

IN THE SUPREME COURT OF NEW ZEALAND  
I TE KŌTI MANA NUI O AOTEAROA

SC 88/2025

**BETWEEN**            **Maxwell Richard Allen Parore**  
                                 Appellant

**A N D**                **Attorney-General**  
                                 Respondent

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**Synopsis of Argument of Appellant**

Dated: 16 February 2026

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Counsel certify these submissions comply with The Supreme Court Submission  
Practice Note 2023.

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## Synopsis of Argument for Appellant

### May It Please the Court

- 1.1 Under the Tax Administration Act 1994 (TAA), the Commissioner of Inland Revenue may make a reassessment of a taxpayer's tax position, which becomes binding if the taxpayer does not provide a response. Where the taxpayer is at risk of evasion charges, the requirement to respond risks undermining the taxpayer's right to silence. This risk has been recognised by the Commissioner and the Courts for some time.<sup>1</sup>
- 1.2 Despite this recognition, this risk became fact for the Appellant, Mr Parore, who was charged with tax evasion after being required to answer tax reassessments. The District Court,<sup>2</sup> the High Court,<sup>3</sup> and the Court of Appeal<sup>4</sup> have all held that this misconduct breached the New Zealand **Bill of Rights** Act 1990. As a result, the criminal proceeding was stayed, and a declaration made confirming the breach.
- 1.3 This appeal concerns whether an award of damages should also have been made to Mr Parore to compensate him for the harm he suffered in breach of his rights. Mr Parore submits that awards under the Bill of Rights should compensate actual tangible harm, and, in any event, the misconduct in this case both warrants and requires a financial award.
- 1.4 On this basis, Mr Parore seeks that the Court restore the High Court's award of damages, which was overturned by the Court of Appeal, and order the Attorney-General to pay his costs in seeking a remedy under the Bill of Rights.

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<sup>1</sup> *Skinner and Rowley v R* [2016] NZSC 101.

<sup>2</sup> *CIR v Parore* [2020] NZDC 16363 [DC 147 Decision].

<sup>3</sup> *CIR v Parore* [2021] NZHC 3405, (2021) 30 NZTC 25-013 [HC Stay Decision] *CIR v Parore* [2022] NZHC 488, (2022) 30 NZTC 25-015 [HC Extension Decision]; *Parore v Attorney-General* [2023] NZHC 1010, (2023) 31 NZTC 26-003 [HC Damages Decision].

<sup>4</sup> *Attorney-General v Parore* [2025] NZCA 328 [CA Decision].

## 2. Background

- 2.1 This matter arises from an investigation into Mr Parore's GST compliance. In the course of that investigation, the Commissioner issued default GST assessments against Mr Parore. These assessments required him to file a Notice of Proposed Adjustment (**NOPA**), or the default assessments would be treated as correct and could not be challenged. On 2 March 2018, Mr Parore filed a NOPA.<sup>5</sup> From this point, counsel submits, the possibility of criminal charges was foreclosed to the Commissioner.
- 2.2 Mr Parore registered for GST from 1 April 2005 via his tax agent.<sup>6</sup> The GST registration disclosed Mr Parore had no prior experience with GST. Therefore his level of difficulty with compliance was high and that he would file GST returns manually, on a 6 monthly basis.<sup>7</sup> Thereafter the Commissioner mailed paper-copies of GST returns for filing to Mr Parore his P.O Box every 6 months.<sup>8</sup> Mr Parore duly completed his GST return(s), filed and paid GST at his local branch of Westpac Bank for the 6 monthly GST periods ended between March 2006 to March 2011.
- 2.3 On **2 April 2009** Mr Parore was adjudicated bankrupt in respect of plumbing company debt.<sup>9</sup>
- 2.4 At trial, a letter dated **8 April 2009** was produced by the Commissioner sent to a Te Atatu residential address different from the postal address of Mr Parore recorded by the Commissioner.<sup>10</sup> The letter stated the Commissioner had cancelled his previous IRD/GST number and issued him a new IRD number, nothing was mentioned about any GST obligations. No evidence was produced that Mr Parore ever received this

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<sup>5</sup> [[301.0324]]

<sup>6</sup> [[301.0083]]

<sup>7</sup> [[302.0513]] (at 0 to 35), [[302.0514]] (at 0 to 35), [[302.0515]] (at 0 to 35), [[302.0516]] (at 0 to 35)

<sup>8</sup> [[302.0518]] (at 0 to 35), [[302.0519]] (at 0 to 35), [[302.0520]] (at 0 to 35), [[302.0521]] (at 0 to 35), [[302.0522]] (at 0 to 35), [[302.0523]] (at 0 to 35), [[302.0524]] (at 0 to 35), [[302.0525]] (at 0 to 35), [[302.0526]] (at 0 to 20)

<sup>9</sup> [[301.0087 - 0091]]

<sup>10</sup> [[301.0102]]

letter.<sup>11</sup> Upon cancellation of Mr Parore's GST registration, the Commissioner stopped posting GST returns for Mr Parore to file.<sup>12</sup>

