**IN THE COURT OF APPEAL OF NEW ZEALAND**

**I TE KŌTI PĪRA O AOTEAROA**

**CA289/2023**
**[2025] NZCA 328**

| | | |
|---|---|---|
| BETWEEN | ATTORNEY-GENERAL<br>Appellant |
| AND | RICHARD ALLEN PARORE<br>Respondent |

| | |
|---|---|
| Hearing: | 16 July 2024 |
| Court: | Thomas, Ellis and Palmer JJ |
| Counsel: | A M Powell and A B Goosen for Appellant<br>D P Weaver and T J Conder for Respondent |
| Judgment: | 16 July 2025 at 3 pm |

---

**JUDGMENT OF THE COURT**

---

**A The appeal is allowed.**

**B We set aside the High Court judgment.**

**C We make a declaration that the Commissioner of Inland Revenue breached Mr Parore's right to silence, thereby breaching his right to a fair trial under s 25(a) of the New Zealand Bill of Rights Act 1990.**

**D The respondent must pay costs to the appellant for a standard appeal on a band A basis together with usual disbursements.**

---

**REASONS OF THE COURT**

(Given by Palmer J)

## Table of Contents

## Summary

[1] In 2018, Mr Richard Parore was in dispute with the Commissioner of Inland Revenue (the Commissioner) about whether he filed tax returns and paid sufficient goods and services tax (GST). The dispute progressed through several stages of the civil tax disputes procedure under the Tax Administration Act 1994 (TAA). In 2019, using information from Mr Parore obtained in that process, the Commissioner initiated criminal proceedings against him for evading or attempting to evade assessment or payment of GST.

[2] The District Court stayed the criminal proceedings on the basis that Mr Parore's right to a fair criminal trial was breached by his required provision of the information in the civil tax disputes procedure.[1] The High Court upheld that decision on appeal.[2] By then, the Commissioner was out of time to complete the civil tax disputes procedure and an application for an extension of time was declined.[3] In 2023, the High Court declared that the Commissioner had breached Mr Parore's right to silence, as guaranteed by the New Zealand Bill of Rights Act 1990 (Bill of Rights), and awarded him public law damages for the legal costs he had incurred of $70,989.86.[4] The Attorney-General appeals.

[3] The Commissioner used factual information and knowledge of the legal position of Mr Parore, that he provided in response to the requirement to respond in the civil tax disputes procedure, in preparing for the criminal prosecution. The combination of requiring the information and using it in the prosecution was a breach of Mr Parore's right to silence which constitutes, under s 25(a) of the Bill of Rights, a breach of his right to a fair trial, which is an important right.

---

1 *Commissioner of Inland Revenue v Parore* [2021] NZDC 17946, (2021) 30 NZTC 25-010 [DC stay judgment] at [35]–[57] and [60].

2 *Commissioner of Inland Revenue v Parore* [2021] NZHC 3405, (2021) NZTC 25-013 [HC stay judgment] at [63]–[81].

3 *Commissioner of Inland Revenue v Parore* [2022] NZHC 488, (2022) 30 NZTC 25-015 [HC extension judgment] at [4] and [69].

4 *Parore v Attorney-General* [2023] NZHC 1010, (2023) 31 NZTC 26-003 [judgment under appeal] at [132]. See: *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667 (CA) [*Baigent's case*].

[4] The stay of the criminal proceedings was necessary to uphold the integrity of the criminal justice system. The reason for it, the breach of Mr Parore's right, was reasonably clearly indicated in established case law. The Crown had identified the legal risk of breaching Mr Parore's rights that materialised, but proceeded anyway. On the balance of probabilities, we do not accept the evidence demonstrates the Commissioner acted in bad faith. But we consider the Commissioner's decision to proceed with the prosecution was ill-advised. The stay prevented further damage to Mr Parore's right but its purpose was to uphold the integrity of the criminal justice system, not to discipline the Commissioner or vindicate Mr Parore's right. On balance, we accept the stay was not sufficient to do that. Issuing a declaration that the Commissioner breached Mr Parore's right to silence, thereby breaching his right to a fair trial under s 25(a) of the Bill of Rights, was appropriate and proportionate to vindicate Mr Parore's right to a fair trial. It reinstates the rule of law by marking the breach.

[5] Damages are available for breaches of the right to a fair trial. A stayed criminal proceeding is an unpropitious context for the award of public law damages; but it is not impossible. The correct approach to remedies for breaches of the Bill of Rights, including public law damages for breach of the right to a fair trial, is to carefully examine what package of remedies is effective to vindicate the relevant right, appropriately and proportionately in the circumstances — taking into account the seriousness and nature of the particular breach, the particular right and the conduct of the particular right-holder.

[6] The seriousness of the breach at the time of the stay is at the lower end of the scale. The declaration performs the public function of vindicating Mr Parore's right in these circumstances. The Commissioner has changed the guidance about how to proceed in these sorts of circumstances, ensuring there is unlikely to be a repeat of this situation. This Court observed in *Attorney-General v Morrison* that public law damages are unlikely to be the remedy of choice where fair trial rights have been breached, and are likely to be appropriate in only a very limited number of cases that involve very serious breaches of a defendant's fair trial rights.[5] In light of that, and

---

5 *Attorney-General v Morrison* [2025] NZCA 240 at [43].

the factual circumstances here, we do not consider it is appropriate to award public law damages to vindicate Mr Parore's right. His right is fully vindicated by the declaration. We allow the appeal and set aside the High Court judgment.

**What happened?**

[7] The facts of this case are traversed by Gwyn J in the High Court judgment.[6] We summarise the facts relevant to this appeal.

*Bankruptcy*

[8] Mr Parore was a self-employed real estate agent who contracted to Barfoot & Thompson Ltd in Auckland. He was adjudicated bankrupt on 2 April 2009, and discharged from bankruptcy on 10 October 2014.

[9] Mr Parore continued working as a real estate agent during this period and filed what the Commissioner agrees were accurate GST returns until 31 March 2011. He paid GST on his commissions until 31 March 2011.

[10] In May 2011, the Official Assignee advised Inland Revenue | Te Tari Taake (IRD) to cancel Mr Parore's GST registration. In September 2011, Mr Parore filed his statement of affairs with the Official Assignee, who notified him he was required to obtain the Official Assignee's consent to be in business. Mr Parore did not sign and return a document which would give effect to the Official Assignee's consent. So the Official Assignee did not formally consent to him being in business.

[11] The Commissioner submits that, from 30 September 2011 to 30 September 2014, Mr Parore received commissions that included GST and did not return GST. The Commissioner says he retained $55,673.51 of the GST that he had collected.

*Tax audit*

[12] In March 2017, the Commissioner commenced an audit of Mr Parore, including into his GST compliance for the GST periods ending from

---

6 Judgment under appeal, above n 4, at [2]–[56].

30 September 2013 to 31 March 2017. Mr Clint Tully was in charge of the Commissioner's investigation into Mr Parore's tax affairs from 27 April 2017. On 7 September 2017, Mr Tully recommended to Legal and Technical Services of IRD that Mr Parore be prosecuted. Mr Tully's evidence is that, on 15 January 2018, he received internal legal advice that there was sufficient evidence to prosecute Mr Parore.

[13] On 22 January 2018, Mr Tully wrote to Mr Parore:

(a) notifying him that the Commissioner would issue default assessments for income tax, and for GST for periods ending from 31 May 2011 to 31 March 2017;

(b) notifying him that the Commissioner was considering prosecuting him for knowingly not registering for GST, and knowingly not filing GST returns when required to do so, with intent to evade the assessment or payment of GST, as well as income tax offending;

(c) inviting him to explain why he did not register for GST and file the relevant returns, and why he should not be prosecuted; and

(d) stating that Mr Parore did not have to comment or answer but, if he did, the information may be used by the Commissioner as evidence if a prosecution eventuated.

[14] Also on 22 January 2018, Mr Tully's then Team Leader, Mr George Fraser, signed a memorandum from Mr Tully seeking approval to commence prosecution of Mr Parore.

*Civil tax disputes procedure*

[15] On 23 January 2018, the Commissioner issued default GST assessments against Mr Parore, made under s 106 of the TAA, for GST periods ending from 31 May 2011 to 31 March 2017, as well as assessments relating to income tax.

[16] Under the civil tax disputes procedure, if Mr Parore had not then issued a notice of proposed adjustment (NOPA), the Commissioner's assessment would have crystalised.[7] The onus was on Mr Parore to initiate the civil tax disputes procedure. On 2 March 2018, Mr Parore issued his NOPA and attached 16 GST returns for GST periods ending from 30 November 2014 to 30 September 2017, as well as income tax returns. The NOPA set out his defence: that, for various GST periods, as a bankrupt, he was an incapacitated person under s 58(1) of the Goods and Services Tax Act 1985 (GST Act) and should be treated as not being a registered person for those periods; so the Official Assignee was personally liable for any GST payable as a specified agent under s 58(1A) of the GST Act.

[17] Mr Tully's memorandum seeking approval to prosecute, signed by Mr Fraser on 22 January 2018, was subsequently altered and signed by another Team Leader on 7 March 2018. It was approved by Ms Maryanne Hansen, Group Lead — Customer Compliance, on 8 March 2018. Mr Tully did not refer the case for prosecution within IRD, and charges were not laid, at that time. The Crown submits that, at that time, it was the Commissioner's practice to proceed with a civil tax disputes procedure where there was a possibility of prosecution but the final decision had not yet been made. That subsequently changed in July 2020 when a new Commissioner's Statement indicated that, where a criminal proceeding has been commenced or is contemplated, the taxpayer would be advised they are not compelled to respond to an assessment or disputes document.[8]

[18] On 21 March 2018, in a letter sent to Mr Parore's tax agent, Mr Tully accepted Mr Parore's GST returns for the GST periods 31 March 2015 to 30 September 2017 as correct and stated that adjustments would be made shortly. The claim that Mr Parore was not required to file GST returns for the GST periods 31 May 2011 to 30 September 2014 was rejected. On 22 March 2018, Mr Parore's tax agent provided a detailed response to Mr Tully's letter. That same day, after reviewing the correspondence between Mr Tully and Mr Parore's tax agent, Mr Parore's counsel requested a meeting with Mr Tully.

