IN THE SUPREME COURT OF NEW ZEALAND

SC 48/2009
[2010] NZSC 54

	BETWEEN	VINCENT ROSS SIEMER Appellant
	AND	SOLICITOR-GENERAL Respondent

Hearing: 2 March 2010

Court: Elias CJ, Blanchard, McGrath, Wilson and Anderson JJ

Counsel: R M Lithgow QC and L A Scott for Appellant
M F Laracy and B C L Charmley for Respondent

Judgment: 17 May 2010

JUDGMENT OF THE COURT

A **The appeal is allowed and the order made by the Court of Appeal is quashed. It is replaced by an order committing the appellant to prison for a term of a maximum of three months, subject to the proviso that the term of imprisonment will come to an immediate end if the appellant complies with the injunction issued on 5 May 2005 and made permanent on 23 December 2008 by the High Court at Auckland in the proceeding *Korda Mentha v Siemer* HC Auckland CIV-2005-404-1808, 23 December 2008 and if he also provides an undertaking to the High Court in a form approved by the High Court that he and Paragon Oil Services Ltd will continue to comply with that injunction for so long as it remains in force.**

B **Mr Siemer is ordered to surrender to his bail at the High Court in Auckland no later than 4pm on 20 May 2010 unless by then he has complied with the injunction and provided that undertaking to the High Court in a form approved by it.**

REASONS

ELIAS CJ and McGRATH J

(Given by McGrath J)

Introduction

[1] Mr Siemer appeals against a judgment of the Court of Appeal[1] committing him to prison for contempt of court. The contempt lay in his continuing disobedience of an interim injunction issued by the High Court.[2] It required Mr Siemer not to publish, in any form, material containing allegations of criminal, unethical, or other improper conduct by a chartered accountant and his firm in relation to their administration of the receivership of a company associated with Mr Siemer.

[2] Two earlier proceedings alleging contempt of court had been brought by the chartered accountant and his firm against Mr Siemer in relation to earlier breaches of the injunction. The first resulted in the imposition of a fine of $15,000 on Mr Siemer and an order for payment by him of solicitor and client costs to the other parties.[3] The second resulted in Mr Siemer being sentenced to six weeks' imprisonment.[4] He has served that sentence.

[3] The present proceeding was brought by the Solicitor-General as a result of subsequent continuing breaches of the injunction. The High Court held that the contempt was proved by the publication of prohibited allegations on a website

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1 *Siemer v Solicitor-General* [2009] NZCA 62, [2009] 2 NZLR 556.
2 *Ferrier Hodgson v Siemer* HC Auckland CIV-2005-404-1808, 5 May 2005.
3 *Ferrier Hodgson v Siemer* HC Auckland CIV-2005-404-1808, 16 March 2006.
4 *Ferrier Hodgson v Siemer* HC Auckland CIV-2005-404-1808, 13 July 2007.

controlled by Mr Siemer.[5] He was sentenced to six months' imprisonment. The sentence was suspended to allow Mr Siemer the opportunity to remove offending material from the website, and provide an undertaking it would not be replaced, in which case further submissions on penalty could be made. Mr Siemer did not accept that opportunity. On appeal the Court of Appeal was required to address s 24(e) of the New Zealand Bill of Rights Act 1990. That provision gives those charged with an offence the right to trial by jury if the penalty includes imprisonment for more than three months. The Court accepted that this right was engaged in the case. It modified Mr Siemer's sentence, so the term imposed became a maximum term of six months' imprisonment which was subject to a proviso. Mr Siemer was to be released from prison during the term on his compliance with the High Court's injunction and on giving an undertaking to the Court that he and his company would continue to comply. The Court of Appeal decided that this modification put the term of imprisonment within the control of Mr Siemer who could bring it to an end at any time. This meant the sentence was no longer in breach of s 24(e).

[4] The issue in the appeal is whether Mr Siemer was wrongly deprived of the right under s 24(e) to trial by jury because of the summary procedure of trial by judges sitting alone in the High Court. In considering that submission we start by identifying the requirements of the law prior to enactment of the Bill of Rights Act in relation to the procedure by which contempt proceedings were determined. We then assess the effect of the enactment of the Bill of Rights Act provision on that procedure in order to decide if the appellant's protected right has been breached.

Procedure in contempt proceedings

[5] Contempt of court is a common law jurisdiction.[6] The category of contempt with which this appeal is concerned involves actions committed outside the court which tend to undermine the system for administration of justice. The jurisdiction of

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5 *Solicitor-General v Siemer* HC Auckland CIV-2008-404-472, 8 July 2008.

6 Some specific aspects are addressed in statute law.

the High Court to deal with contempts of this kind is long established.[7] In *Almon's* case Wilmot J said:[8]

> The power, which the Courts in Westminster Hall have of vindicating their own authority, is coeval with their first foundation and institution; it is a necessary incident to every Court of Justice, whether of record or not, to fine and imprison for a contempt to the Court.

[6] A summary process has long been used by the court to determine questions of contempt because of the perceived need for the courts to act quickly and effectively when their authority is challenged. Under the summary procedure, there is no preliminary inquiry, committal procedure or requirement for an indictment. Historically the judge could take the initiative in the proceeding, determine the grounds of complaint, identify witnesses and inquire into what they had to say. The judge would then determine guilt or innocence and the sentence to be imposed.[9] More recently, when out of court conduct is involved, contempt proceedings have been brought by a law officer, usually the Solicitor-General.

[7] Over the years, the summary process has come to include the safeguards normally available to accused persons to protect their rights with the exception of the right to trial by jury. As Gale CJ said of the summary procedure in the High Court of Ontario:[10]

> It must be borne in mind, however, that there are several degrees of "summary process" and that the procedure adopted in this instance was summary only in the sense that the matter was brought to this Court by way of originating notice of motion, rather than indictment, and that the respondents did not have the right to elect trial by jury. All other rights, including the right to cross-examine, the right to call witnesses and the right to call no defence, as in any other trial, were accorded the respondents.

[8] The common law summary procedure for contempt of court proceedings was adopted in New Zealand. Following the codification of the criminal law the question arose in *Nash v Nash, Re Cobb*[11] as to whether the common law jurisdiction for

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7 David Eady and ATH Smith *Arlidge, Eady and Smith on Contempt* (3rd ed, Sweet & Maxwell, London, 2005) at [1-51] citing *The St James Evening Post (Roach v Garvan)* (1742) 2 Atk 469, 26 ER 683 (Ch) and *Cann v Cann* (1754) 2 Ves Sen 520, 28 ER 332 (Ch) for the proposition that the courts undoubtedly had jurisdiction to deal summarily with all types of contempt.

8 *The King v Almon* Wilmot's Notes (1765) 243 at 254, 97 ER 94 at 99.

9 *R v Griffin* (1989) 88 Cr App R 63 (CA) at 67 per Mustill LJ.

10 *Tilco Plastics Ltd v Skurat* (1966) 57 DLR (2d) 596 (ONHC) at 610.

