binding on himself and then –

McGRATH J:

It didn't relate to trial unfairness?

MR EDGELER:

No.

MS LARACY:

I can confirm on that. No, we never alleged pre-trial publicity-type contempt. It was just that if the Court found that this order wasn't binding on Mr Siemer, because there was no jurisdiction to make it, reasonably late in the piece of the proceedings the Solicitor-General sought to rely on the form of contempt which is identified in the House of Lords decision in *Attorney-General v Punch Ltd* [2002] UKHL 50, [2003] 2 WLR 49 which is where you will, in any event, by in contempt if an order does not

bind you, it binds another person, but you take deliberate action to undermine the Court's order.

McGRATH J:
Thank you.

MR EDGELER:
Yes Sir and I would note there was evidence in the affidavit filed by, on behalf of Mr Siemer, and for the, at the arrest point an affidavit of Jamie Lockett, who was one of the defendants in the –

GLAZEBROOK J:
Mr Lockett was actually represented at the 21 December 2010 hearing and was presumably one of the nine counsel who, according to the Judge, all counsel for the accused opposed the suggestion so Mr Lockett might have changed his mind but certainly through counsel at that stage –

MR EDGELER:
Certainly through counsel –

GLAZEBROOK J:
– he was requiring, making submissions that the suppression order should be maintained in its entirety.

MR EDGELER:
He was. Well his counsel was yes.

GLAZEBROOK J:
Well he was through his counsel so he may have changed is mind later but certainly at the time he considered it would interfere with his fair trial rights.

MR EDGELER:
I'm not sure I can take it that far but that may be the case.

GLAZEBROOK J:
Well all counsel for the accused opposed the Crown's suggestion that the suppression orders be made more limited.

MR EDGELER:

I'm just reluctant to give evidence from the Bar that might contradict that, is all.

GLAZEBROOK J:

Well it can't contradict it because through his counsel that's what he said at that telephone conference.

MR EDGELER:

Yes Ma'am, through his counsel, yes. The next point I have to respond to a submission by my friend that Parliament, having looked in great detail at the Criminal Procedure Act and had addressed these matters which she termed high policy, it would be inappropriate for this Court to essentially make separate decisions. Of course this is solely concerned with a common law suppression power and so the extension of the amendment of the common law is a matter for this Court and if there's anyone to make a policy decision about, well even if the statutory procedures allow one sort, given the different types of orders we have here, if there's to be a policy decision it's entirely appropriate for this Court to make it, to say we need to have greater rights and the ground of appeal, what we might call 2.1 today, if that is an extension of the rights that currently exist, only if this Court can make it, if Parliament makes it, it will be making statutory changes and it can do that as well but the idea that this Court shouldn't I submit is wrong.

Mr Ellis certainly would like me to make the point, the Criminal Procedure Act and the requirement effectively for non-approved media to get consent, effectively to cover aspects of the proceeding at least, it should be very careful that not too much is placed on that given that it may, in some respects, amount to a prior restraint on publication or on activities which might then enable people to publish if they want to make applications to the Court to rescind or vary suppression orders of that nature and given that that's a statutory procedure, the Criminal Procedure Act that we're dealing with here, broader suppression powers, which deal with whole judgments and results that the greater allowance for freedom of expression is needed and that sort of case then if we're – and it's important but merely discussing name suppression or suppression of a number of facts which might come under a hearing. A whole judgment is a – prohibiting someone from publishing a whole judgment is a far greater imposition on freedom of expression than the statutory suppression orders that the Criminal Procedure Act recognizes at the moment. I would note, I can't

remember who it was who said it, just in case it comes up in the judgment, these aspects of the Criminal Procedure Act are currently in force. The difference is –

CHAMBERS J:
Oh they are in force are they?

MR EDGELER:
Yes, they weren't in force at the time of the contempt proceeding.

CHAMBERS J:
I see.

MR EDGELER:
But most of it won't come in for a number of months later this year –

CHAMBERS J:
But these ones are in force?

MR EDGELER:
The suppression powers came into force, into place quite quickly...

GLAZEBROOK J:
I didn't quite understand the prior restraint because nothing stops anybody reporting what they're heard in Court, apart from if it's a subject of a suppression order.

MR EDGELER:
That's certainly true. So it's certainly lesser than the sort of prior restraint cases we have of needing permission to have a march somewhere or something like that. But needing to have permission in the sense to be officially covering the report, officially covering proceedings which might then stop you from making the application to publish the story you want if only people who are officially covering proceedings can apply to rescind or vary third parties.