---

7 Tax Administration Act 1994, s 89D; and *Allen v Commissioner of Inland Revenue* [2006] NZSC 19, [2006] 3 NZLR 1 at [22]–[37].

8 Inland Revenue | Te Tari Taake *Commissioner's Statement: The Disputes Resolution Process and Fair Trial Rights* (CS 20/04, 22 July 2020) at [4]–[5].

[19] On 18 April 2018, Mr Tully and an IRD solicitor met with Mr Parore's counsel. Mr Tully's evidence is that Mr Parore's counsel indicated he would take instructions on a without prejudice settlement offer in relation to the civil dispute. If a settlement had involved shortfall penalties, as was apparently discussed, s 149(5) of the TAA means Mr Parore could not subsequently have been prosecuted. In this Court, counsel for Mr Parore disputed that settlement discussions had taken place.

[20] On 24 April 2018, Mr Tully issued the Commissioner's notice of response (NOR) by sending it to Mr Parore's tax agent.[9] The NOR accepted Mr Parore's proposed adjustments to the GST assessments for the periods ending from 30 November 2014 to 30 September 2017, and to the income tax assessments. However, it rejected Mr Parore's proposed adjustments to the GST assessments for the GST periods ending from 31 May 2011 to 30 September 2014, and set out the Commissioner's assessment of the facts and legal arguments. On 26 April 2018, Mr Parore's tax agent formally rejected the Commissioner's NOR.

[21] On 6 June 2018, a conference between the parties was held as part of the usual civil tax disputes procedure. Mr Tully's evidence is that Mr Parore's tax agent voluntarily provided him with detailed submissions that, in part, developed the defence set out by Mr Parore in his NOPA, and included references to case authorities and IRD's Tax Information Bulletin. On 19 June 2018, Mr Tully sent a subsequent letter to Mr Parore's tax agent, thanking him, Mr Parore and a Mr Alastair McKenzie for their attendance at the 6 June 2018 conference, and noting "[q]uestions were also raised at the conference in respect of potential criminal charges that may be laid by the Commissioner in respect of alleged offending by Mr Parore".

[22] On 26 June 2018, in IRD's computer system, Mr Tully noted that "[a]fter discussions with my [Team Leader] it was agreed to park the disputes at the [c]onference stage and proceed with the prosecution". An email to the same effect was sent by Mr Tully to a member of IRD's Legal and Technical Services the same day. On 27 June 2018, Mr Parore's tax agent sent a letter to Mr Tully in response to the letter of 19 June 2018, seeking further clarification regarding IRD policy, further

---

9 Tax Administration Act, s 89G.

elaborating on submissions made at the conference, and requesting additional information relating to Mr Parore's situation. It also noted that "[IRD was] still addressing whether to prosecute [Mr Parore]".

[23] On 28 June 2018, Mr Tully advised Mr Parore in a letter that the Commissioner had decided to commence prosecution of offences allegedly committed against the TAA, and the civil tax disputes procedure would be parked at the conference stage, pending the outcome of the prosecution.

[24] Mr Tully's evidence is that at no time did he know or intend that his actions would breach any fair trial rights. Mr Goosen, for the Attorney-General, submits the decision to prosecute was made when negotiations had broken down and that the final decision to prosecute was made in June 2018. Mr Weaver submits that cannot be squared with the fact that Mr Parore's tax agent responded to a number of matters raised at the conference the day between the prosecution decision being made and Mr Parore being notified.

*Preparation for the criminal proceedings*

[25] Counsel for Mr Parore submit that, between July and November 2018, the Commissioner's staff worked with the Official Assignee to prepare formal witness statements regarding the application of s 58 of the GST Act, for use in the criminal proceeding. Under cross-examination in the High Court before Gwyn J, Mr Tully accepted that the charges relating to post-bankruptcy periods were framed with reference to Mr Parore's NOPA. Mr Tully also accepted that, after the conference with Mr Parore, the approach to s 58 of the GST Act was discussed at a meeting with staff of the Official Assignee on 27 July 2018, and that a witness statement made by a person holding the delegation of the Official Assignee on 1 November 2018 contained information relating to the obligations of an undischarged bankrupt, effectively directed at Mr Parore's legal defence.

[26] On 31 October 2018, Mr Tully was advised by an IRD solicitor that the prosecution could not commence until the Commissioner considered the approach to

be taken to the District Court judgment of *R v Safi*.[10] That judgment, issued on 21 September 2018, relied on the Supreme Court's decision in *Skinner v R*, which had been decided on 15 February 2016, and related to s 109 of the TAA.[11] Section 109 of the TAA states a disputable decision (which includes an assessment) and all relevant particulars "are deemed to be, and are taken as being, correct in all respects" except in specified proceedings under pts 8 and 8A of the TAA. In *Skinner*, on the basis of the purpose and context of, and case law about, the provision, the Supreme Court held that s 109 does not apply to criminal proceedings, stating:[12]

> [65] Hearing the civil proceedings before the criminal trial would carry the risk of interfering with the fair trial rights of the defendant. As he or she would have the burden of proof in the civil proceedings, he or she would be required to disclose information supporting his or her position and, in effect, disclose his or her defence to the criminal charge in advance of the trial. In a different context, these risks led the Court of Appeal to uphold the adjournment of civil proceedings until after criminal proceedings were completed in *Commissioner of Police v Wei.* In that case, the civil proceedings were applications by the Commissioner of Police for asset forfeiture orders under the Criminal Proceeds (Recovery) Act 2009.
>
> [66] Kós J recorded that the IRD's preferred practice is to amend an assessment (triggering the civil process for disputes in the TAA) after the outcome of the criminal process is known. This accords with the appropriate order as outlined in the *Wei* case. The Commissioner is allowed to do this because the time limits in ss 107 and 108 of the TAA do not apply by virtue of ss 108(2) and 108A(3). The express exceptions to these time bar provisions [appear] to be designed to facilitate the conduct of criminal proceedings before civil proceedings.
>
> **Bill of Rights**
>
> [67] As mentioned earlier, if the Commissioner had reassessed the appellants before their trial, they would have been prevented from advancing a defence that the actus reus of the offence was not made out because their tax returns correctly stated their incomes and their liability for income tax. Such an outcome would have been inconsistent not only with the burden of proof provided for in s 149A(4) of the TAA, but also the appellants' rights under s 25 of the Bill of Rights. These include the right to a fair hearing (s 25(a)), the right to be presumed innocent until proven guilty according to law (s 25(c)) and the right to present a defence (s 25(e)). The Commissioner's administrative act in reassessing the appellants would have, in effect, deemed an element of the offence to be met contrary to the Crown's obligation to prove it.
>
> …

---

10 *R v Safi* [2018] NZDC 19698, (2023) 31 NZTC 26-013.
11 *Skinner v R* [2016] NZSC 101, [2017] 1 NZLR 289.
12 Footnotes omitted.

> [69] Whether the restriction on the defence that could be advanced in these circumstances can be said to "prevent" a defendant from mounting a defence or just to limit his or her options, may be a matter of debate. We do not think it is one that needs to be resolved. The reality is that s 109, if interpreted as the appellants argue it should be, would obviate the need for the prosecutor to prove beyond reasonable doubt an essential element of the offence and restrict the defendant's available defences. We see that as unduly impinging on the right to a fair trial. We do not consider Parliament would have intended this. Interpreting s 109 as applying only in civil proceedings is therefore the preferred interpretation in terms of s 6 of the Bill of Rights.

[27] In *R v Safi,* the defendants had disclosed their factual defence in a civil dispute after being charged criminally.[13] Judge Collins stayed the prosecution, stating:

> [45] The Supreme Court has made clear that if the civil process is triggered before the criminal trial fair trial rights will be in jeopardy. The risk of fair trial rights will move from risk to fact if the defendants in attempting to preserve their position and assets in the civil litigation provide information which discloses the defence to the criminal charges.

[28] The Judge noted that the defendants had disclosed their position in order to preserve their position in the civil proceeding and the Crown would call rebuttal evidence if that defence was advanced, "such evidence only being in the possession of the Crown because it had the opportunity to investigate the defence".[14] Citing the presumption of innocence, the onus of proof being on the Crown, and the non-compellability of a defendant to make a statement or disclose a defence, the Judge determined that the trial there would be presumptively, and in fact, unfair.[15] He considered the stay was warranted because the defendants' fair trial rights had been breached in a fundamental way which prejudiced the defendants and, if the evidence was excluded, the trial would be a farce and an abuse of the judicial process.[16] The civil proceedings could continue.[17]

*The criminal proceedings*

[29] On 26 August 2019, the Commissioner charged Mr Parore with 13 offences of evading or attempting to evade the assessment of GST, and payment of $84,226.05 of

---

13 *R v Safi*, above n 10, at [1]–[4].
14 At [51].
15 At [52].
16 At [54].
17 At [55].

GST, contrary to s 143B(2) of the TAA. The charges covered most of the GST periods that had been the subject of the civil tax disputes procedure.

[30] On 14 July 2020, the trial commenced before Judge Clarkson in the District Court at Auckland. Mr Parore applied under s 147 of the Criminal Procedure Act 2011 to dismiss the charges relating to the period of his bankruptcy, relying on s 58 of the GST Act as he had argued in his NOPA. On 24 August 2020, the Judge granted the application.[18] On 8 March 2021, on appeal to the High Court, Jagose J allowed the Commissioner's appeal and ordered a new trial on the seven dismissed charges in conjunction with the conclusion of the trial on the six remaining charges.[19]

*Stay of the criminal proceedings*

[31] Before the resumed trial concluded, on 16 August 2021, Mr Parore applied for a stay of the criminal proceedings on the basis his fair trial rights had been put at risk or impugned through the interaction of the civil tax disputes procedure and the criminal proceedings. On 14 September 2021, Judge Clarkson granted the stay, after forming precisely the same conclusion as Judge Collins in *R v Safi*.[20] She concluded the loss of the right to silence had been a serious breach of Mr Parore's fair trial rights and a stay was not disproportionate, taking into account the fact the civil tax disputes procedure could continue.[21]

[32] On appeal to the High Court, Wylie J dismissed the Commissioner's appeal against the stay.[22] He referred to the absolute or minimum nature of the right to a fair trial enshrined in s 25 of the Bill of Rights.[23] Citing *Skinner*, he stated that the risk of triggering the civil tax disputes procedure ahead of a criminal prosecution had been recognised for some years in legislation and case law, and acknowledged and accepted

---

18 *Commissioner of Inland Revenue v Parore* [2020] NZDC 16363 at [53].