11 *Nash v Nash, Re Cobb* [1924] NZLR 495 (SC).

committal for contempt had been taken away by the Crimes Act 1908.[12] In a judgment delivered by Salmond J, a Full Court of the then Supreme Court rejected the submission that the enactment of the criminal code had removed the Court's summary jurisdiction to commit for contempt. The Court pointed out that the 1908 Act actually recognised that that jurisdiction still existed. It decided that the purpose and effect of s 5 of the 1908 Act was simply to stipulate that the only indictable offences should be those set out in the criminal code, or in some other statute not inconsistent with it. Salmond J then continued:[13]

> This being so, the Supreme Court preserves unimpaired and unaffected its original jurisdiction to secure the efficiency and the purity of the administration of public justice by dealing summarily with all conduct which is recognized by the common law as amounting to criminal contempt of Court.

[9] The Crimes Act 1961 is the successor of the 1908 Act. The provision in that Act which is equivalent of s 5 is s 9:

> **9 Offences not to be punishable except under New Zealand Acts**
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> No one shall be convicted of any offence at common law, or of any offence against any Act of the Parliament of England or the Parliament of Great Britain or the Parliament of the United Kingdom:
>
> Provided that—
>
> (a) Nothing in this section shall limit or affect the power or authority of the House of Representatives or of any court to punish for contempt:

[10] In 1977 in *Solicitor-General v Radio Avon Ltd*,[14] the Court of Appeal considered s 9 and rejected an argument that its effect was to preclude the contempt in question from being dealt with by means of the summary procedure. The Court said s 9(a) was "obviously" enacted to give effect to the Full Court's decision in *Re Cobb*.[15] It followed that a contempt of court could not be dealt with as such by way

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12 Section 5 of the Crimes Act 1908 provided:
> Every one who is a party to any offence shall be proceeded against under some provision of this Act, or under some provision of some statute not inconsistent herewith and not repealed, and shall not be proceeded against at common law.

13 At 498.

14 *Solicitor-General v Radio Avon Ltd* [1978] 1 NZLR 225 (CA).

15 At 235.

of indictment; the only way it could be dealt with under the law was by the summary process.

Right to trial by jury

[11] The next question is whether the enactment of the Bill of Rights Act in 1990 and its protection of the right to trial by jury in criminal cases has altered the position. Section 24(e) of the Bill of Rights Act provides:

> **24 Rights of persons charged—**
>
> Everyone who is charged with an offence—
>
> ...
>
> (e) Shall have the right, except in the case of an offence under military law tried before a military tribunal, to the benefit of a trial by jury when the penalty for the offence is or includes imprisonment for more than 3 months;

[12] Section 24 is one of a group of sections which affirm criminal law process rights. These rights are engaged when a person is "charged with an offence". An issue in the appeal is whether a person against whom summary proceedings for contempt of court are brought is such a person. Two arguments against that proposition are advanced. The first is that as s 24 is concerned with criminal procedure, it is not engaged where the alleged contempt is civil in nature. In the Court of Appeal this argument led to an analysis of the purpose of contempt proceedings which are brought to address alleged disobedience of court orders. The Court of Appeal observed that the distinction traditionally drawn between the civil and criminal categories of contempt turns on the dominant purpose of the relief sought in the proceeding. If the main purpose is remedial, in the interests of a complaining party, the contempt is classified as civil. If the proceeding is brought rather for punitive purposes, or to vindicate the court's authority, it is classified as criminal. There is an extensive discussion of the authorities in the Court of Appeal

judgment.[16] The Solicitor-General's contention in this case is that the contempt is of a civil nature. On his behalf Ms Laracy has argued that, as s 24(e) is concerned with criminal process rights, it is not engaged.

[13] The second argument is that, to the extent contempt proceedings are criminal, they deal with a common law crime which is not an "offence" for the purposes of s 24. This argument largely relies on definitions of "offence" in criminal procedure Acts.

[14] In our view, in agreement with the majority's reasons at [57] both arguments must fail as they depend on a legalistic approach to interpretation of the language of a protected right under the Bill of Rights Act, when a purposive interpretation must be applied. As Richardson J said in *Ministry of Transport v Noort*:[17]

> A purposive approach to the interpretation of the Bill of Rights Act requires the identification of the particular right. The Act's guarantees are cast in broad and imprecise terms and the identification of the object of the particular right allows for the inclusion within its scope of conduct that truly comes within that purpose and the exclusion of activity that falls outside ...

And as Cooke P said in *R v Te Kira*:[18]

> I am convinced that in interpreting and applying the Bill of Rights Act the Courts must strive to avoid the danger of becoming verbose and evolving fine distinctions. A Bill of Rights should be interpreted generously and simply.

[15] When a court holds someone to be in contempt of court, whether the contempt is one categorised as criminal or civil,[19] its determination stigmatises that person. The effect of the court's finding is equivalent to that resulting from conviction on a charge of committing a statutory crime. This indeed is recognised by Parliament in the Crimes Act 1961, which confers on a person found guilty of

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16 At [33]–[58].

17 *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA) at 279.

18 *R v Te Kira* [1993] 3 NZLR 257 (CA) at 261.

19 A classification which, except where required by statute, is probably best avoided as unhelpful. See the criticisms of the distinction by the United States Supreme Court in *International Union, United Mine Workers of America v Bagwell* 512 US 821 (1994), especially at 827 and 845, and by the High Court of Australia in *Witham v Holloway* (1995) 183 CLR 525 at 531–534 and 539–549.

committing criminal contempt a right of appeal as if that finding "were a conviction".[20] It is not, however, appropriate to transport that distinction to the Bill of Rights Act.

[16] The purpose of the criminal process rights in the Bill of Rights Act is to accord the various protections to those who are the subject of official accusation that they have breached the criminal law. They are "charged with an offence". The protections are extended because of the nature of the consequences to an individual of a determination of guilt of an offence including exposure to the punishment that will follow. Exactly the same consequences apply to adverse findings of contempt of court, whether criminal or civil, and the penal orders that may then be imposed. The purpose for which the Bill of Rights Act confers s 24 protections applies equally to the position of those against whom contempt proceedings are brought. The words in s 24 "charged with an offence" are, in our opinion, capable of extending to persons facing contempt proceedings and, reading them purposively in their context, they should be interpreted in that way.[21]

[17] At common law, the penalty available to the courts to impose on those found guilty of contempt was not limited, whether by way of fine or imprisonment.[22] That includes imprisonment for more than three months.

[18] It follows that the established summary jurisdiction which provides for a judge or judges sitting alone to determine proceedings for contempt is inconsistent with the right of persons facing such proceedings to trial by jury under s 24(e). Whether or not it infringes the right will turn on whether it is a justifiable limitation in terms of s 5 of the Bill of Rights Act.

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20 Crimes Act 1961, s 384(4).

21 In *Benham v United Kingdom* (1996) 22 EHRR 293 the European Court of Human Rights held that a person found to have committed contempt had been charged with a criminal offence despite arguments that the contempt was of a civil kind.

22 *Radio Avon* at 229.

Importance of trial by jury

[19] At this point it is necessary to consider the importance of the right to trial by jury in the criminal process. The primary and most important function of the jury in a criminal trial is to determine the relevant facts of a case and to apply the law to reach a verdict of guilty or not guilty. In exercising that function jurors bring a diverse range of perspectives, personal experiences and knowledge to bear in individual cases which judges may lack.[23] As fact finders, jurors determine which of the admissible evidence presented at a trial is to be believed and acted upon.[24] Juries ultimately decide whether the facts fit within a particular legal definition, according to community standards.[25] In this way they reflect the attitude of the community in their determination of guilt or innocence.