GLAZEBROOK J:
You might deal with that by saying, well, if that does happen you can retrospectively apply for consent and if the Court gives you permission to cover then at that stage it would give you permission also to – that would deal with your point, wouldn't it?

MR EDGELER:

That would deal with that point but it's an important point to make if it comes up that we want that point dealt with.

GLAZEBROOK J:

I doubt that it would be, we'd be getting into that.

MR EDGELER:

I can't imagine but it's a – one case in my friend's bundle, I think it's the last tab at 26, *Mackay and BBC Scotland v United Kingdom*, a decision of the European Court of Human Rights. I think it's useful that the second to last page of that decision –

ELIAS CJ:

What's the submission directed at because we haven't heard anything said about the fact –

MR EDGELER:

No, no, it's –

ELIAS CJ:

Mackay is it?

MR EDGELER:

Assessing the approach about who should be able to challenge these and whether there's a more limited, I think the scope there, there's a scope of limited, the scope of natural justice maybe very small and there's a section near the end of that, at the end of paragraph 34, which is on the second to last page and over, the suggestion for the need of an effective remedy and the needs for equality before the law suggests that if this Court is granting or considering, particularly in respect of ground of appeal 2.1, who is it who can make third party challenges and how can they make them.

CHAMBERS J:

What's' the passage, which paragraph is it you're referring too?

MR EDGELER:

Paragraph 34 Sir. Page 681. It's the very last leaf.

CHAMBERS J:

Thank you.

McGRATH J:

And where do you pick it up from?

MR EDGELER:

The end of page 681.

McGRATH J:

Starting with accordingly is it?

MR EDGELER:

Sorry Sir?

McGRATH J:

What are you starting with? What words?

MR EDGELER:

Just the High Court of Justiciary remains seized of the application.

McGRATH J:

That's all right.

MR EDGELER:

To give the introduction but the main effect is over on the next page.

ELIAS CJ:

Sorry, what's the point? That there must be an effective remedy, is it?

MR EDGELER:

There needs to be an effective remedy and that means if people are going to be given a scope of natural justice, which is very small, third parties are making applications to vary so that they can publish things that they consider are important to the public interest, then the natural justice rights they need to be granted, do need to be brought in order to assure that there's an equality of the law. So limiting it to

people who are official members of the media and in whose ordinary businesses sometimes you get important issues which aren't, I can't think of instances where media, new media where it's an important IT case or copyright case, or something like that, have covered proceedings in a way that you would expect an ordinary media to do but with the expert knowledge of people who know about intellectual property in computer matters and that they might not be subject to press counsel regulation, you might give them fewer rights, and that would be something that is caught in drafting –

ELIAS CJ:
I find it hard to read that provision though as doing other than asserting categories of people who have standing leaving open the possibility that others will establish standing. So it's not a huge incursion on –

MR EDGELER:
Not in that sense but in the sense of if this Court is trying to grant, draft something similar for common law suppressions, assuming it finds such power exists, does need to bear in mind the importance of the other sorts of media and equality –

McGRATH J:
The *Domm* case though said that anybody who wanted to publish would have the right to seek review, didn't it, it was really a quid pro quo for there being no right of collateral challenge?

MR EDGELER:
I think that's the case, yes Sir, and –

McGRATH J:
That was a Canadian case the Crown relies on?

MR EDGELER:
Yes.

GLAZEBROOK J:
And the Crown seems to accept that those categories aren't closed, they're just categories that given absolute right as against, actually discretionary probably isn't quite the – doesn't quite capture what Ms Laracy was saying but...

MR EDGELER:

In essence yes, yes, I think that's right. But the Court should be careful when addressing that, I think, to make sure that it does actually recognise what *Domm* was getting at there and we do have the process at the moment where it is a lot harder for some people to make this sort of application, the fact that they don't know they can make this application, and it was suggested by my friend that it's clear he could have made this application before which is why it's different from the *Boddington* type challenge where people might not know. If it was clear I would imagine this Court wouldn't have granted leave at 2.1. The idea that Courts below know that third parties can make this sort of challenge isn't clear. It's certainly not clear, if it is, to lay people and I think this Court should say that they can and it should set out the circumstances so that everyone knows they can because at the moment I submit that that's not the case.

GLAZEBROOK J:

And is the argument therefore that despite the fact that there was no attempt to do so because in fact the law was so unclear and from Justice Brewer, even if it was a civil jurisdiction actually rejecting that ability to challenge but in fact – until it was made clear by this Court then the contempt proceedings shouldn't have been brought, is that the submission?

