IN THE SUPREME COURT OF NEW ZEALAND

SC 88/2006
[2006] NZSC 113

BETWEEN	NIKALA JANICE TAYLOR Appellant
AND	CHRISTOPHER DEAN JONES Respondent

SC 90/2006

AND BETWEEN	KAY HALTON SKELTON Appellant
AND	CHRISTOPHER DEAN JONES Respondent

Hearing:	6 December 2006
Court:	Elias CJ, Blanchard, Tipping, McGrath and Anderson JJ
Counsel:	W C Pyke for N J Taylor D P H Jones QC for K H Skelton T Sutcliffe and L F Walkington for Respondent
Judgment:	6 December 2006
Reasons:	19 December 2006

JUDGMENT OF THE COURT

In relation to Mrs N J Taylor:

A Leave to appeal is granted.

B **The order for habeas corpus made by Heath J in the High Court on 18 October 2006 was a final order and accordingly the Court of Appeal had jurisdiction to hear and determine the appeal.**

C **The appeal is allowed. The orders for habeas corpus and other orders made by the High Court on 18 October 2006, except Order No 9 relating to publication of the name of Nikala J Taylor, are quashed in respect of this appellant.**

D **The order for suppression of this appellant's name, made by the High Court on 18 October 2006, is to lapse at 9 am on 7 December 2006.**

E **The sealed affidavit by this appellant, held on the Court file, and any copies, must be returned to Mr W C Pyke.**

F **Costs are reserved.**

In relation to Mrs K H Skelton:

A **Leave to appeal is granted.**

B **The order for habeas corpus made by Heath J in the High Court on 18 October 2006 was a final order.**

C **The appeal is dismissed.**

D **Costs are reserved.**

REASONS

(Given by Blanchard J)

[1] We give reasons for the orders made at the conclusion of the hearing on 6 December 2006.

[2] Mrs Skelton and Mr Jones have been engaged for some years in a custody dispute over their six year old son, Jayden. The Family Court gave custody to Mr Jones on an interim basis in June 2006. On 18 August Mr Jones' sister took him to the Hamilton Public Library. He disappeared from the library in the company of a woman said to resemble Mrs Taylor, who is a close friend of Mrs Skelton. Despite efforts by the police he has not been found. There is reason to believe that he is being concealed by Mrs Skelton's father, Mr Headley.

The habeas corpus orders

[3] Some two months after Jayden was taken from the library, Mr Jones applied to the High Court for a writ of habeas corpus in relation to Jayden directed to six named persons including Mr Headley, Mrs Skelton and Mrs Taylor. On the next day, 18 October 2006, Heath J gave an oral judgment on that application.[1] After referring to the circumstances of the abduction he said that it was likely, having regard to correspondence that has been sent to the police by Mr Headley, that Jayden is being held by him in a safe location. There was no evidence to suggest that Jayden might be at risk of physical harm or under coercion. However, the Judge said, it was self-evident that a six year old child, removed from the care of a parent in the manner that occurred in this case, was likely to suffer psychological or emotional consequences of a serious nature, notwithstanding efforts that might be made to ameliorate those effects by a person who genuinely might be acting out of love.

[4] The Judge was satisfied from the evidence that each of the other five defendants was likely to have knowledge of the place at which Jayden is presently held and, *apart from Mrs Taylor*, might be able to exercise influence over Mr Headley to return Jayden in terms of any order the Court might make. In the view of the Judge, it was not credible to suggest that Mrs Skelton did not know where Jayden was and what was happening to him nor was it credible that she did not know where her father was. No justification for the detention of Jayden had been put forward.

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1 CIV 2006-419-1489.

[5] The Judge made an order that the six named persons, including the two appellants:

> shall discharge and release Jayden Christopher Headley from detention. They are ordered to bring Jayden before the Court at Hamilton at 10.00am on Wednesday 25 October 2006.

The Judge also ordered:

> (b) In the event that all or any of those people are unable to bring Jayden before the Court at that time and place, each shall file and serve an affidavit by 5.00pm on 24 October 2006 containing the following information:
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> i) Their knowledge of what has happened to Jayden since the time he was taken from the Hamilton public library on 18 August 2006.
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> ii) Details of any contact (whether physical, telephone, email or otherwise) that the deponents have had with Jayden or Mr Dick Headley since he was taken.
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> iii) Efforts each of them have made to locate or contact Jayden.
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> iv) The location in which Mr Headley may be found.
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> v) The reasons why the deponent is unable to bring Jayden before the Court and the steps that each has taken to have Jayden brought before the Court in compliance with my order.