- 2.5 Mr Parore remained working as a real estate agent. Despite not receiving further GST returns to file, Mr Parore kept filing GST returns and paying GST by adapting the paper copies of his pre-bankruptcy GST return for each subsequent GST return period, for a further two years. Mr Parore continued to use his pre-bankruptcy IRD/ GST registration number for each GST return he filed and paid.<sup>13</sup>
- 2.6 The Commissioner accepted and processed each GST return filed/paid under the cancelled GST registration without further notice to Mr Parore. No statements of account or return acknowledgement letters were sent to Mr Parore.<sup>14</sup>
- 2.7 On **2 May 2011**, the Official Assignee contacted the Commissioner making a request that Mr Parore's GST registration be cancelled on a backdated basis, from **7 May 2010**.<sup>15</sup> The request was actioned.
- 2.8 Mr Parore manually filed and paid his last GST return under his pre-bankruptcy GST number for the period ended 31 March 2011 on **13 May 2011**.<sup>16</sup>
- 2.9 Mr Parore completed his Statement of Affairs on **30 September 2011**, the Official Assignee (**OA**) responded by asking for an application for self-employment.<sup>17</sup> Mr Parore swore an affidavit in support of his application for self-employment.<sup>18</sup> During January 2012, Mr Parore met with Carla

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<sup>11</sup> DC 147 Decision at [18].

<sup>12</sup> [[302.0523]] (at 0 to 35)

<sup>13</sup> [[302.0524]] (at 5 to 35)

<sup>14</sup> [[302.0525]] (at 0 to 10)

<sup>15</sup> [[301.0393]]

<sup>16</sup> [[301.0392]]

<sup>17</sup> [[301.0191 – 0209]]

<sup>18</sup> [[301.0217]]

Freda from the office of the OA to discuss the application<sup>19</sup>. Ms Freda advised Mr Parore in writing that the OA's consented to self-employment, subject to certain conditions being agreed.<sup>20</sup> There was no mention of GST obligations. The OA did not receive the signed consent form back from Mr Parore, thus consent to self-employment, though approved, was not formally granted to Mr Parore. Ms Freda did not follow this matter up with Mr Parore at any stage thereafter.<sup>21</sup>

- 2.10 On **6 March 2017**, Mark Bandara issued audit notification letter to Mr Parore<sup>22</sup> then left the Inland Revenue. Mr Tully was subsequently assigned as case officer.<sup>23</sup> On **5 October 2017** Mr Tully sent an information request pursuant to s 17 of the TAA to the OA.<sup>24</sup> Mr Tully queried why the OA had deregistered Mr Parore for GST and whether notification of GST deregistration had been given to Mr Parore. On **26 October 2017** the OA responded by letter<sup>25</sup> denying deregistering Mr Parore for GST or giving notice to him.
- 2.11 Without any contact with Mr Parore, on **7 September 2017** Mr Tully submitted recommendation to the Legal and Technical Services Unit of Inland Revenue, Takapuna, to prosecute Mr Parore for evading GST. This was approved.<sup>26</sup>
- 2.12 Mr Tully then prepared a further lengthy internal memorandum seeking approval to commence the prosecution of Mr Parore. The subject of the memorandum was *“Approval to prosecute for charges allegedly committed against the TAA as outlined below”*.<sup>27</sup>

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19 [[301.0226]]  
 20 [[301.0222]]  
 21 DC 147 Decision, above n 2 at [20] – [29].  
 22 [[301.0283]]  
 23 [[302.0498]] (at 0 to 10).  
 24 [[301.0290]]  
 25 [[301.0290 - 0298]]  
 26 [[301.0377]] at [1.2]  
 27 [[301.0377]]

2.13 The memorandum included the following from Mr Tully:

*3.2 In the Investigator's [Mr Tully] opinion the offending of this taxpayer is at the highest level of non-compliance on the compliance wheel and it is therefore recommended that the offending in question warrants the strongest action by the CIR.*

2.14 The memorandum was addressed to three senior Inland Revenue officials. On **22 January, 7 and 8 March 2018** each official signed and approved the prosecution approval memorandum respectively.<sup>28</sup> On **22 January 2018** Mr Tully issued a letter to Mr Parore advising that default GST assessments would be issued for the GST periods ending 31 May 2011 to 31 March 2017.<sup>29</sup> These being same GST periods for which Mr Parore would later be charged.