MR EDGELER:

Yes, yes, or that given that's the case –

McGRATH J:

Isn't this case on Mr Siemer's affidavit that he knew he could make an application but he didn't make it because he thought it would be futile?

ELIAS CJ:

Is this the one that's just come in that we haven't asked whether we're going to receive it. I meant to ask that, I'm sorry. Are you making an application for us to receive this affidavit Mr Edgeler?

MR EDGELER:

Yes.

ELIAS CJ:

Ms Laracy, do you object to our receiving this affidavit?

MS LARACY:

No, certainly not.

ELIAS CJ:

Thank you.

MR EDGELER:

Yes he could have applied, thinks it would be futile in a sense –

GLAZEBROOK J:

Well he's saying that it would actually have been futile as you can see from Justice Brewer's rather brusque rejection of their being jurisdiction, admittedly in the civil jurisdiction, but admittedly nothing to do with Mr Siemer –

MR EDGELER:

Yes.

GLAZEBROOK J:

– and admittedly after the time of the contempt hearing but given all of those nevertheless one can infer it back.

MR EDGELER:

And the decision of the registrar as well, to Mr Siemer.

GLAZEBROOK J:

The later decision of the –

MR EDGELER:

Yes.

GLAZEBROOK J:

Presumably relying on Justice Brewer's –

CHAMBERS J:

Isn't the sole point of the *Mackay* case, to go back to that, now that I've looked at the facts of it, the sole point of the European Court of Human Rights was making was, these applications to revoke or vary suppression orders ought to be heard reasonably quickly and the delay in this case, in hearing BBC Scotland's application for more than three months was unreasonable. Isn't that the point of the case?

MR EDGELER:

That's a major point of the case. It's also another reason why Mr Siemer would feel that it was futile in this case. That it was time sensitive. People had been denied their right to a jury trial and the Court had prohibited anyone from mentioning that in public and he felt that –

GLAZEBROOK J:

Well at the request, in fact, of the people accused, however, if you're looking at the 21st of December.

MR EDGELER:

Yes but the public has an interest in justice being done and the public certainly has an interest in knowing whether people are going to get jury trials for serious offences and even if the defendants didn't want that out there, for some reason, and I suspect it was everything else and they would perhaps have been fine with a decision and a result being out there, but that people need to know that and they need to know that quickly... with a decision and the result being out there but that people need to know that and they need to know that quickly because that's, this was the first time, well the first major case where this had come up and that is a big change to the ancient jury right that people have expected for quite some time. So the time sensitive nature and the fact that it might not have been three months but it might have been quite some time before he could, Mr Siemer could convince someone to accept his application, convince a Judge that he had a right to be heard on it, and then actually be heard on it. Is part of the reason why he should be allowed to do the sort of collateral challenge in the same sense that we have in *Boddington* and cases of that nature.

ELIAS CJ:

I'm getting slightly confused on the sequencing, I'm sorry it's just slipped away, but when did he publish? What date was that –

MR EDGELER:

Very shortly after.

WILLIAM YOUNG J:

Within a day or so.

ELIAS CJ:

Yes so the attitude of 21 December, do we know what the attitude of the defence was to suppression at the earlier stage? I don't mean on the 21st of December, he's already published by then.

MR EDGELER:

Certainly not publicly, not before this Court.

ELIAS CJ:

But did somebody apply for a suppression order in this?

MR EDGELER:

I imagine someone must have and I don't –

CHAMBERS J:

Well no, no one would have applied.

GLAZEBROOK J:

No, not necessarily.

MR EDGELER:

Not necessarily.

CHAMBERS J:

It would've been standard procedure which Judges in the High Court, the District Court and the Court of Appeal they do, day in, day out, if there's a risk of interfering with fair trial they do it off their own initiative.

GLAZEBROOK J:

And the defence counsel would know that and therefore would not necessarily think that they had to make an application specifically plus it was a sequence of judgments.

ELIAS CJ:

Well that's what I'm a little bit concerned about, and raised earlier, as to whether we have the whole, whether we don't need the whole sequence in front of us to understand. There may well have been an earlier decision in which the issues around suppression were specifically canvassed.

GLAZEBROOK J:

One suspects not because I think the earlier decisions were search warrant decisions and it would be absolutely normal to expect that they would be suppressed because there would be a whole lot of information there that would not usually make its way into the trial so as a matter of course you would usually suppress.