19 *Commissioner of Inland Revenue v Parore* [2021] NZHC 420, (2021) 30 NZTC 25-001 at [23]. Mr Parore's application for leave to bring a second appeal against the High Court judgment was declined by this Court: *Parore v Commissioner of Inland Revenue* [2021] NZCA 312, (2021) 30 NZTC 25-009 at [23].

20 DC stay judgment, above n 1, at [46] and [60].

21 At [54]–[55] and [57].

22 HC stay judgment, above n 2, at [81].

23 At [48]–[50].

by the Commissioner, including in a statement of the Commissioner dated 22 July 2020 (after the charges were filed).[24] The Judge stated:[25]

> [72] When the Commissioner was dealing with the civil dispute, she had not charged Mr Parore. However, when she subsequently charged him on 26 August 2019, in my judgement, she put Mr Parore in an impossible position. She had used her statutory powers under the TAA to effectively require Mr Parore to disclose his prospective defence, to deprive him of the right to remain silent, to get him to acknowledge the actus reus of certain of the offences and to disclose his hand in relation to other of the offences. When the charges were laid, a fair trial for Mr Parore was already an impossibility. I agree with observations made by Judge Collins in *Safi* that, whether innocently or deliberately, the Commissioner cannot bring about a situation where she is forewarned ahead of trial what defences will be run, what evidence the defence will call and then, being so forewarned, assert that the trial is fair.
>
> [73] In my view, there was prejudice to Mr Parore when the charges were laid because his fair trial rights were then engaged but they had already been compromised.
>
> [74] Looking forward, any trial was going to be unfair and it would be unfair were the trial allowed to go through to its conclusion because Mr Parore's fair trial rights were undermined from the outset.
>
> …
>
> [79] A stay is warranted because the Commissioner breached Mr Parore's fair trial rights from the outset. To grant a stay is not to discipline the Commissioner for that breach; rather it serves to recognise the importance of fair trial rights and the administration of criminal justice in this country generally. There is a clear connection between the misconduct that occurred and the prejudice that would be suffered by Mr Parore were the matter sent back for a retrial. The rights breached were important and the intrusion on fair trial rights was serious. Granting a stay upholds the integrity of the criminal justice system and it may well have a deterrent effect, not only on those who committed the misconduct but on others more generally, in the sense that, as a consequence of the granting of a stay, … they are likely to take greater care in the future.

[33] Mr Parore has sought that the Commissioner pay the legal costs of his defence. The Commissioner has declined to do so.

---

[24] At [55]–[56], citing *Skinner v R*, above n 11, at [64]–[67] and Inland Revenue | Te Tari Taake, above n 8, at [1]–[10].

[25] Footnote omitted.

*The fate of the civil proceedings*

[34] After her stay appeal was dismissed, the Commissioner attempted to recommence the civil tax disputes procedure. However, she did not issue a disclosure notice until 3 February 2022.[26] The civil tax disputes procedure was required to be completed by 9 March 2022.[27] Mr Parore was not required to respond to the disclosure notice until 2 April 2022.[28] The Commissioner applied to the High Court to extend the four-year period on the ground of exceptional circumstances.[29] Harvey J, in the High Court, declined the application.[30] Accordingly, under ss 89H(4) of the TAA, Mr Parore's tax position as set out in his NOPA was deemed to have been accepted by the Commissioner. Accordingly, the Commissioner is precluded from recovering the $55,673.51 of GST she assessed Mr Parore as wrongfully retaining.

*The decision under appeal*

[35] Mr Parore then pursued a civil proceeding against the Attorney-General, seeking public law damages for breach of his rights under the Bill of Rights.[31] On 1 May 2023, Gwyn J in the High Court stated:

(a) She accepted Wylie J's characterisation of the breach.[32] The Commissioner breached Mr Parore's right to silence under s 25(d) of the Bill of Rights. When she charged Mr Parore, the Commissioner placed Mr Parore in an impossible position, having him disclose his prospective defence, depriving him of the right to silence, getting him to acknowledge the actus reus of certain offences, and disclose his hand in relation to others.[33]

---

26 HC extension judgment, above n 3, at [22].

27 The Commissioner must issue a challenge notice to a disputant within four years of the disputant's issue of a notice of proposed adjustment: Tax Administration Act, s 89P. The four-year period was to lapse on 1 March 2022, but was extended to 9 March by a minute of Fitzgerald J: HC extension judgment, above n 3, at [6] and [22].

28 At [22]; and Tax Administration Act, s 89AB(5).

29 At [4].

30 At [69].

31 Judgment under appeal, above n 4, at [1].

32 At [70]–[71].

33 At [71].

(b) The Commissioner knew of the risk of this course of action from 2016, when *Skinner* was issued, reinforced by *Safi* in 2018.[34] The breach of Mr Parore's fair trial rights "was plainly not inadvertent" and, although there was no direct evidence of intention, the Commissioner's decision to lay the charges when she did "was highly reckless at best".[35]

(c) The cause of damage to Mr Parore was the breach of his rights. It is entirely artificial to distinguish between "damage arising from breach of the fair trial right and the impact of the trial process itself".[36]

(d) The Courts' purpose in granting and upholding the stay was not to vindicate Mr Parore's rights or to discipline the Commissioner but to recognise the importance of fair trial rights.[37] Mr Parore had been through the substance of two trials before the stay was granted.[38] The stay was not a sufficient remedy for the breach of his rights.[39]

(e) Mr Parore has not retained GST because, as a matter of law, Mr Parore's NOPA is deemed to be correct and the court is not entitled to look beyond it.[40] Therefore any alleged windfall is not relevant to the remedy.

(f) A declaration was necessary and was ordered in the following terms:[41]

> … that [the Commissioner] has breached Mr Parore's right to silence as guaranteed by s 25(d) of the [Bill of Rights] by filing charges against him after compelling him to provide information and then by continuing that prosecution until it was stayed.

---

34 At [73]–[74].
35 At [79]–[80].
36 At [84].
37 At [89]–[90].
38 At [92].
39 At [93].
40 At [98].
41 At [132(a)].

(g) Mr Parore was awarded damages in the amount of $70,989.86, reflecting Mr Parore's legal costs, plus $5,000 to reflect emotional harm.[42] Mr Parore was also awarded costs.[43]

*The appeal*

[36] The Attorney-General appeals on the basis that the stay of the criminal proceedings against Mr Parore was sufficient vindication of the breach of his rights, having regard to his windfall retention of GST; so he is not entitled to a declaration or public law damages. Mr Parore opposes the appeal.

**A preliminary issue: what right was breached?**

*The rights to silence and a fair trial*

[37] The parties differ on the preliminary issue of what right was breached by the Commissioner. The dispute appears to arise primarily because, in counsel's view, it might make a difference to relief. The Attorney-General submits the breach here was of the right to a fair trial under s 25(a) of the Bill of Rights and there is little room to award public law damages for breach of fair trial rights. Mr Parore maintains that his right to silence under s 25(d) of the Bill of Rights is the relevant right that was breached.

[38] The right implicated here is one of the manifestations of what is generally known as the right to silence. In 1992, in *R v Director of Serious Fraud Office, Ex parte Smith*, Lord Mustill for the House of Lords clarified the nature of the "right of silence" at English common law:[44]

> I turn from the statutes to the "right of silence." This expression arouses strong but unfocused feelings. In truth it does not denote any single right, but rather refers to a disparate group of immunities, which differ in nature, origin, incidence and importance, and also as to the extent to which they have already been encroached upon by statute. Amongst these may be identified:

---

42 At [124] and [131]–[132].

43 At [133]; and *Parore v Attorney-General* [2023] NZHC 1241.

44 *R v Director of Serious Fraud Office, Ex parte Smith* [1993] AC 1 (HL) at 30; and see: Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [23.15.3].

(1) A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions posed by other persons or bodies.

(2) A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions the answers to which may incriminate them.

(3) A specific immunity, possessed by all persons under suspicion of criminal responsibility whilst being interviewed by police officers or others in similar positions of authority, from being compelled on pain of punishment to answer questions of any kind.

(4) A specific immunity, possessed by accused persons undergoing trial, from being compelled to give evidence, and from being compelled to answer questions put to them in the dock.

(5) A specific immunity, possessed by persons who have been charged with a criminal offence, from having questions material to the offence addressed to them by police officers or persons in a similar position of authority.

(6) A specific immunity (at least in certain circumstances, which it is unnecessary to explore), possessed by accused persons undergoing trial, from having adverse comment made on any failure (a) to answer questions before the trial, or (b) to give evidence at the trial.

[39] The right to silence is expressed in art 14.3(g) of the International Covenant of Civil and Political Rights (the Covenant) as the minimum guarantee "[n]ot to be compelled to testify against himself or to confess guilt".[45] In New Zealand, the Bill of Rights, which affirms New Zealand's commitment to the Covenant,[46] states:

**23 Rights of persons arrested or detained**

…

(4) Everyone who is—

(a) arrested; or

(b) detained under any enactment—

for any offence or suspected offence shall have the right to refrain from making any statement and to be informed of that right.

…

---

45 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 19 December 1966, entered into force 23 March 1976).

46 New Zealand Bill of Rights Act 1990, long title.

> **25 Minimum standards of criminal procedure**
>
> Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:
>
> (a) the right to a fair and public hearing by an independent and impartial court:
>
> (b) the right to be tried without undue delay:
>
> (c) the right to be presumed innocent until proved guilty according to law:
>
> (d) the right not to be compelled to be a witness or to confess guilt:
>
> (e) the right to be present at the trial and to present a defence:
>
> (f) the right to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution:
>
> …
>
> **28 Other rights and freedoms not affected**
>
> An existing right or freedom shall not be held to be abrogated or restricted by reason only that the right or freedom is not included in this Bill of Rights or is included only in part.