2.15 On **23 January 2018**, Mr Tully issued a letter to Mr Parore that “*to dispute the assessments you must file a notice of proposed adjustment along with your tax returns within 4 months of the assessment issue dates shown on the notices*”.<sup>30</sup>

2.16 In order to preserve his position against the default assessments, Mr Parore was required to issue a Notice of Proposed Adjustment (**NOPA**) and tax returns within four months of the default assessments.<sup>31</sup> If not the default assessments crystallise, are deemed correct, and become non-disputable.<sup>32</sup>

2.17 On **2 March 2018** nsaTax Chartered Accountants issued a NOPA disputing liability for the default assessments.<sup>33</sup> The Commissioner had until 1 May 2018 to issue a Notice of Response (**NOR**).<sup>34</sup>

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28 [[301.0379 – 0380]]

29 [[301.0299]]

30 [[301.0301]]

31 TAA, s 89D(2C).

32 Section 89AB(3) of the TAA; *Allen v Commissioner of Inland Revenue* [2006] NZSC 19 at [18].

33 [[301.0324]]

34 Section 89AB(2) of the TAA

- 2.18 Mr Parore denied and disputed the requirement to be registered or file GST during the period of his bankruptcy which related to the seven default assessed GST periods. The basis for that proposition was the application of s 58 of the GST Act 1985. Mr Parore's NOPA and GST returns disclosed he was required to be GST registered for the 6 GST periods as well as his GST liability for each period. Each period would later be the subject of a single criminal charge of tax evasion.<sup>35</sup>
- 2.19 On **21 March 2018** Mr Tully advised by letter that the GST returns and proposed adjustments in respect 6 GST periods ended 31 March 2015 to 30 September 2017 were accepted.<sup>36</sup> Mr Tully requested further information about the basis for disputing the default assessments for the 7 GST periods ended 31 May 2011 to 30 September 2014.
- 2.20 Despite the criminal charges already approved internally, Mr Tully's letter of **21 March 2018** advised that the Commissioner's position in the civil disputes resolution process would continue.<sup>37</sup>
- [5] If you disagree with the Commissioner's position outlined above please let me know by Wednesday, 28 March 2018 so that that we may continue with the disputes resolution process.*
- 2.21 Mr Carruthers of nsaTax agreed to respond by 28 March 2018 and asked for information from Mr Tully about cancellation of Mr Parore's GST registration in May 2011.<sup>38</sup> Mr Tully wrote to Mr Carruthers providing details of the request made by the OA to cancel Mr Parore's GST registration.<sup>39</sup> Mr Tully advised the request for deregistration by the OA was made around the same time that Mr Parore filed his last GST return, in May 2011.<sup>40</sup>

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35 [[301.0487 – 0488]]

36 [[301.0384 – 0385]]

37 [[301.0385]] at [5]

38 [[301.0381]]

39 [[301.0391]]

40 [[301.0392]]

- 2.22 On **22 March 2018**, Mr Carruthers sent a 6 page letter to Mr Tully in response to the request for further information in support of the NOPA.<sup>41</sup> On **24 April 2018**, Mr Tully issued the Commissioner's **NOR** pursuant to section 89G of the TAA.<sup>42</sup> Mr Carruthers sent a letter to Mr Tully rejecting the Commissioners NOR pursuant to s 89H(3) of the TAA, within the statutory response period. Mr Carruthers made further submissions about Mr Parore's position in respect of the post-bankruptcy GST periods.<sup>43</sup>
- 2.23 Mr Tully then invited Mr Parore to attend a conference as part of the civil procedures. Mr Tully advised the conference was an opportunity to resolve differences in understanding of facts, law and legal arguments.<sup>44</sup> The fact that a prosecution had already been approved was not mentioned.
- 2.24 Mr Tully confirmed the time, date and agenda for the conference, which was accepted by nsaTax.<sup>45</sup> Mr Carruthers also sent further information to the Mr Tully disputing the default assessments ahead of the conference.<sup>46</sup>
- 2.25 Mr Tully entered notes in the Commissioner's computer system<sup>47</sup> recording Mr Carruthers, Mr McKenzie, Mr Parore, Gary Swain (in-house counsel for the Commissioner), Mr Baxter (Inland Revenue) and himself were present at the conference. The notes record discussions were held about the default assessments raised, s 58 of the GST Act and the role of the OA during the period of Mr Parore's bankruptcy. Mr Tully subsequently wrote to nsaTax summarising matters discussed between the parties.<sup>48</sup>

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41 [[301.0394]].  
42 [[301.0407]].  
43 [[301.0412]].  
44 [[301.0416 - 0420]].  
45 [[301.0424]].  
46 [[301.0426]].  
47 [[302.0589]].  
48 [[301.0468 – 0469]].

- 2.26 On **26 June 2018** Mr Tully recorded the following a note in the Inland Revenue computer system:<sup>49</sup>

*After discussion with my TL [Team Leader] it was agreed to park the dispute at the conference stage and proceed with the prosecution*

- 2.27 Also, on **26 June 2018** Mr Tully sent an email to Gary Swain and Jim Bourne (both) of the Legal Services Unit of Inland Revenue advising a decision had been made by himself and his team leader to “park” the civil dispute at the conference stage and proceed with the prosecution.<sup>50</sup>

- 2.28 Mr Carruthers wrote to Mr Tully responding to his letter of 19 June 2018 addressing s 58 of the GST Act.<sup>51</sup> Mr Parore’s accountants were clearly under the impression the disputes procedures were continuing through to the final stage and had not been told otherwise.