[20] The right to trial by jury is also generally seen as providing a safeguard against the arbitrary or oppressive enforcement of the law by the government. It is a common perception that when jurors perceive that a prosecution has these characteristics they are likely to acquit. The same point is made about trials where a law sought to be applied itself may be thought to be arbitrary or oppressive by a jury. For these reasons the jury is seen as standing between the accused and the state in a way that judges, who are sworn to apply the law, are not always able to do.

[21] New Zealand's threshold under the Bill of Rights Act for the right to trial by jury is that the penalty for the offence is or includes imprisonment for more than three months. By comparison with Canada, three months is a low threshold.[26] It may have been decided on when the Bill of Rights Act was enacted simply to reflect the existing provision for the right to trial by jury in the Summary Proceedings Act 1957, which continues to apply under that Act. Neither the International Covenant on Civil and Political Rights nor the European Convention on Human Rights provide for a right to trial by jury. Indeed a number of signatories to the latter convention do not regard trial by jury as a fundamental right. That is not, however, the case in

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23 Law Commission *Juries in Criminal Trials* (NZLC PP32, 1998) at [6], [7] and [60].
24 Ibid, at [64].
25 Ibid, at [67].
26 Section 11(f) of the Canadian Charter of Rights and Freedoms gives the right to trial by jury where the charge carries a penalty of five years or more imprisonment.

New Zealand where the right to trial by jury has always been central in New Zealand criminal law. The courts must, of course, respect the choice made by Parliament in affirming the right to trial by jury with the threshold of three months in s 24(e) of the Bill of Rights Act.

A justified limitation?

[22] In order to determine whether the summary procedure is in breach of the Bill of Rights, it is necessary now to consider whether the inconsistent summary procedure is a justified limitation of the right to trial by jury in terms of s 5 of the Act. Section 5 provides:

> **5 Justified limitations—**
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> Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[23] There are reasons of legal policy which have traditionally been regarded by the courts as requiring determination of such proceedings by a judge or judges sitting without a jury. These must now be assessed, in light of the Bill of Rights Act, to decide whether there is a justified limitation under s 5. This must be done by examining first, whether the limitation on the right to a jury trial that is imposed by the summary procedure is one "prescribed by law"; secondly, whether the objective of the procedural requirement is important enough to override the right to trial by jury; and, thirdly, whether the means used, the summary process itself, is reasonable limitation on the right in terms of s 5.[27]

[24] The source of the law of contempt of court is the common law and the procedural requirement is part of that law. As already explained, the continuing application of the summary procedure to contempt has been confirmed by s 9 of the Crimes Act. It is unaffected by the codification of the criminal law under that Act. Contempt of court is the sole common law crime.

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[27] *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.

[25] The standard of being "prescribed by law" in terms of s 5 of the Bill of Rights Act requires that the law be identifiable and expressed with sufficient precision in an Act of Parliament, subordinate legislation or the common law. It is also recognised that a limitation in terms of s 5 may result from the application of a common law rule.[28] The High Court has held that the "prescribed law" requirement of a justified limitation poses no difficulty in the context of contempt law.[29] We agree with that conclusion.

[26] The objective of the summary process in contempt of court proceedings is to protect the ability of the courts to exercise their constitutional role of upholding the rule of law. Effective administration of justice under our constitution requires that the orders of the courts are obeyed unless properly challenged or set aside. Public confidence in the administration of the law, also necessary for its effective administration, requires that there is a strong expectation that those who ignore court orders are quickly brought to account. Achieving these aims is part of the objective of the law of contempt. The purpose of the summary process, whereby that law is administered by the judges without the assistance of juries, is to put the administration of the contempt law in their hands.

[27] The law of contempt does not, of course, exist to protect the dignity of judges but to protect the public interest in the due administration of justice by an impartial court.[30] As the effective functioning of the rule of law is itself essential in a democratic society, the protective purpose of the summary process is of sufficient importance as an objective to override the right to trial by jury. This reflects what the Court of Appeal said in *Radio Avon*:[31]

> No one can question the extreme public importance of preserving an efficient and impartial system of justice in today's society which appears to be subject to growing dangers of direct action in its various forms. It is to that end, and that end alone, that the law of contempt exists.

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28 *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 48 (HC) at 63; *Ministry of Transport v Noort* (CA) at 272 per Cooke P.

29 *Duff v Communicado Ltd* [1996] 2 NZLR 89 (HC) at 100.

30 *Gisborne Herald Co Ltd v Solicitor-General* [1995] 3 NZLR 563 (CA); *Radio Avon* at 229.

31 *Radio Avon* at 229.

[28] The next point for consideration is whether the summary procedure is a proportionate means of achieving this objective, having regard to its negation of the right to trial by jury.

[29] The requirement of administration of contempt law by a summary process has arisen because the courts themselves have decided that it is necessary in this area that they themselves have the power of "self protection ... [in] superintending the administration of justice".[32] In doing so they are exercising the inherent jurisdiction of the court which enables the court to function effectively as a court of law. That jurisdiction is based on "the authority of the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner".[33]

[30] The constitutional need of the judges themselves having control over enforcement of orders of courts was recognised by the Privy Council in a case concerning the constitution of Mauritius.[34] In delivering the Privy Council's judgment Lord Steyn said:[35]

> [T]he Constitution gave to each arm of government such powers as were deemed to be necessary in order to discharge the functions of a legislature, an executive and a judiciary [and] in order to enable the judiciary to discharge its primary duty to maintain a fair and effective administration of justice, it follows that the judiciary must as an integral part of its constitutional function have the power and the duty to enforce its orders and to protect the administration of justice against contempts which are calculated to undermine it.

[31] If court orders could only be enforced by imposition of punishment, including imprisonment, after a hearing before a jury to determine the fact of breach, that restraint would considerably diminish the power of the courts to exercise their inherent jurisdiction. It would undermine their authority and their independence in exercising their functions. The reasons were explained by the Supreme Court of the United States in a leading case:[36]

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32 *Porter v The King; Ex parte Yee* (1926) 37 CLR 432 at 443 per Isaacs J.

33 I H Jacob "The Inherent Jurisdiction of the Court" (1970) 23 *Current Legal Problems* 23 at 27–28; cited in *Taylor v Attorney-General* [1975] 2 NZLR 675 (CA) at 682.

34 *Ahnee v Director of Public Prosecutions* [1999] 2 AC 294 (PC).

35 At 303.

36 *Gompers v Bucks Stove & Range Co* 221 US 418 (1910) at 450 per Lamar J. See also *The State (Director of Public Prosecutions) v Walsh* [1981] IR 412 (SC) at 425.

> For while it is sparingly to be used, yet the power of courts to punish for contempts is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law. Without it they are mere boards of arbitration whose judgments and decrees would be only advisory.
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> ...
>
> There has been general recognition of the fact that the courts are clothed with this power and must be authorized to exercise it without referring the issues of fact or law to another tribunal or to a jury in the same tribunal. For, if there was no such authority in the first instance, there would be no power to enforce its orders if they were disregarded in such independent investigation. Without authority to act promptly and independently the courts could not administer public justice or enforce the rights of private litigants.