[40] In *R v Barlow*, Richardson J in this Court noted that s 25(d) of the Bill of Rights guarantees, to those charged, the right not to be compelled to be a witness, but does not expressly guarantee the general immunity in category (1) of Lord Mustill's formulation of the right to silence.[47] He noted that provisions such as the right to a fair hearing in s 25(a), which is not confined to the trial, may implicitly contain other incidents of a right to silence.[48] In the same case, Cooke P stated:[49]

> While there can be no doubt that there is some overlapping between our ss 21, 22, 23, 24, 25 and 27, it does not seem useful in this case to try to identify its extent. Indeed that would be largely an impossible task.

[41] The learned authors *The New Zealand Bill of Rights Act: A Commentary* suggest that, other than s 25(d), aspects of the right to silence that are not captured in s 23(4) are best considered as part of the right to a fair hearing under s 25(a).[50]

---

47 *R v Barlow* (1995) 14 CRNZ 9 (CA) at 30.
48 At 30–31.
49 At 22.
50 Butler and Butler, above n 44, at [23.6.8].

*Judgment under appeal*

[42] The High Court stated:[51]

> [70] The default assessments were equivalent to a decision to continue with the civil process. Mr Parore was then required to file a NOPA if he wished to dispute the default assessments. Mr Parore was compelled by the NOPA process to give evidence against himself. It was wrong for the Commissioner to go back on the decision regarding the civil process and lay criminal charges. By subsequently laying charges, the Commissioner made Mr Parore a witness against himself, in breach of his rights.
>
> [71] I accept Wylie J's characterisation of the breach. It was a breach of the right to silence under s 25(d) of the Bill of Rights. As the Judge observed, when the Commissioner charged Mr Parore on 26 August 2019, she put him in an impossible position. She had used her statutory powers under the TAA to effectively require Mr Parore to disclose his prospective defence (by filing his NOPA and GST returns), to deprive him of his right to remain silent, to get him to acknowledge the actus reus of certain of the offences and to disclose his hand in relation to other of the offences. "When the charges were laid, a fair trial for Mr Parore was already an impossibility."

*Submissions*

[43] Mr Powell and Mr Goosen, for the Attorney-General, submit that, contrary to the High Court finding, s 25(d) of the Bill of Rights was not engaged. Mr Parore was not compelled to be a witness or to confess guilt after he was charged but before he was charged. The Bill of Rights preserves the broader common law expression of the right to silence in s 28. But the Bill of Rights does not itself guarantee that broader expression, which reflects a general freedom to refrain from assisting the state as an expression of personal autonomy; and there are powerful arguments against doing so.[52] In *Skinner*, the Supreme Court acknowledged that disclosure may be required in advance of trial; issuing a default assessment requiring a NOPA to initiate a dispute is not the fair trial issue the Court considered.[53] The variant of the right to silence at issue here, the right to withhold from the prosecution the defence to the charge, is a matter of the fair use of the criminal proceeding, not the fairness of the trial. Wylie J clearly saw the breach of the right to silence as a matter of trial fairness, engaging

---

51 Judgment under appeal, above n 4 (footnotes omitted).

52 Citing EW Thomas "The So-Called Right to Silence" (1991) 14 NZULR 299 at 300; and Glanville Williams "The Tactic of Silence" (1987) 137 NLJ 1107.

53 Citing *Skinner v R*, above n 11, at [65].

s 25(a) of the Bill of Rights, which is the only provision to which any limitation of rights here could relate.

[44] Mr Weaver and Mr Conder, for Mr Parore, submit the Commissioner breached the right to silence as partially codified in s 25(d), though there was a breach of the right to a fair trial as well. What went wrong went to the heart of the proceeding itself, meaning the process was unlawful from beginning to end. The right to silence is a tangible reflection of the right to be presumed innocent. Wylie J referred to the effect of the breach being to deprive Mr Parore of the right to remain silent.[54] Implicitly, he found that s 25(d) was breached. Gwyn J reached the same conclusion. The Commissioner's Statement, discussed by Wylie J, expressly refers to the right to not be compelled to be a witness or to confess guilt under s 25(d).[55] The right under s 25(a) is not a reasonable substitute. What is at issue is Mr Parore's own compelled statements, disclosing legal arguments and his intention, being used as part of the prosecution case. The opportunity for Mr Parore to exercise his right to silence was lost by the onus being on him to file a NOPA. Any decision to lay charges after that breached his right under s 25(d), which is compounded by the Attorney-General's continued failure to acknowledge the violation.

*The right to silence here*

[45] As Lord Mustill stated in the House of Lords in *R v Director of Serious Fraud Office, Ex parte Smith*, the right to silence at common law manifests in a disparate group of general and specific immunities.[56] At their essence is the unfairness of a person being compelled to answer questions when the answers — or failures to answer — may be used against them in a criminal proceeding. The learned authors of *The New Zealand Bill of Rights Act: A Commentary* state:[57]

> The right [against self-incrimination] has at times been controversial and there has been no shortage of critics of its continued recognition and protection. Nonetheless, it is fair to say that the right is the bedrock of the Anglo-American legal tradition and has also been a fundamental principle of the Continental legal tradition.

---

54 Citing HC stay judgment, above n 2, at [72].
55 At [56]; and Inland Revenue | Te Tari Taake, above n 8, at [1].
56 *R v Director of Serious Fraud Office, Ex parte Smith*, above n 44, at 30.
57 Butler and Butler, above n 44, at [23.15.1] (footnotes omitted).

[46] In New Zealand, some of these immunities have been explicitly affirmed in ss 23(4) and 25(d), and are encompassed within s 25(a) of the Bill of Rights. Others remain recognised at common law and their standing and effect are explicitly preserved by s 28 of the Bill of Rights.

[47] Section 23(4) of the Bill of Rights is not relevant here because it relates to persons who are arrested or detained. Mr Parore was neither.

[48] Strictly speaking, Mr Parore, who chose not to give evidence at trial, was also not compelled to be "a witness" or to confess guilt in terms of s 25(d).[58] We do not rule out the possibility that information disclosure might put undue pressure on a defendant to become a witness. But that was not the position here. Mr Parore's defence essentially related to a point of law which was no different whether he was a witness or not.

[49] Mr Parore disclosed his tax returns and his legal defence in his NOPA on 2 March 2018. IRD discussed the approach to the defence with the staff of the Official Assignee on 27 July 2018. Between July and November 2018, the Commissioner's staff worked with the Official Assignee to prepare witness statements regarding the defence, for use in a prosecution. One of the witness statements contained information about the GST obligations of a person that is an undischarged bankrupt, which related to the legal defence Mr Parore had disclosed in the NOPA. Thus prepared, the Commissioner laid the charges on 26 August 2019.

[50] As the Supreme Court recognised in *Skinner*, being required in civil proceedings to disclose information supporting a legal position and effectively disclose a defence to a criminal charge in advance of the trial, carries the risk of interfering with a defendant's fair trial rights.[59] That risk materialised here. The combination of the Commissioner requiring the information and using it in the prosecution was the breach. It meant the criminal trial was inherently unfair.

---

58 *Burke v Superintendent of Wellington Prison* [2003] 3 NZLR 206 (HC) at [43]; and see *Sutherland Estate v Murphy* 2025 ONCA 227 at [48]–[50] for a general discussion of the equivalent provision of the Canadian Charter of Rights and Freedoms.

59 *Skinner v R*, above n 11, at [65].

[51] Judge Collins in *Safi* concluded that similar conduct had breached the defendant's fair trial rights there.[60] That was the basis of Mr Parore's application for a stay in the District Court.[61] That was what Judge Clarkson concluded in granting the stay.[62] So did Wylie J on appeal of the stay in the High Court, who referred to the absolute nature of the right to a fair trial, a fair trial being an impossibility when the charges were laid, and Mr Parore's fair trial rights being "engaged", "compromised", "undermined", and "breached".[63] In the judgment under appeal, Gwyn J accepted Wylie J's characterisation of the breach. We agree. She then referred to it as a breach of the right to silence under s 25(d), which was an error.[64] It was a breach of Mr Parore's right to silence which constitutes, under s 25(a) of the Bill of Rights, a breach of his right to a fair trial.

**The law of remedies, including damages, for breach of the Bill of Rights**

*Initial New Zealand case law*

[52] In 1994, in *Baigent's case*, a full court of this Court determined that damages are an available remedy for breach of the Bill of Rights.[65] Cooke P observed:[66]

> … we would fail in our duty if we did not give an effective remedy to a person whose legislatively affirmed rights have been infringed. In a case such as the present the only effective remedy is compensation. A mere declaration would be toothless. In other cases a mandatory remedy such as an injunction or an order for return of property might be appropriate …

[53] Until this year, public law damages had only been awarded once for breach of the right to a fair trial, by the High Court in 1996 in *Upton v Green*.[67] That was for breaches of the right to a fair hearing and the right to natural justice where an offender was sentenced to imprisonment without being heard. Relatively soon after *Baigent's case*, Tompkins J concluded that, had the offender been heard, there was a

---

60 *R v Safi*, above n 10, at [45].
61 DC stay judgment, above n 1, at [2]–[4].
62 At [46], [54]–[55] and [57].
63 HC stay judgment, above n 2, at [48], [72]–[74] and [79].
64 Judgment under appeal, above n 4, at [71].
65 *Baigent's case*, above n 4.
66 At 676.
67 *Upton v Green (No 2)* (1996) 3 HRNZ 179 (HC).

reasonable possibility a lesser sentence may have been imposed.[68] He awarded damages of $15,000.[69]

[54] In 2005, a full court of this Court in *Brown v Attorney-General* considered a claim for public law damages for breach of the right to a fair trial because legal aid was refused for the purposes of DNA testing that, when it eventually occurred, resulted in the plaintiff's convictions being discharged.[70] The Court upheld Glazebrook J's decision in the High Court that the breach of rights was not established.[71] She noted that the Crown's argument that compensation is not available for breaches of rights during trial would have to be considered by the Court of Appeal, given the decision in *Upton v Green*.[72] She also noted that, "if the remedy of compensation generally is for exceptional cases then this must be even more true if there have been alleged breaches in the trial process".[73]

[55] Four of the five judges of this Court expressed "no view as to when (if ever) compensation or financial relief would be an appropriate remedy for breach of 'fair trial' rights", or how it should be measured if it were appropriate, but acknowledged "the strength of the views expressed by William Young J in his separate judgment".[74] William Young J separately considered that *Upton v Green* "does not … sit easily with the later Privy Council cases".[75] Citing three Privy Council decisions, he noted that:[76]

> On the whole, the Courts have taken the approach that constitutional guarantees as to fair trial are best given effect within the statutory appellate process provided for (and of course by trial Courts).