- 2.29 On **28 June 2018**, Mr Tully wrote to Mr Carruthers advising that the Commissioner had decided to “park” the tax dispute and prosecute Mr Parore for evading GST.<sup>52</sup>

- 2.30 On **18 July 2018** Mr Tully telephoned Bhavna Gulati from the office of the OA. In response Bhavna Gulati spoke to Chris Viljoen (Deputy OA) and Charles Jones (In-house Counsel for the OA) “*regarding a possible meeting to discuss the tax evasion by the (ex) bankrupt Mr Parore*”, meeting arrangements were made.<sup>53</sup> Subsequent correspondence was entered into between Chris Viljoen, Charles Jones and Mr Tully. Meeting arrangements were made for 27 July 2018.<sup>54</sup>

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<sup>49</sup> [[302.0589]]

<sup>50</sup> [[301.0470]]

<sup>51</sup> [[301.0473]]

<sup>52</sup> [[301.0477]]

<sup>53</sup> [[301.0479]]

<sup>54</sup> [[301.0481 – 0482]].

- 2.31 Mr Tully recorded an electronic note of that meeting in the Inland Revenue computer system:

*Gary Swain (LTS) [Inhouse counsel for Commissioner] and I met with Chris Viljoen (Deputy Assignee) and Charles Jones (Legal Team) from the Official Assignee. We briefed them on the s 58 Act argument being put forth by nsaTax. We advised them that a potential prosecution was being considered and that we may require them as a witness. Chris to check Parore's file to see if the case officer is still employed by the trustees and insolvency service.*

- 2.32 In evidence, Mr Tully denied that the notes of the meeting were accurate stating “[I]t was a wrongly worded note by me. It was late in the evening, I was tired”<sup>55</sup>. This was entirely untrue. Under cross-examination Mr Tully conceded he in fact wrote the note at 1.27pm.<sup>56</sup>
- 2.33 On **30 October 2018** Anthony Pullen of the OA sent Mr Tully formal written statement(s) to be produced in evidence by the Commissioner at trial.<sup>57</sup> Those statement(s) were offered in response to the arguments raised by Mr Parore in his NOPA and subsequent correspondence.<sup>58</sup> The statement(s) were sent to trial counsel for the Commissioner.<sup>59</sup>
- 2.34 In evidence Mr Tully (eventually) conceded the Commissioner had disclosed Mr Parore’s defence obtained through the statutory civil procedures, then briefed Mr Pullen as a prosecution witness to advance the criminal case.<sup>60</sup> Mr Tully also admitted in evidence that the Commissioner took the GST liability amounts disclosed in Mr Parore’s NOPA and transposed them directly onto the charging documents subsequently filed by the Commissioner.<sup>61</sup>

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55 [[201.0071]] at 30 – 35.

56 [[201.0072]] at 15 – 20.

57 [[301.0483]].

58 [[301.0491]].

59 [[301.0483]].

60 [[201.0073 - 0074]] at 0 to 5.

61 [[201.0075]] at 0 to 35.

- 2.35 Trial counsel for the Commissioner emailed Mr Tully,<sup>62</sup>

*Thanks Clint, I am not sure whether we will be able to commence prosecution any time soon though. I am still waiting to hear what IR's approach to things is going to be in light of the Safi Judgment. Nick*

- 2.36 Mr Tully sent an email to Stephanie Townsend (In-house Solicitor for the Commissioner) asking how to proceed with the prosecution in view of *Safi*.<sup>63</sup> The responses to this show the Commissioner's lawyers were discussing how to proceed in view of *Safi*.<sup>64</sup>
- 2.37 In August 2019, the Commissioner filed charging documents in the Auckland District Court alleging 13 charges of evading GST being the same GST periods that were the subject of the "parked" civil tax dispute.<sup>65</sup>
- 2.38 Anthony Pullen of the OA's office signed his witness statement dated 23 January 2020, which directed at countering the defence arguments disclosed by Mr Parore throughout the statutory civil disputes resolution procedures.<sup>66</sup>

### Procedural History

- 2.39 Mr Parore pleaded not guilty to the charges and faced trial in July 2020. At the first trial, he obtained a discharge under s 147 of the Criminal Procedure Act 2011,<sup>67</sup> although that decision was reversed on appeal and a second trial directed.<sup>68</sup>
- 2.40 Before the second trial commenced, in the context of unrelated proceedings, counsel for Mr Parore obtained from Inland Revenue in a

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<sup>62</sup> [[301.0483]].

<sup>63</sup> [[301.0485]].

<sup>64</sup> [[301.0486]].

<sup>65</sup> [[301.0487 – 0490]].

<sup>66</sup> [[301.0492]] at [10].

<sup>67</sup> *DC 147 Decision*, above n 2.

<sup>68</sup> *Commissioner of Inland Revenue v Parore* [2021] NZHC 420 [**HC 147 Decision**].

copy of *Safi*.<sup>69</sup> Recognising that Mr Parore had suffered an identical breach as the defendant in that case, a stay application was immediately filed. Judge Clarkson delivered a reserved decision<sup>70</sup> ordering a stay for “precisely”<sup>71</sup> the same reasons as *Safi*. A stay was ordered because the charges had been laid in *serious breach*<sup>72</sup> of Mr Parore’s fair trial rights. This was despite the *plethora of rebuttals to defence arguments*<sup>73</sup> from the Commissioner.