[32] Two further factors indicate that the use of the summary process is fair and not arbitrary, in its impact on litigants, in a way that a jury trial would not be. First, in most cases of contempt there will be little dispute concerning the underlying facts, determination of which is the primary function of the jury. The main issue will usually be rather whether the facts amount to contempt, on which a direction as to the law would be given to the jury if the procedure of a jury trial were to apply. Secondly, referring to the present context, most contempt cases involving breach of court orders are brought by private litigants. It would add greatly to cost, time, delay, expense and complexity of litigation if litigants had to enforce rights already obtained through court proceedings. This is so whether or not the proceedings were brought by a public official such as the Solicitor-General. For a party to have to go through court proceedings to enforce rights it had already obtained from a judgment of the court would be grossly unfair and seriously undermine public confidence in the rule of law.

[33] It is true that the summary process under the common law makes a jury trial for common law contempt impossible and is accordingly a serious intrusion on the protected right. But it must be remembered that the right to trial by jury is just one of the rights in relation to the criminal law process under ss 24 and 25 of the Bill of Rights Act. The other process rights, which are collectively aimed at protecting the right to a fair trial, will continue to apply. In cases of contempt, the courts have always been careful to incorporate other safeguards. The criminal standard of proof must be met and rights to legal representation, against self-incrimination and to

properly be heard are all features of the process as far as practicable. The effects of the lack of a right to a jury trial must been seen in this context.

[34] *Borrie & Lowe*, writing in 1995, concluded:[37]

> The need for speed seems a plausible justification for the most extreme summary process, namely, where the judge acts upon his own motion to deal with disorder in the face of the court or the intimidation and harassment of a witness during a trial. Such acts pose an immediate and direct threat to the due administration of justice and have to be dealt with quickly. Moreover, there seems little need for a jury since the facts should not be in dispute and sentence is quite properly a function of the judge. Judges are well aware that their apparently arbitrary powers need to be exercised with the greatest restraint. There is no evidence that the power is abused and with the added safeguard of a right of appeal contemnors' rights are reasonably protected. The process is by no means perfect but it does seem a necessary one.

[35] The need for speed is not, however, confined to contempts in the face of the court and intimidation and harassment of witnesses. It applies equally to any continuing contempt such as the persistent disobedience of court orders in this case. Urgency is also important in other types of out of court contempt because of their corrosive effect on the administration of justice as well as the loss of public confidence that it engenders.

[36] Since 1995, the problems that the administration of justice faces through a variety of forms of contemptuous conduct have grown. The common law summary procedure remains the only means yet identified which enables effective protection to be given to the threats to the rule of law that all contempts provide. The unusual nature of the procedure emphasises the gravity of the threat to the administration of justice and in the eyes of the court. The procedure also adequately protects persons who come before the court. For all these reasons we consider the constitutional importance of the objective of the summary process and the impact that accommodating a jury trial would have on the courts' ability to ensure the effective administration of justice clearly indicate that the procedure is a proportionate response to the needs of the rule of law.

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[37] Nigel Lowe and Brenda Sufrin *Borrie & Lowe The Law of Contempt* (3rd ed, Butterworths, London, 1996) at 473.

[37] It follows that we consider the summary procedure for all contempt of court proceedings is a justified limitation of the right to a jury trial under s 24(e). The summary procedure accordingly is not in breach of the Bill of Rights Act.

Future proceedings

[38] In the present case the High Court sentenced the appellant to six months' imprisonment, having first allowed him the opportunity to remove the offending website and bring his infringing conduct to an end.

[39] In our view a finite term of imprisonment was the appropriate sentence in this case. The purpose of imprisonment of this type of offender is to punish for disobedience and to provide the incentive for compliance. The High Court's approach addressed both aspects, but once Mr Siemer rejected the final opportunity for compliance, the focus of the sentence was rightly put on punishment. Were Mr Siemer later to change his mind, that could be taken into account in the appellate process. Further offending thereafter would have to be addressed having regard to the circumstances which came before the court.

Conclusion

[40] For the reasons given, we disagree with the majority judgment. We conclude that the right of the appellant to a jury trial has not been breached by the process applied by the High Court. We consider the finite sentence imposed by the High Court was correct in principle and did not require modification by the Court of Appeal. As the Solicitor-General did not seek to vary the sentence imposed by the Court of Appeal, we would dismiss the appeal.

BLANCHARD, WILSON and ANDERSON JJ

(Given by Blanchard J)

Introduction

[41] In January 2008 the Solicitor-General made an application to the High Court under rr 608 and 609 of the High Court Rules[38] to have Mr Siemer held in contempt of an order of that Court forbidding him from publishing certain statements relating to the actions of a Mr Stiassny and his firm in the receivership of Mr Siemer's company, Paragon Oil Systems Ltd. The application was directed to certain internet websites controlled by Mr Siemer.

[42] It is unnecessary to give more than a brief account of the background, or to go into the rights and wrongs of the dispute between Mr Siemer and Mr Stiassny, which is the subject of other proceedings. It is enough to say that Mr Siemer has for some years carried on a vigorous campaign denouncing the way in which Mr Stiassny and his firm conducted the receivership of Paragon. The websites were one of Mr Siemer's means of advancing his point of view.

[43] The Solicitor-General sought in his application to have Mr Siemer committed to prison to remain there until further order of the High Court. Mr Siemer considered that he was entitled in these circumstances to have the matter heard at a trial by judge and jury by reason of s 24(e) of the New Zealand Bill of Rights Act 1990, which reads:

> **24 Rights of persons charged**
>
> Everyone who is charged with an offence—
>
> ...
>
> (e) Shall have the right, except in the case of an offence under military law tried before a military tribunal, to the benefit of a trial by jury when the penalty for the offence is or includes imprisonment for more than 3 months ...

[38] Now see rr 17.84 and 17.85 in force from February 2009.

[44] A Full Court of the High Court dismissed Mr Siemer's request for a jury trial, saying in a Minute dated 11 June 2008 only that he had not been charged with an offence and that s 24(e) of the Bill of Rights Act did not apply:

> The inherent jurisdiction of the Court in contempt matters, whilst civil/quasi criminal in nature, is dealt with under the civil procedure of an originating application and the involvement of a jury is neither permitted or appropriate.

That is the issue which now comes before this Court.

The injunction and the breach

[45] Later, in a judgment delivered on 8 July 2008,[39] Chisholm and Gendall JJ rejected Mr Siemer's argument that he was not in breach of the injunction, issued a writ of arrest and ordered that he be committed to prison for six months. However, it suspended the writ and the order "to allow Mr Siemer a final opportunity to arrange for the removal of the offending material from the websites" and to provide an undertaking that there would not be a repetition.[40] When Mr Siemer did not take up this opportunity, the writ and order came into force, but bail was granted pending appeal and that has continued while the matter is before this Court.

[46] The injunction said to have been breached by Mr Siemer had been granted to Mr Stiassny and his firm and ordered, in part, that Mr Siemer, Paragon and their servants, contractors or agents were not to:

> Publish in any form any information containing allegations of criminal or unethical conduct or as to improper personal enrichment on the part of the plaintiffs in relation to their conduct of the receivership of Paragon Oil Systems Limited; any claim that the plaintiffs deliberately over-charged Paragon Oil Systems Limited in the sum of $10,000; together with information as to the fact of complaints made by Mr Siemer and/or Paragon Oil Systems Limited to ICANZ or to the Serious Fraud Office; and including any information obtained by Mr Siemer or Paragon Oil Systems Limited in the course of discovery in any proceedings pending further order of the Court ...

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39 *Solicitor-General v Siemer* HC Auckland CIV–2008–404–472, 8 July 2008.