---

68 At 196.
69 At 197.
70 *Brown v Attorney-General* [2005] 2 NZLR 405 (CA) [*Brown (CA)*].
71 At [86]; and see *Brown v Attorney-General* [2003] 3 NZLR 335 (HC) [*Brown (HC)*].
72 *Brown (HC)*, above n 71, at [116].
73 At [118].
74 *Brown (CA)*, above n 70, at [100]–[101].
75 At [133].
76 At [132], citing: *Hinds v Attorney General of Barbados* [2001] UKPC 56, [2002] 1 AC 854; *Forbes v Attorney General* [2002] UKPC 21, [2003] 1 LRC 350; and *Independent Publishing Co Ltd v Attorney General of Trinidad and Tobago* [2004] UKPC 26, [2005] 1 AC 190.

[56] He noted that, at that stage, no awards of compensation for unfairness at trial had been made in the United Kingdom, Canada, or the United States.[77] He saw that as more significant than European jurisprudence.[78] He considered:[79]

> … the possibility of circumstances in which the unfairness of a trial might seem to call out for monetary relief by way of vindication or compensation but which might not be within any established principle of law warranting an award of damages … are likely to be rare.

[57] He also considered, for six specified reasons, that:[80]

> … New Zealand Courts ought not to award compensation as a remedy for unfair trial process but rather should require such complaints to be raised with either the trial Judge or on appeal.

*Taunoa v Attorney-General*

[58] In 2007, the Supreme Court addressed the general principles for remedies of breaches of the Bill of Rights in *Taunoa v Attorney-General*.[81] The 10 sets of reasons in the Court of Appeal's decision in *Baigent's case*, and the Supreme Court's decision in *Taunoa*, still constitute the most authoritative statements of the New Zealand courts' approach to remedies for breach of the Bill of Rights.[82]

[59] The context in *Taunoa* was breaches of the right of prisoners to be treated with humanity and respect for their inherent dignity under s 23(5) of the Bill of Rights, and the right to not be subjected to torture or cruel treatment under s 9 of the Bill of Rights in respect of one prisoner. McGrath J stated:[83]

> [366] … In determining the appropriate remedy in cases of breach, the court's focus must be on the fundamental nature of those rights in New Zealand's democracy and the need for their affirmation, promotion and protection in accordance with the principles of the Bill of Rights Act. The court's principal objective must be to vindicate the right in the sense of upholding it in the face of the state's infringement. Selection of the appropriate remedy from those available will involve the making of a principled choice in the exercise of judicial judgment. An important concern will be to ensure that the rule of law is reinstated through cessation of any

---

77 *Brown (CA)*, above n 70, at [134].
78 At [138].
79 At [140].
80 At [142].
81 *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429.
82 See: *Baigent's case*, above n 4; and Butler and Butler, above n 44, at [26.7.1].
83 *Taunoa v Attorney-General*, above n 81 (footnotes omitted).

continuing breach and securing the future respect of the state for the right concerned.

[367] … The remedy should be proportionate to the breach but also have regard to other aspects of the public interest. The remedy must also be directed to the values underlying the right.

[368] The court's finding of a breach of rights and a declaration to that effect will often not only be appropriate relief but may also in itself be a sufficient remedy in the circumstances to vindicate a plaintiff's right. That will often be the case where no damage has been suffered that would give rise to a claim under private causes of action and, in the circumstances, if there is no need to deter persons in the position of the public officials from behaving in a similar way in the future. If in all the circumstances the court's pronouncement that there has been a breach of rights is a sufficiently appropriate remedy to vindicate the right and afford redress then, subject to any questions of costs, that will be sufficient to meet the primary remedial objective.

[369] … The courts have responded to breaches of protected rights in relation to search, arrest and detention by developing the common law rule of exclusion of evidence. … This approach to remedies in the criminal law sphere seeks to safeguard rights through a deterrent impact, where protection against future infringement is necessary for the right to be upheld and the remedy to be an effective one. …

[60] Blanchard J stated:

[255] In undertaking its task the Court is not looking to punish the state or its officials. For some breaches, however, unless there is a monetary award there will be insufficient vindication and the victim will rightly be left with a feeling of injustice. In such cases the Court may exercise its discretion to direct payment of a sum of monetary compensation which will further mark the breach and provide a degree of solace to the victim which would not be achieved by a declaration or other remedy alone. … Although it can be accepted that in New Zealand any government agency will immediately take steps to mend its ways in compliance with the terms of a Court declaration, it is the making of a monetary award against the state and in favour of the victim which is more likely to ensure that it is brought home to officials that the conduct in question has been condemned by the Court on behalf of society.

[256] It may be entirely unnecessary or inappropriate to award damages if the breach is relatively quite minor or the right is of a kind which is appropriately vindicated by non-monetary means, such as through the exclusion of improperly obtained evidence at a criminal trial. …

…

[258] When, therefore, a Court concludes that the plaintiff's right as guaranteed by the Bill of Rights Act has been infringed and turns to the question of remedy, it must begin by considering the non-monetary relief which should be given, and having done so it should ask whether that is enough to redress the breach and the consequent injury to the rights of the plaintiff in the particular circumstances, taking into account any non-Bill of Rights Act damages which are concurrently being awarded to the plaintiff. It

> is only if the Court concludes that just satisfaction is not thereby being achieved that it should consider an award of Bill of Rights Act damages. …

[61] Tipping J stated:

> [305] … whether more than a declaration is required to vindicate the breach is to be assessed primarily on the basis of two factors: (1) the nature of the right which has been breached; and (2) the circumstances and seriousness of the breach. I would add three further factors: (3) the seriousness of the consequences of the breach; (4) the response of the defendant to the breach; and (5) any relief awarded on a related cause of action. In the end it is a matter of judgment in the individual case whether a declaration is sufficient to vindicate the breach or whether a sum of money should be added for that purpose. The combined force of the matters I have identified, plus any others relevant to the particular case, should be assessed in making the necessary judgment.

[62] The Supreme Court's reasons in *Taunoa* set out its general approach to public law damages for breach of the Bill of Rights. They did not state explicitly that the reasoning extended to claims for breach of fair trial rights. But the reasoning of Blanchard and Tipping JJ referred to relief granted by trial courts in the context of undue delay, unreasonable search and seizure, and exclusion of evidence in criminal trials.[84] Three of those references made clear that, in assessing remedies for breaches of the Bill of Rights, such relief must be considered in the circumstances, which left open the possibility that public law damages may be necessary in some such cases.[85] Three judges, Elias CJ and Blanchard and Tipping JJ, also referred to two judgments of the House of Lords and the Privy Council where breaches of rights had occurred through actions of judicial or quasi-judicial officers.[86] The rights concerned were to a fair trial and not to be deprived of the right to life, liberty, security of the person and enjoyment of property except by due process of law. Both cases contemplated that public law damages could be awarded in appropriate cases.[87]

---

84 At [238] and [247] per Blanchard J; and at [303], [367]–[369] and [370] per Tipping J. The cases referred to are *Martin v Tauranga District Court* [1995] 2 NZLR 419 (CA); *Hawley v Bapoo* (2005) 76 OR (3d) 649 (ONSC); *Link Technology 2000 Ltd v Attorney-General* [2006] 1 NZLR 1 (CA); *R v Shaheed* [2002] 2 NZLR 377 (CA); and *R v Jefferies* [1994] 1 NZLR 290 (CA).

85 See: *Martin v Tauranga District Court*, above n 84, at 427–428; *Hawley v Bapoo*, above n 84, at [122]; and *Link Technology 2000 Ltd v Attorney-General*, above n 84, at [34].

86 *Taunoa v Attorney-General*, above n 81, at [109] per Elias CJ; at [233], [245] and [258] per Blanchard J; and at [313] per Tipping J. The cases referred to are *Regina (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14, [2005] 1 WLR 673; and *Maharaj v Attorney-General of Trinidad and Tobago (No 2)* [1979] AC 385 (PC).

87 *Regina (Greenfield) v Secretary of State for the Home Department*, above n 86, at [6]; and *Maharaj v Attorney-General of Trinidad and Tobago (No 2)*, above n 86, at 398–399.

*New Zealand case law since Taunoa*

[63] In 2014, in *Currie v Clayton*, this Court held, in an appeal from a strike out application, that it was arguable a breach of the right to a fair trial under the Bill of Rights through non-disclosure by a Crown prosecutor gave the respondents a claim for public law damages.[88] However, the Court stated:[89]

> [82] Compensation will normally only be appropriate where the rights cannot be vindicated by means other than the award of compensation, for example where the breach of the right has resulted in some sort of irreparable harm. Those who have been through the criminal process and have had their NZBORA rights vindicated through remedies such as exclusion of evidence or a stay of prosecution will find it difficult to obtain a further remedy of compensation.