Mrs Skelton found in contempt

[6] A further hearing took place on 25 October 2006 before Keane J. Jayden had not been brought to the Court. Mrs Skelton had filed an affidavit in which she invoked "the right against self-incrimination" and declined to make an affidavit in terms of the order made by Heath J. In her affidavit she also said that she would not answer questions if put into the witness box to be cross-examined. She expressed the opinion that she had not had sufficient time to instruct a lawyer before the hearing on 18 October. She complained that the lawyer who appeared for her had sought an adjournment which had been declined. She said she had no opportunity to

test any of the evidence put forward against her. She noted that the Judge had already made factual findings against her, including that it was not credible to suggest that she did not know where Jayden was and what was happening to him. She said that clearly any denials by her of such knowledge would not be accepted by the Court in any event: "Therefore I have nothing further to say".

[7] Keane J recorded that Mrs Taylor had appealed to the Court of Appeal against Heath J's decision and that the orders against her had been stayed. She had made an affidavit but it was held by her solicitors.

[8] In the circumstances the Judge made no further order against Mrs Taylor. But he proceeded to consider whether Mrs Skelton was in contempt. He said that in assessing the evidence as a whole as it related to her he took no inference adverse to her as a result of her decision to remain silent, although "the want of an affidavit from her means that any inferences that can be taken against her on the evidence as a whole on the question of contempt remain uncontradicted; and there are a number".[2] The Judge then gave a narrative of that evidence which it is unnecessary for this Court to repeat. He concluded that he could be sure that once Mrs Skelton had lost Jayden's primary care (a reference to the Family Court decision) she had set about "to take complete control herself".[3] He noted that she had done so on an earlier occasion in 2002 when she had left New Zealand for Australia taking Jayden with her, returning in August 2003 so as to avoid Hague Convention proceedings in Australia. He found that she was presently acting "with her father" and that:[4]

> she knows where Mr Headley is, and Jayden also; and … had she wished to, she could have complied with the order requiring her to bring Jayden to Court this morning.

[9] Keane J found that Mrs Skelton's decision not to comply with the order was deliberate and, so long as Jayden remained with his grandfather, would be a continuing contempt. He said that the only sanction which answered her contempt

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2 At para [25].
3 At para [34].
4 At para [34].

was imprisonment and committed her to prison "until she discloses where Jayden and her father are".[5] She remained in prison at the date of the hearing in this Court.

The Court of Appeal judgment on Mrs Taylor's appeal

[10] The Court of Appeal heard Mrs Taylor's appeal on 26 October and on the same day gave judgment dismissing that appeal and making certain orders in respect of an affidavit which she had sworn.[6] The Court gave its reasons on 10 November. It accepted the submission made on behalf of Mr Jones that it had no jurisdiction to hear the appeal. It referred to s 16(1) of the Habeas Corpus Act 2001:

> **16 Certain unsuccessful parties may appeal**
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> (1) The provisions of the Judicature Act 1908 relating to appeals to the Court of Appeal against decisions of the High Court in civil cases—
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> (a) apply with respect to a determination refusing an application for the issue of a writ of habeas corpus; but
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> (b) do not apply to a final determination that orders the release from detention of a detained person unless the substantive issue is the welfare of a person under the age of 16 years.[7]

Although counsel for Mr Jones had not made the argument, the Court found that Heath J's orders were not a final determination under s 16(1)(b) but, rather, were interim orders under s 11 of the Act against which, it said, no appeal was provided. The order dealing with the event of inability to produce the child was, the Court said, an integral part of the habeas corpus procedure, not an exercise of the High Court's inherent jurisdiction.[8] Section 66 of the Judicature Act 1908 therefore did not apply so as to give any right of appeal against that part of the determination. Accordingly the appeal failed on a jurisdictional ground.

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5 At para [35].

6 CA 230/06 (Arnold, Baragwanath and Wild JJ).

7 A further subsection is relevant to the present appeal:

> (1A) With the leave of the Supreme Court, a party to the proceeding in which the determination was made may appeal to the Supreme Court—
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> (a) against a determination refusing an application for the issue of a writ of habeas corpus:
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> (b) if the substantive issue is the welfare of a person under the age of 16 years, against a final determination that orders the release from detention of a detained person.