- 2.41 This decision was upheld on appeal to the High Court.<sup>74</sup> The High Court emphasised that the decision was a *serious step*<sup>75</sup> for the Court to take when no alternative remedy exists, the purpose of which is not to discipline the Commissioner but to prevent abuse of the Court processes and preserve the integrity of the justice system<sup>76</sup>. Wylie J held the right to a fair trial in New Zealand is *absolute*<sup>77</sup>, *enshrined*<sup>78</sup> by s 25 of the Bill of Rights and common law<sup>79</sup>. A *clear connection* was proven between the Commissioner’s *misconduct*<sup>80</sup> and violation of Mr Parore’s fair trial rights. Despite various denials offered by the Commissioner<sup>81</sup>, Wylie J held:

[66] Although Mr Tully denied it, it is hard to escape the conclusion that the Commissioner was engaged in a fact-finding process aimed at obtaining information to determine whether Mr Parore had a reasonable explanation for the Commissioner’s allegations and whether criminal prosecution was appropriate. Mr Tully met with representatives from the OA’s office. He sought and obtained information from Mr Parore’s accountants. He commenced the conference phase and in the course of the conference, it seems as though the assertions made in the NOPA were discussed

<sup>69</sup> *R v Safi* [2018] NZDC 19698.

<sup>70</sup> *Commissioner of Inland Revenue v Parore* [2021] NZDC 17946 [[DC Stay Decision](#)].

<sup>71</sup> [At \[46\]](#).

<sup>72</sup> [At \[55\]](#).

<sup>73</sup> [At \[51\]](#).

<sup>74</sup> [HC Stay Decision](#).

<sup>75</sup> [At \[51\]](#).

<sup>76</sup> *Wilson v R* [2015] NZSC 189 [at \[32\]](#)

<sup>77</sup> HC Stay Decision [at \[48\]](#), citing *R v Burns* [2002] 1 NZLR 387 (CA) [at \[10\]](#), *Stewart v R* [2009] NZSC 53, [2009] 3 NZLR 425.

<sup>78</sup> HC Stay Decision [at \[49\] – \[50\]](#).

<sup>79</sup> [At \[49\] – \[50\]](#).

<sup>80</sup> [At \[79\]](#).

<sup>81</sup> DC Stay Decision [at \[51\]](#).

- 2.42 After the appeal, the Commissioner failed to issue a Disclosure Notice within the timeframe prescribed under part 4A of the TAA.<sup>82</sup>
- 2.43 The Commissioner applied to the High Court to extend time on the basis of *exceptional circumstances*.<sup>83</sup> There, the Commissioner surprisingly pleaded that the civil procedures had been “parked” to protect Mr Parore’s fair trial rights. This argument was roundly rejected by the Court, which expressly held that the Commissioner had knowingly compromised the statutory civil procedures.<sup>84</sup> The High Court rejected the affidavit evidence filed and legal argument(s) advanced – quoting lengthy passages from the cross-examination in the judgment itself.<sup>85</sup> The High Court held that no legal or factual basis existed to extend time.<sup>86</sup>
- 2.44 The application was dismissed. In consequence, the Commissioner is deemed to have accepted the GST adjustments proposed in his NOPA.<sup>87</sup> The Commissioner reassessed the default assessments accordingly. The effect of this decision is that Mr Parore is tax-compliant.

#### High Court Damages Claim

- 2.45 Mr Parore then sought damages under the Bill of Rights to compensate him for the financial and emotional harm he had suffered as a consequence of the breach of his fair trial rights. Significantly, during that trial, Clint Tully (who had conducted the investigation for the Commissioner), conceded that:
- (a) the Commissioner had used the information Mr Parore was forced to disclose from the statutory civil procedures to prove the *actus reus* element(s) of six of the charges;<sup>88</sup>

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<sup>82</sup> Section 89P of the TAA.

<sup>83</sup> Section 89L(1B) of the TAA

<sup>84</sup> HC Extension Decision at [68].

<sup>85</sup> At [48] – [50].

<sup>86</sup> At [68]

<sup>87</sup> Section 89H(4) of the TAA.

<sup>88</sup> [[201.0075]] (at 0 to 30), [[201.0076]] (at 0 to 35).

(b) Mr Parore’s defence(s) were disclosed to the Official Assignee (OA) after “parking” the statutory civil procedures.<sup>89</sup> The Commissioner then briefed two prosecution witnesses from the OA to advance the Commissioner’s criminal case against Mr Parore’s known defence(s) in the criminal trial.<sup>90</sup>

2.46 During that proceeding, the Commissioner also disclosed, for the first time<sup>91</sup>, that the decision to prosecute had been approved prior to the statutory civil procedure being commenced.<sup>92</sup> Prior courts had been forced to speculate as to when exactly this had occurred.<sup>93</sup> The evidence in that proceeding also established that the Commissioner had expressly considered the impact of *Safi* on Mr Parore, at least 10 months before the charges were filed.<sup>94</sup>

2.47 The High Court held that the breach warranted damages, and awarded Mr Parore the full sum of the legal costs he had incurred in defending the charges, as well as an emotional harm award of \$5000.<sup>95</sup>

### 3. How the Breach Arose

3.1 The core misconduct in this case was the use of the statutory civil tax disputes procedures to obtain information about Mr Parore’s tax affairs, which was then used by the Commissioner in the course of the prosecution against him. This is in direct violation of his right to silence, and his right not provide evidence against himself.