ELIAS CJ:

Yes.

MR EDGELER:

And that could be an appropriate way, if that happened, that could be an appropriate way for a Court to give reasons. It doesn't necessarily have to be long. For the reasons we did in our decision of date, we consider continued suppression is warranted. We don't even have anything of that nature and as long – the Court needs to address it and it needs to give reasons but if there has been that long train of discuss the next step, it can use those previous steps as part of its reasoning process, but it needs to say it's doing that if it's to meet the *Lewis v Wilson & Horton* –

GLAZEBROOK J:

Well the necessity to give reasons, if they're not given, does that invalidate the decision? Because quite often you'll say for reasons to be given later this is the decision and reasons will be given later. Sometimes you may not give reasons in the course of a ruling in trial so I would just say, for myself, while there is a duty to give reasons, I do not consider that it would invalidate a decision that reasons have not

been given. One could always apply for reasons later if one was concerned about it in order to appeal or one could...

MR EDGELER:
You could –

GLAZEBROOK J:
That's it, because the submission is, if you don't give reasons it invalidates the decision in some way and I just wouldn't like it to be thought that I, for one, accept that as a proposition.

MR EDGELER:
The case is different, the submission is, where there's an infringement on fundamental rights, open justice, freedom of expression, and often you'll have, you know, the Court of Appeal will get a decision, realise we should tell people quickly so that this man is out of prison, we'll give our reasons later. No one is disadvantaged by that sort of approach because no one else has an interest in keeping a person whose appeal is properly allowed in prison any longer. But when it's this sort of case, where it's prohibiting people from publishing something.

GLAZEBROOK J:
But if you have a decision that's invalid because reasons aren't given then the important right of a fair trial could be infringed. Say a situation where it is absolutely clear that everything in that judgment would infringe on a fair trial because there's a confession, for instance, that has been excluded. So a decision saying, this judgment's suppressed with no reasons, why would that, given that it would be absolutely clear that it would infringe on the right to a fair trial if in fact the confession is reported, be just invalid from the start?

MR EDGELER:
Because in cases where, in that sort of example there's a confession which has been thrown out, publication of that confession, the fact that it was made, will be contempt irrespective of a suppression order. The publishing of information even that's not suppressed, someone's previous conviction history, all those sorts of things that publications know they can't publish anyway because of strict liability contempt. There might be some prohibitions and problems with strict liability contempt as it's currently formulated but it does at least have the additional step, more to deal with

the argument we had in the last day's hearing, it does at least have the step of you have to prove that there is a threat to fair trial and all sorts of cases, it doesn't happen very often, where the Solicitor-General has pursued contempt proceedings where someone has actually threatened someone's fair trial rights by a publication. And the fact that the suppression order is invalid in that case doesn't mean people can publish it because publishing it will threaten fair trial rights and will be a contempt. Assuming it can be proved.

CHAMBERS J:

Of course it's after the fact though, isn't it, because by this stage the publication is out there so retrospective prosecution isn't going to help the trial, which will had to have been deferred or put off or as being prejudiced.

MR EDGELER:

If there's publication but the major sorts of publications you're concerned about, publication in newspaper, they do know that strict liability contempt exists and know that it limits – journalists, even first year journalists just out of journalism school, know that they can't go and print people's convictions records when they're up on trial and newspapers and magazines and the TV knows that as well and larger scale publication of official nature is unlikely to happen whether a suppression order is valid or not because they know they will get in trouble if they do that.

I'll check if I had anything else but I think that might be it. There was one more matter my senior suggests. It's in our earlier submissions so I won't get you to read them but referring to general comment 34 of the UN Human Rights Committee, paragraphs 19 and 20 of that, as well as affecting the discussion we had last time affect what we have today, that there needs to be able to be free and informed discussion and comment on public issues without the sorts of restraint that we have here and it's an important consideration in formulating answers to the three questions of leave we now have.

I had one more thought. And paragraph 19, that the sort of Government and State parties should actively put information in the public interest out in the public domain to encourage public debate.

The other matter, I did think that it might be useful for this Court to discuss, we have three grounds of leave and I think it was conceded last time that if ground 1 was met

the suppression order was completely invalid because common law suppression no longer exists, Mr Siemer's conviction would be thrown out and I think that's clearly also the case in respect of ground 3. I submit that it may not be clear with ground 2 but that that should be the case.

GLAZEBROOK J:
So what was, I'm now lost as to which was ground 3?