[11] The Court proceeded nonetheless to give its views on the issues which would have been before it but for the absence of jurisdiction. It said that the rapidity with which Heath J had undertaken the hearing on 18 October, and thus the lack of time for Mrs Taylor to prepare her case, did not give rise to any breach of natural justice. Further, any such breach would in any event have been cured by the appeal hearing. Of its nature habeas corpus is a rapid and summary remedy. The legislation required expedition.[9]

[12] The Court also rejected Mr Pyke's submission, for Mrs Taylor, that there was no sufficient evidential basis for any order against her. The assertion that Jayden was in the control of his grandfather and that Mrs Taylor could not compel the grandfather to release him did not, in the Court's view, meet the argument that she had been a party to his abduction and that her conduct had contributed materially to the continuing detention.[10] A legal burden was cast on Mrs Taylor to demonstrate "effective dissociation from the transaction".[11] It would only be if she satisfied the Court that she had done everything in her power to assist the authorities to find the child and restore him to his father that the consequences of her initial conduct would be exhausted. That, the Court said, had not occurred.[12]

[13] The Court was satisfied that the order made by the High Court satisfied the criteria stated by the House of Lords in *Barnardo v Ford; Gossage's Case*[13] and was not persuaded that "the constraints upon securing information in support of a claim for habeas corpus" suggested in dicta in *Barnardo* remained in New Zealand since the Habeas Corpus Act. It said there could be no reason why a person reasonably suspected of relevant knowledge should not be required to give evidence, no doubt most conveniently by affidavit, and be cross-examined upon it "in exercise of the Judge's responsibility under s 14(2) [of the Habeas Corpus Act] to enquire into matters of fact".[14]

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8 At para [67].
9 See paras [33] – [41].
10 At para [73].
11 At para [75].
12 At para [76].
13 [1892] AC 326.
14 At para [78].

[14] The Court of Appeal was also of the view that Mrs Taylor's privilege against self-incrimination had not been infringed by the second High Court order concerning the making of an affidavit, particularly in light of certain conditions which the Court of Appeal itself had imposed in an interim decision on 26 October, including an order that the affidavit would not be admissible in any criminal proceedings against her relating to the abduction.

Leave to appeal to this Court

[15] From that judgment Mrs Taylor sought leave to appeal. Mrs Skelton had brought her own appeal to the Court of Appeal against the habeas corpus orders but abandoned it when the Court of Appeal ruled it had no jurisdiction to consider Mrs Taylor's appeal. However, when Mrs Taylor approached this Court, Mrs Skelton applied for leave to bring an appeal to us directly from the High Court under s 14 of the Supreme Court Act 2003 on the ground that there were exceptional circumstances justifying this course. In view of the urgency required by s 17(1A) of the Habeas Corpus Act we heard the arguments on the leave applications and on the substantive questions together. At the end of the hearing we granted leave to both applicants,[15] being satisfied that questions of general and public importance are involved and that there are exceptional circumstances in relation to Mrs Skelton, namely that the Court of Appeal was likely to reject her appeal on the jurisdictional ground as it had done with Mrs Taylor. That plus the need for particular urgency justified abandonment of her initial attempt to appeal and the bringing of an appeal directly to this Court, where it could conveniently be heard along with Mrs Taylor's appeal.

[16] At the time of the hearing in this Court Mrs Skelton had not appealed against her imprisonment for contempt.

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15 [2006] NZSC 104.

Jurisdiction

[17] It may possibly be that an appeal does lie against an interim order under s 11, but it is unnecessary for the Court to reach a view on that since there can be no doubt that the Court of Appeal erred in holding that the orders of Heath J were not final orders in terms of s 16. Heath J, by his first order, issued a writ of habeas corpus which largely followed the form in the schedule to the Habeas Corpus Act in requiring the six named persons to "discharge and release" Jayden from detention. He may have omitted the word "custody" which appears in that form simply because he did not wish to dignify what has occurred as the creation of any form of custody. It is true that he added another, conditional, order to the requirement for discharge and release but he was plainly doing so only in anticipation that all or some of the defendants might be "unable" to bring Jayden before the Court. In no sense did the second order make the first order conditional or interim. From the form of the orders and their context it would be surprising if Heath J considered that what he was doing was making anything less than a final order for the issuance of the writ. He did also order that Jayden be brought before the Court. As the order related to a six year old child, who cannot look after his own welfare, that was entirely proper and understandable. Mere release from detention without delivery to the Court might have had unfortunate consequences for the child.

[18] The question of jurisdiction is therefore governed by s 16(1)(b). The appeal provisions of the Judicature Act relating to civil cases, conferring a general right of appeal, do not apply where there is, as here, a final determination that orders the release from detention of a detained person "unless the substantive issue is the welfare of a person under the age of 16 years".