3.2 This issue is not novel, and has been expressly discussed in a number of earlier cases.

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<sup>89</sup> [[201.0070]] (at 14 to 35) , [[201.0071]] (at 0 to 35), [[201.0072]] (at 0 to 35).

<sup>90</sup> [[201.0073]] (at 0 to 35), [[201.0074]] (at 0 to 5).

<sup>91</sup> [[201.0060]] (at 25 to 35).

<sup>92</sup> [[301.0377]].

<sup>93</sup> HC Stay Decision at [61].

<sup>94</sup> [[301.0483]], [[301.0484]], [[301.0485]], [[301.0486]].

<sup>95</sup> *Parore v Attorney General* [2023] NZHC 1010 [HC Damages Decision]

Skinner v R

- 3.3 In *Skinner v R*,<sup>96</sup> a conviction appeal, the appellant argued that s 109 of the TAA – which bars determination of the correctness of tax assessments outside of the civil disputes process – applied in both criminal and civil proceedings. As the Commissioner had not undertaken the civil processes or reassessments, the appellant argued that tax evasion could not be proven as the self-assessed returns filed bound the Commissioner.
- 3.4 The Supreme Court rejected this argument. The Court identified the onus of proof in respect of civil proceedings under the TAA rested with the taxpayer,<sup>97</sup> where the reverse is true in criminal proceedings.<sup>98</sup> The Supreme Court expressly linked this fact to s 25 of the Bill of Rights, recording the risks to fair trial rights of a defendant if the civil procedures were engaged under the TAA before a criminal trial.
- 3.5 In that decision, the Supreme Court also recorded the Commissioner’s practice was for the statutory civil processes for disputes under the TAA to be triggered and pursued after the outcome of the criminal process is known.<sup>99</sup> This order of events was found to be consistent with the legislative scheme of the TAA which allows for the time-bar provisions for tax reassessments to be extended.<sup>100</sup> Accordingly, the Supreme Court held s 109 does not apply to criminal proceedings.<sup>101</sup>
- 3.6 The Supreme Court also drew support from earlier authority where fair trial rights had been considered in the context of tax disputes. In *Allan*,<sup>102</sup> Glazebrook J had held “*[I]t would be a very startling proposition if the existence of a valid assessment precludes any challenge in criminal*

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<sup>96</sup> *Skinner*, above n 1.

<sup>97</sup> At [65].

<sup>98</sup> At [24].

<sup>99</sup> At [66] also citing *R v Rowley* [2012] NZHC 1198, (2012) NZTC at [6].

<sup>100</sup> At [66].

<sup>101</sup> At [67] – [69].

<sup>102</sup> *R v Allan* [2009] NZCA 439.

*proceedings*".<sup>103</sup> In *Allan* the Court of Appeal held the onus placed on a taxpayer in "*assessments dispute proceedings*" is contrary to the onus of proof on the prosecution which is an *essential principle of a fair trial*.<sup>104</sup> Justice Glazebrook also cited *Woolmington*<sup>105</sup> which discussed the "*golden thread*" running through the web of criminal law that places the onus on the prosecution.<sup>106</sup> Her Honour also referred to the recognition of that common law principle in New Zealand since 1948 under international instruments.<sup>107</sup>

- 3.7 In *Skinner*, the Supreme Court warned that reassessing a defendant, triggering the statutory civil procedures under the TAA risked violation of fair trial rights of the defendant in subsequent criminal proceedings.<sup>108</sup> The Commissioner's submissions also entirely supported this finding.<sup>109</sup>

### *R v Safi*

- 3.8 This risk came to pass in *Safi*.<sup>110</sup> In *Safi* the Court held the Commissioner had engaged in the misconduct which the Supreme Court had warned against, per Judge Collins;<sup>111</sup>

*"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"*

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<sup>103</sup> At [55].

<sup>104</sup> At [55] and [60]

<sup>105</sup> *Woolmington v The Director of Public Prosecutions* [1935] AC 462 at 481

<sup>106</sup> *R v Allan* above n 102, at [55]

<sup>107</sup> At [55].

<sup>108</sup> *Skinner*, above n 1 at [65].

<sup>109</sup> At [64].

<sup>110</sup> Indeed, *Safi* had been adjourned pending the outcome in *Skinner* for this exact reason: *Safi* above n 68 at [22.1].

<sup>111</sup> *Safi*, above n 68 at [45].