40 At [97].

The High Court was satisfied that material on three websites controlled by Mr Siemer had been published in breach of that order.

The Court of Appeal judgment

[47] The right to a jury trial became the focus of the appeal to the Court of Appeal, which delivered a reserved judgment on 9 March 2009.[41] That Court devoted a substantial portion of its reasons for judgment to a consideration of the distinction between criminal and civil contempts.[42] The reasons contain a helpful summary of the diverse positions in Australia, Canada, the United States and the United Kingdom, as well as in this country. The Court traced the historical background in New Zealand, saying that even contempt proceedings which are clearly criminal in nature have in this jurisdiction been dealt with summarily. The Court's conclusion, after its survey of the different jurisdictions, was that there is still a distinction in New Zealand law between criminal and civil contempt; that the classification exercise often will have substantive legal effects; and that it might be material to determining whether the rights provided for in s 24 of the Bill of Rights Act apply to an alleged contemnor in particular contempt proceedings.

[48] The Court proceeded to consider whether the Solicitor-General's application was a civil proceeding, concluding that the application "fell on the civil side of the boundary".[43] It accepted, however, that the issue was a finely balanced one and that Canadian authorities tended to support the argument that the application was criminal in nature. The Court ultimately preferred to adopt the American approach that the distinction was to be determined by reference to the relief sought or the dominant purpose of the relief proceeding; that it was necessary to examine whether the purpose of the Court was to coerce the defendant into compliance rather than administering punishment. The Court of Appeal had earlier in its reasons described United States case law in which criminal confinement for contempt was said to be

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41 *Siemer v Solicitor-General* [2009] NZCA 62, [2009] 2 NZLR 556 per O'Regan, Robertson and Arnold JJ.

42 In either case a right of appeal lay to the Court of Appeal and, by leave, to this Court: see Crimes Act 1961, s 384; Judicature Act 1908, s 66; and Supreme Court Act 2003, s 7.

43 At [65].

punitive, to vindicate the authority of the Court, but civil confinement was said to be remedial and for the benefit of the complainant, the person with the benefit of the order which had been disobeyed. In *International Union, United Mine Workers of America v Bagwell* the "paradigmatic coercive, civil contempt sanction" had been said to involve the confinement of a contemnor indefinitely until he complied with the Court's order.[44] In these circumstances, the contemnor was able to purge the contempt and obtain his release by committing an affirmative act and thus "carries the keys of his prison in his own pocket".[45]

[49] The Court of Appeal therefore analysed the High Court's decision in the present case in order to determine whether that Court's decision was essentially criminal in nature. The High Court had itself said that the purpose of the proceedings was twofold: first, to impose a penalty or punishment upon Mr Siemer for his serious continuing defiance of the authority of the Court and the law and, secondly, as an adjunct to that, to secure compliance with the law so that Mr Siemer no longer infringed the injunction. That appeared to promote the punitive objective above the coercive objective.

[50] However, the Court of Appeal saw the Solicitor-General's application as having an essentially civil nature. It said that the sanction ultimately imposed by the High Court also differed in kind from that which had been sought. The High Court had not provided that Mr Siemer would have the keys of the prison in his pocket. The imposition of a sanction that was not contingent on continued defiance of the court orders provided a stronger basis for arguing that the sanction was a criminal rather than a civil sanction, at least for the purposes of the Bill of Rights Act.[46] The Court of Appeal accepted that where the sanctions sought in an application for civil contempt included a finite term of imprisonment of more than three months, there was a valid argument that the rights given by s 24, including the right to elect trial by jury, should apply. In the present case, however, the sanction which was sought was an indefinite term, but with the important proviso that the imprisonment would come to an immediate end if the appellant complied with the court orders and gave an

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44 *International Union, United Mine Workers of America v Bagwell* 512 US 821 (1994) at [9].
45 See *Gompers v Bucks Stove & Range Co* 221 US 418 (1910) at 442.
46 At [77].

undertaking to continue to do so. Whether the time in prison would exceed three months would be entirely in Mr Siemer's own hands. In those circumstances, the Court said, the coercive purpose would be manifest.[47] However, once the "keys in the pocket" aspect to the proposed sentence was removed, the position changed. After the period of grace given by the High Court to the appellant had elapsed, he would be required to serve his sentence in accordance with s 86 of the Parole Act 2002, which provides a release date for a short-term sentence (one of 24 months or less) at the date on which the person subject to the sentence has served half of it.[48] The Court of Appeal concluded that the High Court had applied a punitive sanction, which meant that the proceeding did have a criminal character for the purposes of s 24(e) of the Bill of Rights Act. The finite sentence of imprisonment for six months could only have been imposed after Mr Siemer had been provided with the election of trial by jury.[49]

[51] The Court of Appeal then considered whether it could adjust the sentence, or whether the trial would have to be conducted again after an election to have a trial by judge and jury was given to Mr Siemer. In a case where no maximum penalty was provided, it seemed to the Court that the only way in which s 24(e) could be effectively applied was by reference to the remedy actually sought by the applicant. Where that remedy was a sanction other than imprisonment or imprisonment for three months or less, or imprisonment for a period greater than three months but subject to a condition which allowed the contemnor to bring it to an immediate end at any time, the Court considered that the right to elect trial by jury was not triggered. The situation had similarities with that faced by Canadian courts considering the application of the trial by jury right and s 11(f) of the Canadian Charter of Rights and Freedoms. In Canada that right applied where the penalty was five years imprisonment or more. The Ontario Court of Appeal in *R v Cohn* had expressed the opinion that if the Judge presiding alone at a contempt proceeding were to impose a sentence of imprisonment for five years or more, it would be the

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47 At [81].

48 Section 86 applies to someone who is subject to a term of imprisonment for contempt of court: Parole Act 2002, s 9(1). The start date of the term is the date when the person is taken into custody to serve the term imposed: s 81.

49 At [84].

sentence that was unlawful and not the proceedings.[50] The Court of Appeal adopted that view, which led it to quash the term of imprisonment for six months imposed by the High Court and to replace it with a term of imprisonment of a maximum of six months, subject to the proviso that the imprisonment would come to an immediate end if the appellant complied with the injunction and provided an undertaking to the Court that he and Paragon would continue to comply with it. "Thus, the appellant will have the keys to the prison in his pocket".[51]

Discussion

[52] Section 24(e) of the Bill of Rights Act guarantees to everyone who is "charged with an offence" the right to the benefit of a trial by jury when the penalty for the offence is or includes imprisonment for more than three months. The only exception expressed in the section is for the case of an offence under military law tried before a military tribunal. With that exception, the guarantee is expressed to apply to all offences with a maximum term of more than three months.[52] The question to be answered by this Court is whether that apparently comprehensive guarantee does or does not apply to a person who is proceeded against for contempt.

[53] Whether a person can be said to have been charged with an offence is an issue which has been addressed by the Supreme Court of Canada in a case on s 11 of the Charter of Rights and Freedoms, albeit in a slightly different context.[53] That section, like s 24(e), confers various rights on "[a]ny person charged with an offence". The list of those rights is not the same as in s 24 but, significantly, it does include an equivalent of s 24(e) under which that person is entitled:

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50 *R v Cohn* (1984) 13 DLR (4th) 680 (ONCA) at 705. The Court had in fact concluded that it was not open to a court to impose a sentence of over five years because that would conflict with the Charter of Rights and Freedoms.