[64] The Court noted that no concluded view has been reached on the availability of damages for compensation in this context, but quoted the obiter comments in *Brown* of William Young J in the Court of Appeal and Glazebrook J in the High Court.[90]

[65] In 2015, in relation to breach of the right to be secure against unreasonable search and seizure in *Attorney-General v Van Essen*, this Court surveyed public law damages awards, commenting:[91]

> [106] … [I]n most cases in which damages are eventually awarded, the conduct concerned has involved physical restraint, direct infliction of physical harm, or a prolonged or significant deprivation of liberty. …
>
> [107] Conversely there are very few cases in which public law damages have been awarded where no physical damage or interference with liberty has occurred. Where damages have been awarded in such cases, this has typically been to reflect equivalence with tortious claims, or on the basis of clear pecuniary loss arising directly from the breach of the right itself. …

[66] In 2018, in relation to illegal search and surveillance in *Dotcom v Attorney-General*, this Court summarised the leading judgment for the majority in *Taunoa*, by Blanchard J, as the correct approach to remedies for breaches of the Bill of Rights. The following aspects are relevant to this appeal:[92]

---

88 *Currie v Clayton* [2014] NZCA 511, [2015] 2 NZLR 195 at [90].
89 Footnotes omitted.
90 At [84]–[85], citing *Brown (CA)*, above n 70, at [142] and *Brown (HC)*, above n 71, at [118].
91 *Attorney-General v Van Essen* [2015] NZCA 22, (2015) 10 HRNZ 155 (footnotes omitted).
92 *Dotcom v Attorney-General* [2018] NZCA 220, [2018] NZAR 1298 at [30] (footnotes omitted), citing *Taunoa v Attorney-General*, above n 81, at [253]–[256], [258]–[259] and [263]–[265].

(a) The Court must provide an effective remedy: taken overall, the remedy or remedies must be sufficient to deter and also to vindicate.

(b) The purpose of a monetary award was not to punish the State or its officials: monetary awards would be made to ensure sufficient vindication of, and solace to, the victim.

(c) If those outcomes were achieved by damages awarded under other available private causes of action, *Baigent* damages may be "entirely unnecessary or inappropriate".

[67] The learned authors of *The New Zealand Bill of Rights Act: A Commentary* suggest that four key words, and associated themes, feature in these and other cases about remedies: "appropriate", "effective", "proportionate", and "vindication".[93] These themes reflect the general requirement on courts to use their discretion to calibrate remedies that are effective to vindicate the relevant right, appropriately and proportionately in the circumstances — taking into account the seriousness and nature of the particular breach of the particular right of the particular right-holder.

*Overseas jurisprudence*

[68] The decision of the Privy Council in *Maharaj v Attorney-General of Trinidad and Tobago (No 2)* was applied in *Baigent's case*.[94] It concerned a barrister who was imprisoned for seven days for contempt of court. The Judge had not "[made] plain to him the particulars of the specific nature of the contempt" and therefore had "failed to observe a fundamental rule of natural justice".[95] The relevant provision of the Constitution of the Republic of Trinidad and Tobago provided that "the right of the individual to life, liberty, security of the person and enjoyment of property" was not to be deprived from a person "except by due process of the law".[96] The majority of the Privy Council held that a breach of the fundamental human right to a legal system that is fair was established and the barrister was entitled to an award of damages.[97] Errors in procedure that would breach the human right to a fair legal system were thought likely to be rare.[98]

---

93 Butler and Butler, above n 44, at [26.7.2].

94 *Maharaj v Attorney-General (No 2)*, above n 86; and *Baigent's case*, above n 4, at 677, 692, 700, 704, 715 and 718.

95 *Maharaj v Attorney-General (No 2)*, above n 86, at 391.

96 Constitution of the Republic of Trinidad and Tobago, s 1(1) (now s 4(a)).

97 *Maharaj v Attorney-General (No 2)*, above n 86, at 398–399.

98 At 399.

[69] In *Brown*, William Young J emphasised the dissent by Lord Hailsham in *Maharaj*, who noted the difficulty of distinguishing between a mere judicial error and a deprivation of due process that would attract a right of compensation.[99] The passage William Young J quoted from the subsequent Privy Council judgment of *Independent Publishing Co Ltd v Attorney-General of Trinidad and Tobago* emphasised that the majority's point in *Maharaj* was that:[100]

> Where … there was no avenue of redress … from a manifestly unfair committal to prison then, despite Lord Hailsham's misgivings on the point, one can understand why the legal system should be characterised as unfair.

But there was a right of appeal there.[101]

[70] The leading case on damages for breach of fair trial rights in the United Kingdom is that of the House of Lords in *Regina (Greenfield) v Secretary of State for the Home Department*.[102] The context there, however, is that s 8 of the Human Rights Act 1998 (UK) confers a discretion to award damages as a remedy for breaches of rights, if it has taken account of other relief or remedies and consequences, and the award is necessary to afford "just satisfaction".[103] In that case, the appellant was serving a two-year sentence of imprisonment and was charged with a drugs offence. A deputy controller heard the charge and the appellant, having been denied legal representation, was ordered to serve another 21 days of imprisonment. The proceedings involved the determination of a criminal charge, the deputy controller was not an independent tribunal, and the appellant had been denied legal representation of his choosing, which breached art 6 of the European Convention on Human Rights.[104]

---

99 *Brown (CA)*, above n 70, at [130]–[133], citing *Maharaj v Attorney-General (No 2)*, above n 86, at 409–410.

100 *Brown (CA)*, above n 70, at [132], citing *Independent Publishing Co Ltd v Attorney General of Trinidad and* Tobago, above n 76, at [88].

101 *Independent Publishing Co Ltd v Attorney General of Trinidad and Tobago*, above n 76, at [92].

102 *Regina (Greenfield) v Secretary of State for the Home Department*, above n 86. It was applied in *Regina (Faulkner) v Secretary of State for Justice* [2013] UKSC 23, [2013] 2 AC 254.

103 See: Juliet Philpott "Damages Under the United Kingdom's Human Rights Act 1998 and the New Zealand Bill of Rights Act 1990" (2007) 5 NZJPIL 211 at 212 and 235–238.

104 *Regina (Greenfield) v Secretary of State for the Home Department*, above n 86, at [1]; and see: Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953) [ECHR]. The articles of the ECHR are incorporated into the Human Rights Act 1998 (UK) in sch 1. Article 6 concerns the right to a fair trial.

[71] The House of Lords noted that a great majority of European Court of Human Rights (the European Court) cases had treated the finding of a violation to be just satisfaction in itself and the outcome of a breach of art 6 would often be a quashing of the decision and an order for a retrial, which will vindicate the victim's right.[105] The European Court had departed from that principle only where it found "causal connection between the violation found and the [pecuniary] loss" — where it "has on the whole been slow to award such compensation" — or general damages.[106] An award of damages was held to not be necessary because the right was vindicated on appeal by a finding in his favour based on a concession by the Secretary of State.[107]

[72] In Canada, the leading case on damages for breach of fair trial rights is *Henry v British Columbia (Attorney General)*.[108] In that case, the appellant had been imprisoned for almost 27 years for sexual offending. All of his convictions were then quashed. The appellant alleged that the Crown had failed in relation to disclosure before, during and after his trial, and pleaded a number of causes of action, including one predicated on ss 7 and 11(d) of the Canadian Charter of Rights and Freedoms (the Charter).[109] The Attorney General of British Columbia sought to strike it out.[110] The majority of the Supreme Court of Canada held that a cause of action for Charter damages exists where:[111]

> … the Crown, in breach of its constitutional obligations, causes harm to the accused by intentionally withholding information when it knows, or would reasonably be expected to know, that the information is material to the defence and that the failure to disclose will likely impinge on the accused's ability to make full answer and defence.

[73] The appellant's claim as pleaded — which alleged "very serious instances of wrongful non-disclosure that demonstrate a shocking disregard for his [Charter] rights" — would meet the threshold established.[112]

---

105 At [8]–[9].
106 At [11]–[12].
107 At [26].
108 *Henry v British Colombia (Attorney General)* 2015 SCC 24, [2015] 2 SCR 214.
109 At [1] and [21]. Section 7 provides that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice", and s 11(d) provides that "[a]ny person charged with an offence has the right … to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal".
110 At [21].
111 At [82].
112 At [81].

[74] McLachlin CJ and Karakatsanis J, in the minority, held that proof of intention is not required.[113] In particular, they noted that, as alleged, the "fairness of [the appellant's] trial was directly and seriously compromised by the breach of his s 7 right to full disclosure".[114] In the appellant's circumstances, they stated that an award of Charter damages may help to publicly vindicate a serious violation of Charter rights, which would show "the importance of respecting [Charter] rights in order to guarantee trial fairness".[115]

*Attorney-General v Morrison*

[75] On 13 June 2025, in *Morrison*, this Court held that damages are available for breach of fair trial rights in relation to significant deficiencies in criminal disclosure.[116] In that case, as here, the Crown proceeded on the basis that public law damages are available at law.[117] This Court agreed, responding to each of the reasons to the contrary that had been put forward by William Young J in *Brown* and noting that New Zealand jurisprudence has evolved since then.[118] The Court considered public law damages "are unlikely to be the 'remedy of choice' where fair trial rights have been breached",[119] observing:[120]

> (b) Awards (generally very modest) of public law damages are likely to be available in only a very limited number of cases, involving very serious breaches of a defendant's fair trial rights. Most breaches are likely to be remedied by trial and appellate courts using criminal law procedures, rather than through an award of damages. …

[76] This Court upheld the High Court's awards of $10,000 each in public law damages to two respondents in that case, as necessary to vindicate the significant and unprecedented breaches of their rights to a fair trial under s 25(a), highlighting that Crown failures to comply with disclosure obligations will not be tolerated by the courts.[121]

---

113 At [137].
114 At [114].
115 At [115].
116 *Attorney-General v Morrison*, above n 5, at [44].
117 At [40].
118 At [43].
119 At [43(f)], citing Butler and Butler, above n 44, at [35.6.24].
119 *Attorney-General v Morrison*, above n 5, at [43(b)].
120 At [43(b)].
121 At [89]–[93].

**Submissions on remedies**

[77] Mr Powell and Mr Goosen submit the primary remedy for breaches of criminal fair trial rights is be found in the criminal process itself. If it is necessary to look beyond that, all the circumstances must be taken into account to ensure the remedy is not disproportionate. Here, although the Crown did not further appeal the stay decision, the stay itself was not warranted and the trial was capable of proceeding fairly. No further remedy could be justified. The right to silence arising in this case was not fundamental. The limiting of the right was not reckless or egregious. There was no need for Mr Parore to seek a declaration because Wylie J in the High Court had already found that his right to silence and fair trial rights had been breached.[122] If a declaration was appropriate it should be correct as to the nature of the right breached. In relation to damages, Mr Powell and Mr Goosen submit:

(a) Public law damages are a residual, discretionary and exceptional remedy available only in egregious cases. The primary function of public law damages is to provide an effective remedy to vindicate the right, not to compensate, and, if vindication requires the state to make good losses caused by the breach, the losses would have to be directly connected to the breach.