- 3.9 In *Safi* Judge Collins rejected the submission from the Commissioner that the preferred practice was to conclude the civil disputes procedures first and then deal with any criminal proceedings.<sup>112</sup>

*[44]... In arguing for the interpretation of s 109 that the Commissioner sought in Skinner and Rowley the Commissioner was effectively saying the Department was well aware of the risk of fair trial right by triggering the civil process before the conclusion of the criminal trial. In submissions to me Mr Willox submitted that neither Mr La Hood in the High Court nor Mr Ebersohn in the Supreme Court had accurately represented the Commissioner's position to those Courts respectively in advising the preferred position of the Department was to conclude the criminal prosecution first and deal with the civil litigation second. I was not convinced by the submission when it was made and remain very much unconvinced by it. From the decisions in Skinner and Rowley, and from the evidence given before me, the Department was well aware of the risks in proceeding in the way that it did.*

- 3.10 These same comments can also be made in the present case.

#### The Misconduct Here

- 3.11 The Commissioner triggered the statutory civil disputes procedures under Part 4A the TAA by issuing default tax assessments. Mr Parore was required to comply with those statutory procedures otherwise the default GST assessments would crystallise and become non-disputable.<sup>113</sup> In the civil procedures under the TAA the burden of proof rests with Mr Parore in all respects.<sup>114</sup> By contrast, in a criminal proceeding Mr Parore has the right to silence and carries no burden of proof, as the onus of proof rests with the Commissioner.<sup>115</sup>
- 3.12 The statutory procedures compelled Mr Parore to provide information, documents (including tax returns), and legal arguments in defence of the default assessments to preserve his position.<sup>116</sup>

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<sup>112</sup> *Safi*, above n 69, at [44].

<sup>113</sup> Sections 89D(2C), 89D(5), 89AB(4) of the TAA, *Allen v Commissioner of Inland Revenue* [2006] 3 NZLR 1 (SC).

<sup>114</sup> Section 149A(2)(b) of the TAA and *Buckley & Young Ltd v Commissioner of Inland Revenue* [1978] 2 NZLR 485 (CA).

<sup>115</sup> Section 149A(4) of the TAA

<sup>116</sup> Sections 89F, 89D(2C).

- 3.13 Prior to completing the final step in the statutory procedures the Commissioner made a unilateral decision to “park” the civil procedures and pursue the criminal prosecution. The Commissioner then used the information, documents and legal arguments obtained throughout the statutory civil procedures against Mr Parore in the criminal proceedings. This was a clear violation of Mr Parore’s fair trial rights.
- 3.14 The Commissioner had been warned years earlier in *Skinner* about the risks and knew the consequences of this misconduct from *Safi*. Yet the Commissioner took the risk anyway – that was reckless.
- 3.15 The misconduct was aggravated in this case by the Commissioner’s attempts at obfuscation. Multiple denials were advanced about the use of information, contrary to the evidence which showed the opposite was true, only when cornered by evidence were concessions made.<sup>117</sup>
- 3.16 The prosecution approval memorandum authored by various officials was only disclosed for the first time in the High Court Damages proceeding. The Commissioner previously denied this document even existed before the civil dispute was “parked”.<sup>118</sup> When confronted with the document itself, and prior inconsistent denials made under oath, Mr Tully said he had “*lost track of time*” and conceded this was important evidence for the earlier Courts to have known about.<sup>119</sup>
- 3.17 In the High Court before Gwyn J the Commissioner offered “new” evidence that the Commissioner’s practice at the time was to conduct the civil disputes processes before criminal proceedings,<sup>120</sup>. That evidence was precisely opposite to submissions made by the Commissioner in *Skinner* and evidence given by the Commissioner in *Safi*<sup>121</sup> years earlier.

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<sup>117</sup> [[201.0072 – 0075]]

<sup>118</sup> [[201.0068]] at [25] to [35] and [[201.0069]] at [0] to [30] ; Above n 73 [2021] NZHC 3405 at [66].

<sup>119</sup> [[201.0069]] at [20] – [35]

<sup>120</sup> [[201.0076]] at [0] – [20]

<sup>121</sup> *Safi*, above n 69, at [28], [29], [30].

Mr Tully conceded, contrary to his affidavit, that there was no evidence such a practice existed.<sup>122</sup> This evidence was offered as a deliberate attempt, to justify the misconduct.

### The “Windfall” allegation

3.18 This links to the allegation that as a result of the stay, Mr Parore has obtained a ‘windfall’.

3.19 The Commissioner argues the 7 GST assessments for the pre-bankruptcy period represent a ‘windfall’ on the basis they are incorrect, Mr Parore considers the assessments are correct. Regardless, pursuant to s 109 of the TAA the 7 GST assessments and all the particulars are deemed to be correct before this Court and cannot be disputed by the Commissioner “on any ground whatsoever”.<sup>123</sup> The Commissioner’s argument is an unlawful collateral attack on the correctness of those assessments which is embargoed by statute in this proceeding, as confirmed by settled authority on this precise point.<sup>124</sup>

3.20 The ‘windfall’ argument was rejected by the High Court nor was it accepted by the Court of Appeal, which has not been appealed. Counsel submits that the Court can reject the “windfall” argument on this basis.