51 At [96].

52 Section 66(1) of the Summary Proceedings Act 1957 was in its present form when the Bill of Rights Act was enacted and is consistent with s 24(e). It provides that a person charged under Part 2 of that Act (someone who has been proceeded against summarily) with an offence which is punishable by imprisonment for a term exceeding three months is entitled, before the charge is gone into but not afterwards, to elect to be tried by a jury. An exception is made, however, by s 43 of the Summary Offences Act 1981 by virtue of which s 66 does not apply to offences under ss 9 and 10 of the Summary Offences Act, namely common assault or assault on a constable, prison officer or traffic officer acting in the execution of duty. Those two offences carry maximum penalties of six months' imprisonment (or a fine).

53 *R v Wigglesworth* [1987] 2 SCR 541.

> (f) except in the case of an offence, under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

The list also includes an entitlement:

> (h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again;

[54] *R v Wigglesworth*[54] concerned the guarantee in s 11(h) against double jeopardy. The Supreme Court decided that "charged with an offence" must have the same meaning for all of the rights given by the section. In *Wigglesworth* a policeman had assaulted someone in his custody. He had been charged with common assault and also with an offence under the Royal Canadian Mounted Police Act RSC 1985 c R-10 which carried a maximum penalty of imprisonment for one year. The latter charge was dealt with first. Mr Wigglesworth was convicted and fined. He then claimed that it would be improper for the common assault charge to be proceeded with because it would violate his s 11(h) right not to be tried and punished twice for the same offence. In a judgment delivered by Wilson J, the Supreme Court said that the breadth of the opening words of s 11 ("any person charged with an offence") suggested that the section might well apply to non-criminal proceedings, including those for disciplinary offences. But the Court took a narrower view.[55] The s 11 rights were available to "persons prosecuted by the State for public offences involving punitive sanctions, i.e, criminal, quasi-criminal and regulatory offences".[56] A later passage of Wilson J's judgment makes it clear that this includes any "proceedings giving rise to penal consequences".[57] Even proceedings in respect of offences which were criminal in nature but had relatively minor consequences following conviction were included, such as a minor traffic offence, like a parking offence.[58]

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54 *R v Wigglesworth* [1987] 2 SCR 541.

55 Estey J dissented as to the result but agreed with the reasoning on the meaning of "charged with an offence".

56 At 554.

57 At 558.

58 At 559.

[55] In a passage of relevance to the present case, Wilson J said:[59]

> This is not to say that if a person is charged with a private, domestic or disciplinary matter which is primarily intended to maintain discipline, integrity or to regulate conduct within a limited private sphere of activity, he or she can never possess the rights guaranteed under s 11. Some of these matters may well fall within s 11, not because they are the classic kind of matters intended to fall within the section, but because they involve the imposition of true penal consequences. In my opinion, a true penal consequence which would attract the application of s 11 is imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity.

She concluded:[60]

> If an individual is to be subject to penal consequences such as imprisonment – the most severe deprivation of liberty known to our law – then he or she, in my opinion, should be entitled to the highest procedural protection known to our law.

[56] We find this reasoning compelling. Whenever someone faces a proceeding for contempt they face the possibility of a sentence of imprisonment for such length as the court may reasonably impose. It would be extraordinary if, as must be the case, someone charged with minor offending had the benefit of the ss 24 and 25 guarantees, insofar as they can apply in the circumstances, when, as a matter of law, that person may not actually be liable to imprisonment or where as a matter of practice imprisonment will never be imposed, and yet a person proceeded against for contempt and undoubtedly exposed to the possibility of imprisonment did not. It is no answer to say that common law principles provide equivalent benefits, other than jury trial, so far as may be applicable to the circumstances. The Bill of Rights Act guarantee requires a generous reading and where at a trial in a court a penal consequence is in prospect and the term actually available could exceed three months, it seems to us that the ss 24 and 25 rights, including the right to elect trial by jury, must be given effect.

[57] It is no answer, either, to say, as the Solicitor-General does, that the present case involves only civil contempt, because the threat of prison is being used only or primarily to coerce compliance with an order of the court made in a civil

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59 At 560–561.
60 At 562.

proceeding;[61] and that under the order made by the Court of Appeal Mr Siemer will be given the keys to his own prison because his imprisonment will be ended if and when he complies. He still faces deprivation of liberty if found to be acting in breach of the injunction. Unless in law the maximum available penalty cannot exceed three months – a question we will shortly address – he is exposed to the risk of a longer term.[62] As is demonstrated by the order made in the High Court, a judge may decide to impose a finite sentence even when the applicant would have been content with an order of the kind made by the Court of Appeal in this case. An applicant cannot be permitted to restrict the court's freedom to choose the appropriate punishment for a breach of its order, if it considers that has occurred. And, although it can be said of someone who is committed to prison until compliance that he or she is there only because of the choice not to comply, there is an incarceration and therefore, in Wilson J's words, that person should have been entitled to the "highest procedural protection known to our law" in the determination that there was in fact a disobedience of the court's order. It follows that we do not, in this context, see any relevant distinction between imprisonment for criminal and civil contempts. In both cases, if there is a prospect of imprisonment for a term of more than three months, the Bill of Rights Act guarantee of a jury trial should apply. The form of the proceeding cannot be determinative of the need to afford the defendant a right given by the Bill of Rights Act to someone facing the possibility of imprisonment for more than three months.

[58] We have considered whether (as McGrath J believes) an exception can be made to the s 24(e) right in respect of proceedings for contempt as a justified limitation on that right under s 5 of the Bill of Rights Act. Although we are comfortable that the law of contempt is sufficiently prescribed by the common law

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[61] Lamer CJ remarked in *Vidéotron Ltée and Premier Choix: TVEC Inc v Industries Microlec Produits Électroniques Inc* [1992] 2 SCR 1065 at 1071 that the fact that contempt of court has been dealt with in a Code of Civil Procedure does not alter the fact that a person cited for contempt is a person charged with an offence within the meaning of s 11 of the Charter. In *Vidéotron* there had been an alleged breach of an injunction.

[62] In this respect the position is not the same as in Canada where penalties for contempt have never in modern times come close to the five years threshold prescribed by s 11(f) of the Charter: *R v Cohn* at 702; and see *MacMillan Bloedel Ltd v Simpson* (1994) 113 DLR (4th) 368 (BCCA) at 389.

so as to pass muster under s 5,[63] because of the potentially drastic consequences for someone who is imprisoned we do not see that course as justified. Imprisonment has been marked out as the severest punishment which can be imposed. Parliament has declared in s 24(e) that only in the case of a charge where any imprisonment can never exceed three months will the fundamental right of jury trial be denied. It is true that there are two statutory exceptions but even in those cases the maximum term (six months) is finite and quite short. The Court ought not, in our view, now to create by recourse to s 5 another exception to s 24(e) for what has been called a "common law offence"[64] and for which no maximum punishment at all is prescribed by statute or by the common law itself. It should not be overlooked that in the United States contemnors who did not repent of their continuing contempts have been kept in prison for many years, in one case for 14 years.[65] It is very unlikely, indeed impossible, that a New Zealand court would follow that extreme example, but if s 24(e) does not control the situation an imprisonment for contempt could exceed three months without review (other than by way of appeal against the original order) where the contemnor is intransigent.