MR EDGELER:
Ground 3 is can you make a collateral challenge in a defence.

GLAZEBROOK J:
All right.

MR EDGELER:
And Mr Siemer was prevented from doing that so that would mean his trial on this was unfair. Ground 2 was –

WILLIAM YOUNG J:
Well he didn't actually try to though, although probably because he thought he couldn't.

MR EDGELER:
It was certainly argued.

WILLIAM YOUNG J:
It was argued but later in the piece.

MR EDGELER:
A direct application to amend it was argued later in the piece.

ELIAS CJ:
Yes.

MR EDGELER:
At the trial itself we argued it should not have been made.

ELIAS CJ:

That's the thing I –

GLAZEBROOK J:

Well – but that was lack of jurisdiction though, as I understand it.

MR EDGELER:

It was both.

GLAZEBROOK J:

Well, not according to the record.

WILLIAM YOUNG J:

Not according to the judgment.

ELIAS CJ:

Well, let's go there, because I thought that there was a – it's the judgment.

GLAZEBROOK J:

I mean that might be sorted out by seeing the submissions of the...

MS LARACY:

I wonder also if I could just make it clear that the Solicitor-General would concede that if the Court files that a proper form of defence is a challenge to the, to the order and the terms in which it were made, then we would be happy to concede that a miscarriage has occurred.

ELIAS CJ:

Yes, I'd taken that from your submissions last time Ms Laracy. Where's the –

WILLIAM YOUNG J:

Page 86 of the blue volume. The argument is, seems to be that the order was a nullity.

GLAZEBROOK J:

Because there was no power to make it.

WILLIAM YOUNG J:

Or there were process deficits.

ELIAS CJ:

Yes.

MR EDGELER:

Yes. And it's the –

WILLIAM YOUNG J:

Rather than the order was wrongly made. Was within power but wrongly made.

ELIAS CJ:

But it would have to go that far. It would have to be more than was wrongly made. Because otherwise that's an appeal point.

GLAZEBROOK J:

Well I think it was limited to jurisdiction rather than...

ELIAS CJ;

Yes, I see.

GLAZEBROOK J:

But –

MR EDGELER:

Yes, with the –

GLAZEBROOK J:

It's not going to be something that the Crown is going to stand on.

MR EDGELER:

Ma'am, the submission was if – but there's also of course ground of appeal too. And if the Court answers that yes, people can challenge –

WILLIAM YOUNG J:

But that's a ground of appeal.

MR EDGELER:

Well –

WILLIAM YOUNG J:

It's a question.

MR EDGELER:

It was a ground that we sought and –

GLAZEBROOK J:

Well your argument there is all – even though Mr Siemer did not do that, in fact it would've – and even if he had – well, he was right. That even if he had he would have been met with a no jurisdiction argument and so that the fact that he didn't do it should not be, as it were, held against him in that sense in that his – and because it was unclear whether he could or not, then the conviction should not stand.

MR EDGELER:

Yes. And I –

GLAZEBROOK J:

That's the argument, isn't it?

MR EDGELER:

I'm just making sure the Court was aware of that, because I know Mr Siemer's had the concern in the past where he's won an appeal but then still ended up in prison. So he's anxious if he wins this appeal he'd like his conviction overturned.

ELIAS CJ:

Well Ms Laracy says if he wins this appeal he doesn't end up in prison.

GLAZEBROOK J:

Well no, on that second –

ELIAS CJ:

As I understand it.

GLAZEBROOK J:
On that second ground I think –

ELIAS CJ:
I see. Yes.

GLAZEBROOK J:
– the Crown's position would be, because he didn't apply, because he could've applied to set it aside and didn't apply before breaching it, then an order of Court is an order of Court and is to be obeyed because it is – that's my understanding of the Crown's position. So that middle ground would be no, the conviction stands.

WILLIAM YOUNG J:
It's not –

GLAZEBROOK J:
But every other, but the other two grounds would be the conviction is set aside.

WILLIAM YOUNG J:
It's not actually a ground of appeal is it? It's just a question that was asked, which in a sense is a precursor to the second question asked.

ELIAS CJ:
Well I must say I'd seen that...

MR EDGELER:
That may be the case. But the, the submission still is, if that is answered in that way, for effectively the reasons summarised by Her Honour, that his conviction should be overturned.

As the Court pleases.

ELIAS CJ:
Thank you counsel. We'll reserve our decision in this matter. Thank you for your assistance. Very interesting case. Thank you.

**COURT ADJOURNS:		3.03 PM**