[19] Mr Sutcliffe, for the respondent, submitted that the "substantive issue" in this appeal is not the welfare of Jayden but the rights of persons who may be implicated in the child's detention. Certainly no argument was being made about the arrangements for Jayden's lawful custody or care or directly about any other aspect of his welfare but we think that counsel's submission does not correctly identify the purpose of the qualifying words in s 16(1)(b). They are intended, we consider, to

describe a category of case, namely one concerned with the custody of a child, rather than with any particular argument which may be made on the appeal. The statute preserves the general rule that an order for release of a prisoner or detained person is not appealable. But it also recognises that the prohibition would be most inappropriate where the detained person was a child whose custody is in dispute. Holding cases such as the present to be outside the scope of the qualification in s 16(1)(b) would have the anomalous consequence that a right of appeal would exist if the Court left the custody arrangements unchanged but not if it ordered that the child be handed over to the other parent or brought to the Court for the purpose of enforcing those arrangements. Section 16(1)(b) recognises that resort to habeas corpus in a custody case, happily a rare event in modern times, necessitates a different attitude to appeals.

[20] The explanation of the reason for the general prohibition of an appeal and of why the prohibition is inapposite in a custody case appears most clearly from the judgment of Lopes LJ in *R v Barnardo; Jones's Case*,[16] in which he said that because there is no power to re-capture or re-arrest a prisoner who has been released, an appeal after an order to discharge from custody would be useless. He then distinguished child custody cases in these terms:[17]

> It is clear, therefore, that what the House of Lords decided[18] was that, in the case of a discharge from custody under a writ of habeas corpus, there is no appeal, because the Court cannot give effect to its order. This reasoning is inapplicable to the case now under consideration. There has been no discharge of the infant. The infant is within the control of the Court, and the Court can make what order it thinks fit with regard to his custody, and can give full effect to its order or judgment.

It will be observed that Lopes LJ envisaged the bringing of a child before the Court by means of the writ, in the manner directed by Heath J, rather than a discharge simpliciter.

[21] The distinction drawn by Lopes LJ concerning appeal rights is preserved in s 16(1)(b) in the qualification permitting an appeal if "the substantive issue is the

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16 [1891] QB 194 at p 213. The passage from Lopes LJ was cited with approval by Lord Atkinson in *Secretary of State for Home Affairs v O'Brien* [1923] 1 AC 603 at pp 627 – 628.

17 At p 214.

18 In *Cox v Hakes* (1890) 15 App Cas 506.

welfare of a person under the age of 16 years". That qualification is concerned with the category of custody cases, not with the exact argument intended to be pursued on a particular appeal. Furthermore, as Heath J was well aware, the welfare of Jayden is necessarily at stake in a proceeding designed to procure his freedom from unlawful detention.

[22] Both Mrs Skelton and Mrs Taylor therefore had a right of appeal to the Court of Appeal under s 66 of the Judicature Act and, with leave, to this Court under s 7 or s 8 of the Supreme Court Act.

Mrs Taylor's appeal

[23] The crucial matter in this Court's decision to allow Mrs Taylor's appeal was Heath J's finding that she was not, on 18 October 2006, able to exercise influence over Mr Headley to return Jayden in terms of any order the Court might make. The Judge was of the view that Mrs Taylor did not at that date have either actual custody of the child or control over his continuing detention by Mr Headley. If it is assumed that Mrs Taylor was the woman with whom Jayden left the Hamilton Public Library, a factual question on which we express no view, she may have been guilty of an unlawful act, first, in detaining him and, secondly, in then handing him over to Mr Headley or to some intermediary. But the (assumed) unlawfulness of her actions and the fact that she may have had knowledge on 18 October of Jayden's whereabouts did not render her amenable to a writ of habeas corpus.

[24] That is made very plain by the judgments of the Law Lords in *Barnardo v Ford*. Lord Halsbury LC said that:[19]

> I cannot acquiesce in the view that some of the learned judges below seem to have entertained, that if a Court is satisfied that illegal detention has ceased before application for the writ has been made, nevertheless the writ might issue in order to vindicate the authority of the Court against a person who has once, though not at the time of the issue of the writ, unlawfully detained another or wrongfully parted with the custody of another. My Lords, this is a view that I cannot agree to. I think, under such circumstances, the writ ought not to issue at all, as it is not the appropriate procedure for punishing such conduct.

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[19] At p 333.