[59] That leads to two possible consequences. Either there must be a jury trial for all contempts (other than those in the face of the court where by statute the penalty cannot exceed three months)[66] or, if it is not possible to have a jury trial for contempt so that the only available process is by judge-alone summary trial, the sentence must never exceed three months.

[60] We are satisfied that the first course is not available. Jury trial for contempt appears never to have occurred in this country. We have been unable to find any reference to an actual instance. Denniston J recorded in *Attorney-General v Blomfield*[67] an argument from JW Salmond KC, Solicitor-General, rejecting it, and

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63 *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 48 (HC) and *Duff v Communicado Ltd* [1996] 2 NZLR 89 (HC) at 101–102 and in Canada see *United Nurses of Alberta v The Attorney General for Alberta* [1992] 1 SCR 901 at 930–931.

64 *Solicitor-General v Radio Avon Ltd* [1978] 1 NZLR 225 (CA) at 235.

65 *Chadwick v Janecka* 312 F 3d 597 (3rd Cir 2002) where release was refused for a man who had been in prison for seven years for refusing to comply with an order requiring payment of money into a court escrow account. He was released, despite continuing refusal, after 14 years: see *United States v Harris* 582 F 3d 512 (3d Cir 2009) at footnote 13.

66 Crimes Act 1961, s 401; Judicature Act 1908, s 56C; Summary Proceedings Act 1957, s 206; and District Courts Act 1947, s 112.

67 *Attorney-General v Blomfield* (1913) 33 NZLR 545 (SC) at 570.

when he became Salmond J that knowledgeable Judge apparently did not think it worthy of mention when he wrote on behalf of a Full Court Bench of four Judges of the (then) Supreme Court in *Nash v Nash, Re Cobb*.[68] That was a case in which the Court had to determine whether the jurisdiction to punish criminal contempts by way of summary process had been taken away or affected by s 5 of the Crimes Act 1908. That section read:

> Every one who is a party to any offence shall be proceeded against under some provision of this Act, or under some provision of some statute not inconsistent herewith and not repealed, and shall not be proceeded against at common law.

The Court concluded that s 5 was not dealing with the law as to summary process for contempt:[69]

> The purpose and effect of that section were merely to abolish common-law felonies and common-law misdemeanours as the subject-matter of indictment, and to provide that for the future the only indictable offences should be those set out in the Criminal Code or in some other statute not inconsistent therewith. This being so, the Supreme Court preserves unimpaired and unaffected its original jurisdiction to secure the efficiency and the purity of the administration of public justice by dealing summarily with all conduct which is recognized by the common law as amounting to criminal contempt of Court.

Therefore all criminal contempts could be dealt with summarily. As we have said, there was no mention by the Full Court of any possibility of proceeding by way of indictment, unless the contempt happened also to be an offence under the Crimes Act and was accordingly triable on indictment as a crime under that Act. If it was believed that a non-statutory contempt could have been dealt with by way of indictment, surely Salmond J would have described it.

[61] Section 5 of the 1908 Act was replaced in the Crimes Act 1961 by the following provision:

> **9 Offences not to be punishable except under New Zealand Acts**
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> No one shall be convicted of any offence at common law, or of any offence against any Act of the Parliament of England or the Parliament of Great Britain or the Parliament of the United Kingdom:

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68 *Nash v Nash, Re Cobb* [1924] NZLR 495 (SC).

69 At 498.

Provided that—

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

(b) Nothing in this section shall limit or affect the jurisdiction or powers of the Court Martial, or of any officer in any of the New Zealand forces.

[62] Some years later a very strong Court of Appeal, consisting of Richmond P and Woodhouse and Cooke JJ, said in *Solicitor-General v Radio Avon Ltd*[70] that it was not possible, in New Zealand, to prosecute by way of indictment "the common law offence of contempt of court". They pointed to s 9 as the reason, saying that it was "obviously enacted to give statutory recognition to the decision of the Full Court in *Re Cobb*". They affirmed that the law remained the same:[71]

> The only way in which a contempt of court, as such, can be dealt with in New Zealand is by means of the summary process. We speak of course without reference to various specific statutory powers given to the courts in relation to certain types of contempt of court. It may happen that conduct charged as a contempt of court in summary proceedings also falls within the definition of some statutory crime or offence. As was said by the Full Court, that is immaterial, except as one of the elements to be taken into consideration in determining whether the discretionary summary jurisdiction ought to be exercised in any particular case. The point which we make is that in New Zealand the possibility of resorting to proceedings by way of indictment is much more limited than in purely common law jurisdiction and to the extent the various expressions of judicial opinion relied on by Mr Palmer [counsel for the contemnors] are inapplicable in this country.

[63] Although neither of these judgments fully explores the history of the law of contempt in New Zealand or elsewhere we are satisfied that they accurately stated the position prior to the Bill of Rights Act. We have seen nothing to suggest that jury trial for contempt was ever made available for any form of contempt in this

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70 *Solicitor-General v Radio Avon Ltd* [1978] 1 NZLR 225 (CA) at 235.

71 At 235–236.

country, even before codification of our criminal law.[72] It apparently fell into disuse in England early last century and the House of Lords has commented that "this method of proceeding ought not to be revived".[73]

[64] It is true that in Canada, after initial doubts,[74] it was held by the Supreme Court in *R v Vermette* that the equivalent section of the Criminal Code[75] preserved the procedure by indictment for the punishment of contempt in the face of the court, though it was rarely employed.[76] But that procedure had actually been utilised in Canada, so that historically the position was different in this respect from that in New Zealand. It would be a bold step to introduce it here for the first time as a by-product of s 24(e). It has to be said also that in Canada, because the Charter period is five years, there would now appear to be little likelihood of ongoing resort to the indictment procedure.

[65] In agreement with the House of Lords in *Re Lonrho Plc*,[77] we do not believe that the jury trial procedure for contempt would ever be appropriate, even accepting that a means exists or could be devised for summoning a jury and putting a case for contempt before it. Such a procedure would be highly undesirable because it would undermine the authority of the court by interposing a body of lay persons between the court's order and its enforcement and giving to them the task of interpreting the order. That task should be for the court alone to undertake. Resort to the indictment procedure would also, as Wills J said in *R v Davies*, be "too dilatory and too

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72 References to an indictment in the Crimes Act 1961, such as in ss 329 and 345, are directed to offences under that Act or another enactment: see the definitions of "offence" and of "crime" in s 2.

73 *Re Lonrho Plc* [1990] 2 AC 154 (HL) at 177. In the 7th edition of *Russell on Crimes* (7th ed, Stevens & Sons, London, 1909) vol 1 at 539 it was already being said that the remedy by indictment was "rarely used, owing to the inevitable delay and consequent risk of interference with justice." The common law of contempt in England is now subject to rules in the Contempt of Court Act 1981 (UK).

74 *Re Ouellet (No 1)* (1976) 28 CCC (2d) 338 (QCCS) and *R v Cohn* at 701.

75 Section 8.

76 *R v Vermette* [1987] 1 SCR 577 at 583. The point had arisen for decision in *Vermette* because the Crown did lay the charge indictably, but following an initial election there had been a plea of guilty and an inferior court, which did not have jurisdiction in indictable matters, had carried out the sentencing.