(b) Contrary to the High Court's finding,[123] Mr Parore did not go through the substance of two trials before a stay was granted. The breach of his right did not cause the damage claimed by Mr Parore of incurring legal expenses and suffering stress.

(c) The undisputed evidence for the Crown was that Mr Parore collected and retained for himself a windfall of tax that was collected on behalf of the state. It is technically correct that the Commissioner is precluded from recovering this. But it is relevant to the exercise of the Court's discretion as to whether he should be entitled to public law damages.

---

122 Citing HC stay judgment, above n 2, at [71]–[74].
123 Citing judgment under appeal, above n 4, at [92].

(d) The High Court also erred in awarding indemnity costs as public law damages in relation to a criminal case. Prosecutions should not be discouraged by the risk of indemnity costs if there is found to be a breach of fair trial rights. There is no jurisdiction under the Costs in Criminal Cases Act 1967 (the CCCA) to award costs where a prosecution has been stayed,[124] and full indemnity costs under that Act are likely reserved for exceptional cases involving bad faith or other gross misconduct.[125]

[78] Mr Weaver and Mr Conder submit an effective remedy must repair the harm suffered in a practical sense, and affirm the right and denounce the breach in an appropriate manner. The stay decision was prospective, protecting Mr Parore from future prejudice, and was focussed on the integrity of the criminal justice system, not the vindication of his rights. The civil tax disputes procedure required Mr Parore to admit the actus reus of some offences and provide his defence in advance to others. The Commissioner's actions were highly reckless because she knew the legal risk, she does not disclose the legal advice she received, and it was not reasonable to proceed. She deployed a "plethora of rebuttals",[126] has not apologised, and continues to assert the right to silence was never breached and there could have been a fair trial. In relation to damages:

(a) Public law damages are available whenever they are necessary for the victim to have effective relief, including when direct financial or emotional harm has resulted from the breach. None of the financial and emotional harm to Mr Parore from the 28-month criminal process and two-day trial, as a result of the unlawful decision to prosecute, was remedied by the stay.

(b) The tortious approach to causation can be a useful guide.[127] It requires consideration both of whether the defendant contributed to the loss and

---

124 Citing *D v R* HC New Plymouth T3/96, 24 September 1997 at 5–6.
125 Citing *R v Mather* HC Christchurch T33/97, 26 July 1999 at 10.
126 Citing judgment under appeal, above n 4, at [77].
127 Citing *Attorney-General v Van Essen*, above n 91, at [82].

whether he should be held liable for it.[128] Mr Parore needs to be put in the position he was in before the breach of rights occurred for there to be an effective remedy.

(c) Mr Parore is, and must be presumed, innocent. The Court cannot presume his guilt and treat the breach of his rights as some kind of advantage. He has not received a windfall from the breach of his rights. That would ignore the provisions of the TAA which deem the tax position in the NOPA to be correct. The Commissioner's officials sat on their hands regarding recovering the alleged retained tax, until the clock ran down. The $55,673.51 figure is incorrect because it relates only to the tax on outputs, not input tax credits or expenses.

(d) Costs are available as damages in appropriate cases and the Court is not restricted by the principles that usually limit the extent of costs between litigants, including availability under the CCCA. The CCCA regime specifically invites considerations of whether a prosecution was brought improperly, against clear evidence, or is otherwise in bad faith. And the CCCA does not exclude the jurisdiction to award costs in criminal cases, as s 364 of the Criminal Procedure Act 2011 makes clear. In *Van Essen*, indemnity costs were awarded up to the point in time where the Crown conceded a declaration was appropriate.[129] A defendant whose rights have been breached should not have to choose between ending the breach or obtaining an effective remedy for their wasted expenses. Indemnity costs in Bill of Rights cases may be more easily available, as they were in *Van Essen*.

---

128 Citing *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19, [2002] 2 AC 883 at [69]–[73].

129 Citing *Attorney-General v Van Essen*, above n 91, at [160].

**What kind of relief was available, appropriate and proportionate?**

*Are damages available for breach of the right to a fair trial?*

[79] The availability of damages was not addressed by the High Court here, because it labelled the relevant right as the right to silence under s 25(d) of the Bill of Rights, not of the right to a fair trial under s 25(a).[130] But the label of the right does not make a substantive difference to whether damages should be available. The breach of the right to silence in this context was a breach of the right to a fair trial.

[80] Consistent with this Court's judgment in *Morrison*, we consider that damages can be available for breach of fair trial rights because:

(a) In *Taunoa*, issued after *Brown*, the Supreme Court determined the general approach to remedies, including damages, for breaches of the Bill of Rights. The reasoning of two judges referred to relief in the context of criminal trials and the reasoning of three judges referred to two judgments of the House of Lords and Privy Council that contemplated public law damages could be awarded for breaches of rights by judicial officers or quasi-judicial officers, including of fair trial rights.

(b) New Zealand cases since *Taunoa* have not ruled out the availability of damages for breach of fair trial rights and this Court, in *Currie*, held such a claim to be arguable, saying:[131]

> Those who have been through the criminal process and have had their [Bill of Rights] rights vindicated through remedies such as exclusion of evidence or a stay of prosecution will find it difficult to obtain a further remedy of compensation.

(c) The Privy Council in *Maharaj* in 1978, the House of Lords in *Regina (Greenfield)* in 2013, and a majority of the Supreme Court of Canada, in *Henry* in 2015, have held that a cause of action for damages

---

130 Judgment under appeal, above n 4, at [71].

131 *Currie v Clayton*, above n 88, at [82] (footnote omitted).

exists in respect of a breach of fair trial rights, depending on the circumstances.[132]

[81] If William Young J's separate judgment in *Brown* in 2005 meant that public law damages should never be awarded as a remedy for unfair trial process, then we respectfully disagree.

[82] The general approach to public law damages, as stated by the Supreme Court in *Taunoa* and in cases both in New Zealand and overseas, effectively overtakes the reluctance of this Court in *Brown* to decide on the availability of damages for breach of fair trial rights. The emphasis in that case law is not to rule out any particular remedy but to take all relevant considerations into account in assessing the remedies which are, after all, discretionary. As McGrath J stated in *Taunoa*, a finding of a breach and a declaration may be a sufficient remedy, where no damage has been suffered that would give rise to a private cause of action and if there is no need to deter officials from behaving in a similar way in the future.[133] As he, Blanchard and Tipping JJ stated in relation to criminal proceedings, other remedial measures such as exclusion of evidence also need to be considered.[134]

[83] The general principles of public law damages stated by *Taunoa* after *Brown* do not suggest that damages are never available for breach of fair trial rights in a criminal context. They require that, for damages to be available, other remedies would have to be insufficient to vindicate the relevant right, appropriately and proportionately, in the circumstances. We accept that where, as here, a breach of the right to silence as a breach of the right to a fair trial in criminal proceedings is corrected by a stay of those proceedings, that remedial measure must be considered and weighed in relation to any claim to remedies for breach of the right, including a claim for damages. That means that a stayed criminal proceeding is an unpropitious context for the award of public law damages. But it is not impossible.

---

132 *Maharaj v Attorney-General of Trinidad and Tobago (No 2)*, above n 86; *Henry v British Colombia (Attorney General)*, above n 108; and *Regina (Greenfield) v Secretary of State for the Home Department*, above n 86.

133 *Taunoa v Attorney-General*, above n 81, at [368].

134 At [256] per Blanchard J; at [300] per Tipping J; and at [369] per McGrath J.

[84] The correct approach to remedies for breaches of the Bill of Rights, including public law damages, is to carefully examine what package of remedies is effective to vindicate the relevant right, appropriately and proportionately in the circumstances — taking into account the seriousness and nature of the particular breach, the particular right and the conduct of the particular right-holder.

*The importance of the right*

[85] As we held above, the right at issue here is a manifestation of the right to silence which manifests, under the Bill of Rights, in the right to a fair trial. We do not accept the Attorney-General's submissions that attempt to downplay the importance of that right as "not fundamental". The right to silence is important, as Wylie J held.[135] It manifests in the Bill of Rights, the long title of which includes its purpose "to affirm, protect, and promote human rights and fundamental freedoms in New Zealand". The Supreme Court and this Court have described the right to a fair trial under s 25(a) of the Bill of Rights as an "absolute" right.[136] In *Taunoa*, McGrath J stated that, in determining remedies for breach of the Bill of Rights, "the court's focus must be on the fundamental nature of those rights".[137] This is an important right.

*The seriousness of the breach*

[86] Next, we examine the seriousness of the Crown's breach of Mr Parore's right. While the Commissioner did not formally appeal the stay, Mr Powell submits in this appeal on Bill of Rights relief that the stay was not warranted on the facts and the trial was capable of proceeding fairly. He submits that proving the offences did not require proving the exact amounts of tax at issue or the admissions elicited from the tax returns filed with the NOPA, so the Commissioner did not obtain any significant evidence from the breach. Mr Parore was not charged because of the breach but because of prior independent evidence he had committed the offences. If shortfall penalties had been imposed by settlement of the civil claim, there would have been no prosecution. Mr Weaver submits that to consider a hypothetical scenario where Mr Parore was

---

135 HC stay judgment, above n 2, at [78]–[79].

136 *R v Condon* [2006] NZSC 62, [2007] 1 NZLR 300 at [77]; and *Clark v Registrar of the Manukau District Court* [2012] NZCA 193, (2012) 9 HRNZ 498 at [23].

137 *Taunoa v Attorney-General*, above n 81, at [366].

charged without having been served with default assessments, would entirely set aside the breach that did occur and invite speculation without evidence.