> Of course, where a counterfeited release has taken place, and a pretended ignorance of the place of custody or of the identity of the custodian is insisted on, a Court may and ought to examine into the facts by the writ of habeas corpus, because the detention is in fact being continued by someone who is really the agent of the original wrong-doer to continue and persist in the unlawful detention. But, assume the fact that the detention has ceased, then the writ of habeas corpus is, in my judgment, inapplicable.

On Heath J's finding, Mr Headley was in no sense the agent of Mrs Taylor to continue and persist in the unlawful detention.

[25] Lord Watson said that the remedy of habeas corpus was intended to facilitate the release of persons actually detained in custody and was not meant to afford the means of inflicting penalties upon those persons by whom they were at some time or other illegally detained. When it was shown to the satisfaction of the Court that the person charged with unlawfully detaining a child or adult had de facto ceased to have any custody or control, the writ ought not to issue.[20] Lord Herschell said that having regard to the nature of the writ and the purpose for which it was designed he could not feel satisfied that it was not a good return to the writ that the person to whom it related was not at the time it was issued in the custody, power or control of the person upon whom it was served:[21]

> To use it as a means of compelling one who has unlawfully parted with the custody of another person to regain that custody, or of punishing him for having parted with it, strikes me at present as being a use of the writ unknown to the law and not warranted by it.

It was only where, as in *Barnardo*, the Court entertained a doubt whether the defendant had ceased to have custody or control over the boy alleged to be detained that it was entitled to "use the pressure of the writ to test the truth of the allegation, and to require a return to be made to it".[22]

[26] Finally, Lord Macnaghten stated that the writ ought not to be wrested from its proper purpose and used as an instrument to punish a man for an illegal or unauthorised act complete before the jurisdiction of the Court could be supposed to have attached.[23]

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20 At pp 333 – 335.
21 At pp 338 – 339.
22 At p 339.
23 At p 341.

[27] Although Mr Sutcliffe urged us to do so, we can see no good reason to allow the writ to be used against a defendant who no longer has any ability to influence the detention of the subject child. It is not intended as a device whereby the Court may assume an inquisitorial role by examining persons who may have information about a detention for which those persons are no longer responsible. The writ can properly be directed only to those who on the evidence adduced by the applicant are, or appear to be, controlling and managing the continuance of the detention.[24] The only factual inquiry which the Court must make is that specified in s 14(2), namely into matters claimed to justify the detention. But that is not an issue in the present case, where Jayden is obviously being detained unlawfully.

[28] We should not be supposed to be condoning the unlawful character of the actions in which Mrs Taylor, at present, appears to have engaged. But that will be a matter for the police, not the Courts, to pursue should it be warranted by the facts revealed by their investigation. A civil proceeding is not the most suitable vehicle for the investigation of continuing criminal activity.

[29] For these reasons we allowed Mrs Taylor's appeal and quashed the orders against her.

Mrs Skelton's appeal

[30] Mrs Skelton's position was quite different. It was realistically accepted by her counsel, Mr Jones QC, that Heath J was entitled to be satisfied on the evidence before him that she might be able to exercise influence over Mr Headley in relation to the detention of Jayden. In other words, putting the matter in the way in which the question of sufficiency of proof for the issue of the writ is best articulated, it appeared probable on the facts before the Court that Mrs Skelton had the requisite control over Jayden, through the agency of her father, to make her amenable to the writ. We should not of course be taken to be making a finding to this effect. All that

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[24] The control may be indirect or de facto, as it was in *Secretary of State for Home Affairs v O'Brien.*

the plaintiff needed to show was probable cause and Mr Jones accepted that, in the absence of evidence from or called by Mrs Skelton, he had done so.

[31] Mr Jones therefore argued instead that the writ should be set aside because of an abuse of process and procedural deficiencies, notably a breach of natural justice by the High Court Judge and unfairness to Mrs Skelton on the return of the writ because of the making of the second, anticipatory order.

[32] The resort to a writ of habeas corpus was said by counsel to be an abuse because Mrs Skelton's conduct in this matter is already the subject of a criminal prosecution by the police who, it is said, are complicit in this civil proceeding. It was submitted that the proceeding is coercive; it is an attempt to put pressure on Mrs Skelton and to generate adverse publicity about her and her family in order to encourage Mr Headley, the alleged abductor, out of hiding. The very same issues arise in both the criminal and civil proceedings.