77 *Re Lonrho Plc* [1990] 2 AC 154 (HL).

inconvenient to afford any satisfactory remedy".[78] Especially in a case of continued disobedience to an order, the process of a jury trial could lead to a contemnor's conduct going uncorrected for a lengthy period, which, in itself, by giving the appearance that the court was powerless to inquire into an alleged breach and to enforce its order, would reflect badly on the administration of justice. As McEachern CJ of British Columbia remarked in *MacMillan Bloedel Ltd v Simpson*:[79]

> The wisdom of history is that the court must be free to deal directly and decisively with any contempt against its process.

[66] In summary: to this point we have determined: (1) that s 24(e) of the Bill of Rights Act requires a jury trial to be made available upon election to any person faced with the possibility of being imprisoned for more than three months; (2) that someone who is the subject of an application for committal for a contempt faces that possibility even if the prosecution seeks or suggests a lesser penalty, including an order enabling imprisonment to cease as soon as the contempt is no longer being committed; and (3) that in New Zealand a proceeding for any contempt of court (other than one which is a statutory offence carrying a maximum term of imprisonment for more than three months) can only be dealt with by way of summary (judge alone) process.

[67] We have accordingly been brought to the view that as a necessary consequence of the enactment of s 24(e) the power of a New Zealand court to impose a sentence of imprisonment for contempt has been limited to imprisonment for no more than three months (and/or a fine). We reach that view not without hesitation because it would seem that those who recommended the three month limit in s 24(e) may have done so primarily because that was the existing rule under s 66(1) of the Summary Proceedings Act[80] and that they do not appear to have given consideration to the effect on the punishment of contempts. Our concern is, however, considerably lessened by two considerations. The first is that in the majority of cases an imprisonment for contempt for more than three months will be an excessive punishment, and in the happily rare event of a contemnor who

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78 *R v Davies* [1906] 1 KB 32 (KBD) at 41. This view was endorsed by the High Court of Australia in *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351 at 370.

79 *MacMillan Bloedel Ltd v Simpson* (1997) 113 DLR (4th) 368 (BCCA) at 390.

80 See footnote 52 above.

continues in disobedience after a three-month term there would seem to be no good reason why the court should, after a further summary process, be precluded from imposing a further term of imprisonment for the continuation of the disobedience[81] (but again not exceeding three months). In that situation the contemnor should be able to be punished for an additional contempt, namely repetition of the disobedience after the time of the original committal to prison.[82] It appears to be open to a court to make an order for a further committal on the basis that it will take effect only if there has not been compliance by a particular future date.[83] The second consideration, if problems emerge for the courts which we have not foreseen, is that it is obviously open to Parliament to amend s 24(e) by substituting a longer period. There seems to be nothing particularly sacrosanct about three months: in Canada the equivalent period is five years, while in England and Wales a committal for contempt may not be for more than two years by a superior court (or one month by an inferior court).[84]

[68] It follows from the conclusions we have already expressed that both the courts below exceeded their powers in imposing sentences which exceeded three months. Counsel for the appellant argued that, if this Court were of that view, it must treat the proceedings below as a nullity, with the result that the case would have to begin again in the High Court. We do not agree. Subject to a question belatedly raised about whether there has in fact been any contempt proved against Mr Siemer, to which we will turn in a moment, we consider that it must be open to this Court simply to correct a sentencing error made below (an excessive sentence) by imposing a punishment which is consistent with the requirements of s 24(e). That is what the Court of Appeal of Ontario in *R v Cohn* suggested should be done if, in that jurisdiction, a judge presiding at a contempt hearing were to impose a sentence of

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81 See *Bell v The Queen* [1983] 2 SCR 471 at 488 and compare *Loutchansky v Times Newspapers Ltd (No 2)* [2001] EWCA Civ 1805, [2002] 1 All ER 652 at [74]–[76].

82 In the case of a contempt committed on the internet it seems there is a new publication every time access to the item is permitted: *Loutchansky v Times Newpapers Ltd (No 2)* at [51]–[76] and *Dow Jones & Company Inc v Gutnick* (2002) 210 CLR 575 at [42]–[44], [128] and [191]–[196].

83 *Kumari v Jalal* [1997] 1 WLR 97 (CA).

84 Contempt of Court Act 1981 (UK), s 14(1).

more than five years. As that Court said,[85] it would be the sentence that was unlawful and not the summary proceeding.

A contempt was committed

[69] We must first, however, respond to an attempt made in this Court by counsel for Mr Siemer with a view to persuading us that the High Court had erred in finding that Mr Siemer was in contempt of court. It is not clear whether this submission was advanced before the Court of Appeal. However that may be, the High Court was plainly right. The extracts from the websites which constituted the material that the Solicitor-General had said in the High Court was in breach of the injunction were provided to us in the written submissions of Ms Laracy, counsel for the Solicitor-General. Mr Lithgow QC did not seek to dispute that it was those passages that the contempt order made by the High Court on 8 July 2008 was related to nor that they continued to appear on the websites. It is quite obvious that the High Court was correct to conclude that they constituted a breach. On the plain meaning of the words in the passages, the argument that there was no breach could not possibly succeed. We also reject Mr Lithgow's submission that the High Court had later indicated that its order encompassed the whole of the content of the websites. The High Court's decision had clearly related to the passages only. The suspension of its order was intended to enable compliance with the injunction by removal of the particular material from the websites. The Court's later reference in a Minute dated 31 July 2008 to closing down the websites is not fairly to be understood as expanding that requirement. The Minute in fact refers back to the terms of the Court's judgment and is obviously directed to the paragraph in the judgment in which the Court said that the writ of arrest and the order committing Mr Siemer to prison would be suspended "to allow Mr Siemer a final opportunity to arrange for the removal of the offending material from the websites".[86]

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[85] At 705. See *MacMillan Bloedel Ltd v Simpson* at 390 where this statement was approved in the case of a breach of an injunction.

[86] At [97].

The proper sentence

[70] We have given thought to whether the matter should now be returned to the Court of Appeal for it to reconsider the appropriate sentence. We believe, however, that even allowing for the fact that the Court did not appreciate that it was imposing a sentence which was above the maximum, and therefore did not put its mind to the question of whether the case demanded a sentence at or near the maximum actually available, it is very plain the Court considered the matter to be very serious (it was not Mr Siemer's first contempt) and would, if it had been conscious of the limit on its powers, have chosen a three-month term. It was of course making the term subject to a condition which would give Mr Siemer the keys to his own prison. Anything less than three months might, in the case of someone who had already served time for breach of another court order, have been unlikely to produce compliance, particularly when the effect of s 86 of the Parole Act is factored in.

Result

[71] By majority, the appeal is allowed and the order made by the Court of Appeal is quashed. It is replaced it by an order committing the appellant to prison for a term of a maximum of three months, subject to the proviso that the term of imprisonment will come to an immediate end if the appellant complies with the injunction issued on 5 May 2005 and made permanent on 23 December 2008 by the High Court at Auckland in the proceeding *Korda Mentha v Siemer* HC Auckland CIV-2005-404-1808, 23 December 2008 and if he also provides an undertaking to the High Court in a form approved by the High Court that he and Paragon Oil Services Ltd will continue to comply with that injunction for so long as it remains in force.

[72] Mr Siemer must now surrender to his bail at the High Court in Auckland no later than 4pm on Thursday 20 May 2010 unless by then he has complied with the injunction and provided that undertaking to the High Court in a form approved by it.

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