[87] We accept that the Commissioner was not required to prove the quantum of tax at issue in the criminal proceeding or to adduce the tax returns. IRD had buyer-created GST invoices and it is submitted it also had bank records and its own records. This Court has stated that the actus reus of the offence of evading the payment of tax "can be established by any act or omission (or a combination thereof) that has the effect of evading the payment of tax".[138] It would likely have been possible, though less compelling, for the Commissioner to prove that from her records. She likely did not need the information that had been disclosed in the civil proceedings to prove the actus reus of the alleged offending.

[88] In laying and pursuing the criminal charges against Mr Parore after having received his disclosures in the civil tax disputes procedure, the Commissioner possessed and used information she would not otherwise have had:

(a) The charges directly used information provided by Mr Parore in his civil tax disputes procedure disclosure. As we noted above, it is likely the Commissioner had other evidence with which to found the charges. But that is not demonstrated on the information before us.

(b) Mr Tully accepted under cross-examination that the charges relating to the post-bankruptcy periods were framed with reference to Mr Parore's NOPA. The amounts disclosed in the NOPA for that period align with the charges. But whether the nature of the prosecution may have been different had that information from the civil tax disputes procedure not been disclosed is speculative.

(c) From March 2018, the Commissioner had notice of Mr Parore's defence that being bankrupt meant he was an incapacitated person under s 58 of the GST Act. From then, IRD were able to consider how to combat the legal defence disclosed, until they were ready to lay the

[138] *R v G (CA250/2013)* [2013] NZCA 146 at [58].

> charges in late August 2019. But Mr Parore's defence was a legal defence, relating to the interpretation of s 58 of the GST Act. We do not comment on the merits of the defence. But we do not accept that a witness statement about the legal obligations of an undischarged bankrupt would be helpful to a court considering those legal obligations, which are a matter of submission rather than evidence.

[89] As the Supreme Court made clear in *Skinner*, that situation carries the risk of interfering with a defendant's fair trial rights, which materialised here. The combination of the Commissioner requiring the information and using it in the prosecution in laying and framing the charges and prematurely disclosing the legal defence, was a breach of those rights. The combination was a breach, and meant the criminal trial was unfair as Wylie J held.[139] So we do not disagree with Wylie J that the stay was warranted,[140] but for somewhat different reasons. And the Crown did not appeal that decision.

[90] That leaves the question of how serious the breach of fair trial rights was, in light of the fact of the stay. Of course, any breach of fair trial rights, which have been described as absolute, is a serious matter. The Commissioner used Mr Parore's disclosed information to frame the charges and had more time than she otherwise would have to consider his legal defence. Mr Parore was put to significant time and financial effort in mounting his defence. But a defence must inevitably be disclosed at trial and is not infrequently required to be disclosed ahead of trial. It is relevant that the defence prematurely disclosed here was a legal defence, which engages the various forms of the right to silence less directly than premature disclosure of a factual defence as occurred in *Safi*. As noted above, there is a distinct limit to the extent to which evidence is relevant to combatting a legal defence. And the stay prevented the real mischief of an unfair trial from proceeding. So, as at the date of the stay, our assessment is that the breach of Mr Parore's fair trial rights was at the lower end of the scale of seriousness.

---

139 HC stay judgment, above n 2, at [72]–[74].
140 At [75]–[79].

*The Crown's ongoing position*

[91] Counsel for Mr Parore submits the Attorney-General's continuing determination to argue that a stay was not warranted is relevant to whether a stay was sufficient to vindicate Mr Parore's right to a fair trial or whether a declaration or damages are also required. Mr Conder submits it could be viewed as potentially aggravating because the Crown, previously through the Commissioner and now through the Attorney-General, has been, and still is, reluctant to fully recognise the seriousness of the breach of Mr Parore's right to silence. Mr Powell submits that the stay was a powerful vindication of the right to a fair trial given that the Crown forfeited the right to bring Mr Parore to trial.

[92] We observe, as McGrath J stated in *Taunoa*:[141]

> [366] … In determining the appropriate remedy in cases of breach, the court's focus must be on the fundamental nature of those rights in New Zealand's democracy and the need for their affirmation, promotion and protection in accordance with the principles of the Bill of Rights Act. The court's principal objective must be to vindicate the right in the sense of upholding it in the face of the state's infringement. Selection of the appropriate remedy from those available will involve the making of a principled choice in the exercise of judicial judgment. An important concern will be to ensure that the rule of law is reinstated through cessation of any continuing breach and securing the future respect of the state for the right concerned.

[93] It is clear that the legal risk that materialised here was identified by the Commissioner, on the basis of *Safi* which relied on *Skinner*. In submitting that the Commissioner's prosecution was not reckless, Mr Powell submits the Commissioner decided to prosecute in good faith, having taken legal advice from the Crown Law Office | Te Tari Ture o te Karauna about the effect of *Safi*. But the Attorney-General has not waived privilege in the content of that advice and does not disclose it. Mr Powell submits it should be possible to assert that legal advice was taken, if that is relevant, without disclosing the content of the advice. All we are left with is the fact that legal advice was sought and obtained. That neither supports the Crown's good faith nor is the basis for inferring its bad faith. It only demonstrates that some sort of legal risk was identified and considered. The Court does not know

---

141 *Taunoa v Attorney-General*, above n 81.

whether the Commissioner was advised to go ahead with the prosecution or not. Inferring, or speculating, about that would involve going behind the privilege which has not been waived, which the Court will not do. And, in the absence of understanding the nature of the legal advice, it is difficult to put weight on Mr Tully and his Team Leader saying they formed the view that *Safi* was distinguishable.

[94] Mr Powell submits that the Supreme Court in *Skinner* had referred only to a situation where the civil tax disputes procedure is completed prior to criminal proceedings, rather than where the civil tax disputes procedure is adjourned prior to criminal proceedings. We also understand him to submit that the Supreme Court did not discuss the fair trial issue identified by Judge Collins in *Safi* where the taxpayer has to issue a NOPA to dispute a default assessment, but was rather concerned more generally with the effect of liability in civil proceedings where the taxpayer bears the onus of proof.

[95] If those are the submissions, we consider they are based on far too narrow a view of *Skinner*, which we do not accept. The Supreme Court in *Skinner* held that fair trial rights could be compromised by civil proceedings preceding a prosecution because the taxpayer may have to disclose information and, in effect, their defence in advance of trial.[142] The point holds whether or not the civil tax dispute had been settled. The risk that the requirement on a taxpayer to provide information through a NOPA compromises fair trial rights in subsequent criminal proceedings is clearly related to the risk identified in *Skinner*. We consider the Supreme Court's decision in *Skinner* in 2016, particularly in the passages we have quoted above at [25], clearly identified the human rights risk of criminal proceedings following disclosure in civil proceedings or procedures.

[96] On the evidence before us, it is difficult to conclude the Commissioner's decision was highly reckless, as urged on us by Mr Weaver. We prefer not to use the language of recklessness at all. On the balance of probabilities, we do not accept the evidence demonstrates the Commissioner acted in bad faith. But we consider the Commissioner's decision to proceed with the prosecution was ill-advised. In

---

142 *Skinner v R*, above n 11, at [65].

deciding to prosecute in the circumstances here, the Commissioner did not take sufficient account of the implications for Mr Parore's right to silence manifested in his right to a fair trial under the Bill of Rights.

*Is a declaration or damages appropriate?*

[97] The stay prevented further damage to Mr Parore's rights from materialising. But, as Wylie and Gwyn JJ both held, the Courts' purpose in granting and upholding the stay was to uphold the integrity of the criminal justice system, not to discipline the Commissioner or vindicate Mr Parore's rights.[143] There has been no apology for the breach. On balance, we accept the stay was not sufficient to vindicate this important right. Granting a declaration was appropriate and proportionate. It reinstates the rule of law by marking the breach.

[98] We do not accept Mr Powell's submission that a declaration undermines the value of the court ruling in relation to the stay. The stay decision addresses a different objective than the vindication of rights. Mr Parore's claim for relief for the breach of his rights was not before the High Court considering the stay. And the Crown still disputes the need for the stay.

[99] As noted above, we consider the High Court erred in referring to s 25(d) of the Bill of Rights in its declaration. We set it aside and declare that the Commissioner breached Mr Parore's right to silence, thereby breaching his right to a fair trial under s 25(a) of the Bill of Rights.

[100] However, we have concluded that the seriousness of the breach at the time of the stay is at the lower end of the scale. The declaration performs the public function of vindicating Mr Parore's right in these circumstances. The Commissioner has changed the guidance about how to proceed in these sorts of circumstances, ensuring there is unlikely to be a repeat of this situation. This Court observed in *Morrison* that public law damages are unlikely to be the remedy of choice where fair trial rights have

---

[143] HC stay judgment, above n 2, at [79]; and judgment under appeal, above n 4, at [89]–[90]. The Supreme Court has been clear that in criminal proceedings, the basis for a stay being granted is where state misconduct will prejudice the fairness of a defendant's trial or "undermine public confidence in the integrity of the judicial process if a trial is permitted to proceed": *Wilson v R* [2015] NZSC 189, [2016] 1 NZLR 705 at [40].

been breached, and are likely to be appropriate in only a very limited number of cases that involve very serious breaches of a defendant's fair trial rights.[144] In light of that, and the factual circumstances here, we do not consider it is appropriate to award public law damages to vindicate Mr Parore's right. His right is fully vindicated by the declaration. Given that, we do not need to consider whether Mr Parore's so-called "windfall" of tax, which the Commissioner is deemed to have accepted and is precluded from collecting, should have affected any damages awarded to him.

**Result**

[101] The appeal is allowed.

[102] We set aside the High Court judgment.

[103] We make a declaration that the Commissioner of Inland Revenue breached Mr Parore's right to silence, thereby breaching his right to a fair trial under s 25(a) of the New Zealand Bill of Rights Act 1990.

[104] The respondent must pay costs to the appellant for a standard appeal on a band A basis together with usual disbursements.

Solicitors:
Crown Law Office | Te Tari Ture o te Karauna, Wellington for Appellant
Holland Beckett, Tauranga for Respondent

144 *Attorney-General v Morrison*, above n 5, at [43].