[33] It would, in our view, be unrealistic not to acknowledge that the respondent appears to be using the writ of habeas corpus to put pressure on Mrs Skelton to procure Jayden's release from detention. But, as was made clear in *Barnardo*, the exertion of pressure on the defendant by the use of the writ is not improper when it appears probable that the defendant has unlawful custody or control of a child. A circumstance of this kind, if proved to the requisite standard in a criminal trial, may later be found to involve criminality. A prosecution may be brought, as in this case has already occurred, but the existence of the prosecution is not, in our view, a basis for saying that the habeas corpus proceeding is an abuse. It is not an insulation against the use of habeas corpus. The respondent is acting to restore his lawful custody. He must be taken to be thus acting in the interests of the child as determined by the Family Court. Heath J was surely correct to say that a child in Jayden's situation was likely to suffer psychological or emotional consequences of a serious nature from what was occurring. The respondent sought the issuance of the writ only to obtain the release of Jayden, not for some collateral purpose. There was therefore no abuse in the proceeding. Nor is there anything to suggest improper conduct by the police who are after all investigating what appears to be a serious

crime and have the task of locating Jayden. They served the application for habeas corpus on Mrs Skelton on the morning of 18 October. But, given the history of friction between her and Mr Jones and the nature and purpose of the present proceeding it was understandable that Mr Jones considered it prudent to have the application served by the police. They have also made affidavits for the respondent but appear to have done so with some reluctance. The police ought not to be criticised for taking the view that they should assist the father in his attempts to find his child.

[34] The alleged breach of natural justice was that Mrs Skelton was not allowed enough time to prepare a defence and make decisions on calling or giving evidence or cross-examining Mr Jones and his other deponents. Counsel pointed out that the habeas corpus proceeding was served at 7.45 am and that the hearing in the High Court began at 2.15 pm on the same day, with the orders being made at the end of the hearing.

[35] The difficulty which counsel faced in advancing this argument was that he was quite unable to point to any actual, rather than theoretical, prejudice of the kind he was alleging. Even some seven weeks after the hearing, he was unable to say, for example, what evidence Mrs Skelton might have called or what line of cross-examination might have been taken if Mrs Skelton had been given further time by the Judge. Significantly, perhaps, there has been no application to the Judge seeking to have a rehearing in order that further evidence could be considered.[25] Certainly the hearing was brought on and conducted in haste but such is the nature of a habeas corpus proceeding, in respect of which the common law and now the statute enjoin urgency. We have not been persuaded that in the circumstances of this case there was any breach of natural justice in the hearing before Heath J.

[36] Mr Jones QC also submitted that Mrs Skelton suffered an injustice because of the making of the second order requiring her to swear an affidavit if she were to be

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[25] Contrary to the submission of counsel for Mrs Skelton, in a custody case this course would not be prevented by s 15(1) of the Habeas Corpus Act which applies only where an application for habeas corpus is refused.

unable to produce Jayden to the Court on 25 October. Counsel said that his client had been inhibited in relation to the hearing on 25 October because Heath J had remarked in his judgment on 18 October that it was not credible that Mrs Skelton did not know where Jayden was. That observation appears merely to have reflected the apparent strength of the evidence before the Judge. It is all very well now to suggest through counsel that it had the effect of deterring Mrs Skelton from attempting to contradict the respondent's evidence but nothing has been put before the Court to indicate that there was any ability to do so. As the Judge indicated, Mrs Skelton's problem is one of credibility. We do have some concerns about the making of the second order in an anticipatory way, which apparently was done without prior advice to counsel of the Judge's intention, but we are satisfied that, as matters developed, it cannot have operated to the prejudice of Mrs Skelton. It is abundantly clear from Keane J's judgment on 25 October that he put that order to one side and made his decision to commit Mrs Skelton to prison for contempt solely on the basis of her failure to bring Jayden to the Court. In its terms the second order would operate only if Mrs Skelton was unable to produce Jayden. She has never asserted any such inability. Keane J considered that the failure to produce was deliberate. Obviously, therefore, it was not a case, falling within the terms of the second order, of an inability to produce Jayden.

[37] It was unnecessary for us to consider the argument, which Mr Jones QC did not press in his oral submissions, that Mrs Skelton's privilege against self-incrimination was infringed by the second order.

[38] The Court accordingly dismissed Mrs Skelton's appeal. We emphasised as we did so, however, that there was no appeal against the order for committal for contempt.

Solicitors:
Swarbrick Dixon, Hamilton for N J Taylor
Tristram Law Centre, Hamilton for K H Skelton
Till Henderson King, Hamilton for Respondent