## **4. An Effective Remedy Requires Compensation**

4.1 The Bill of Rights is the mechanism which Parliament has chosen to implement New Zealand’s obligations under the International Covenant on Civil and Political Rights (ICCPR),<sup>125</sup> which include obligations on state parties to provide effective remedies when rights are breached.<sup>126</sup> In

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<sup>122</sup> [[201.0075]] at 5 – 20.

<sup>123</sup> *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158 at [53] & [67]; *Skinner v R*, above n 1, at [16] – [17].

<sup>124</sup> *Tannadyce*, above n 123 at [53] – [55].

<sup>125</sup> [International Covenant on Civil and Political Rights 999 UNTS 171](#) (opened for signatures 19 December 1996, entered into force 23 March 1976).

<sup>126</sup> [Article 2\(3\)](#).

counsel's submission, there is no effective remedy if tangible harm remains unaddressed by the relief offered.

- 4.2 Here, the Court of Appeal held that the combination of a stay and a declaration provided an effective remedy for Mr Parore and therefore, no further award was required.<sup>127</sup> However, that decision leaves him without relief for the significant financial cost (and the emotional cost) that he incurred in defending criminal charges that ought never to have been filed. In counsel's submission, such an outcome is anathema to an effective remedy.
- 4.3 Awards under the Bill of Rights by their very nature fill a lacuna in the law. The Bill of Rights itself contains no remedies provision. However, the Court of Appeal in *Baigent* recognised that the affirmation of particular enumerated rights required the development of the law to provide remedies when those rights were breached.<sup>128</sup> The Court considered such a conclusion unavoidable, both in terms of New Zealand's compliance with its international obligations,<sup>129</sup> and the ancient maxim that every right requires a remedy.<sup>130</sup>
- 4.4 In this regard, *Baigent* awards, from their origin, occupied a lacuna in the law in two important senses. First, *Baigent* recognised an implicit right to relief in the Bill of Rights despite no remedies provision being included in the Act. Second, *Baigent* damages were recognised as providing relief in situations where the existing law failed to provide a proper response to a breach of a protected right.

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<sup>127</sup> *Attorney-General v Parore* [2025] NZCA 328, [2025] 2 NZLR 751 [[CA Damages Decision](#)].

<sup>128</sup> *Simpson v Attorney General [Baigent's case]* [1994] 3 NZLR 667 at 676, 692, 702, 707 and 717.

<sup>129</sup> This view was succinctly expressed by Gault J in *Baigent* at 704, even though his Honour would not have reinstated the Bill of Rights action in that case.

<sup>130</sup> At 717 per McKay J. To similar effect, Hardie Boys J also cited *Ashby v White* (1703) 2 Ld Raym 938 at 953.

- 4.5 This ‘gap filling’ characteristic has led to *Baigent* damages being described in terms that could be taken to imply that they are a remedy of last resort. Hence in *Taunoa*, William Young J invited Courts to: <sup>131</sup>

*“... ask whether that [non-monetary relief] is enough to redress the breach and the consequent injury to the rights of the plaintiff in the particular circumstances.”*

- 4.6 Likewise, in *Currie v Clayton*, the Court of Appeal held that: <sup>132</sup>

*“[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.”*

- 4.7 However, this reasoning does not invite the Court to decline relief where vindication has not been achieved. Rather, the fundamental question for the Court is always whether the non-financial redress has corrected the wrong done by the breach.

- 4.8 In the earliest cases concerning relief under the Bill of Rights, it was largely taken for granted that compensation for actual harm would be necessary to repair the breach. In *Baigent*, multiple members of the Court emphasised the need for a remedy that would compensate harm.<sup>133</sup> In the cases that followed, compensation was ordered variously for a lost opportunity to avoid imprisonment;<sup>134</sup> the unavailability of a seized vehicle;<sup>135</sup> and the impact on a business from losing the use of a seized helicopter.<sup>136</sup> Cases expressly linked the measure of damages to

<sup>131</sup> *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [258].

<sup>132</sup> *Currie v Clayton* [2014] NZCA 511, [2015] 2 NZLR 195.

<sup>133</sup> *Baigent*, above n 128, at 676, 703 and 717-718.

<sup>134</sup> *Upton v Green (No 2)* (1996) 3 HRNZ 179.

<sup>135</sup> *Wilson v NZ Customs Service* (1999) 5 HRNZ 134 (HC).

<sup>136</sup> *P F Sugrue v Attorney-General* HC Christchurch CP19/96, 3 May 2002, (overturned on other grounds in the Court of Appeal)

tortious damages,<sup>137</sup> while reserving the possibility that a premium may be applied to reflect the violation of a fundamental right.<sup>138</sup>

- 4.9 In these cases, the question of whether a financial award was necessary arose not from a question of whether the breach of the right had been sufficiently denounced by other means – but rather whether there remained harm that was unremedied. This usually meant considering whether the relief given on tortious grounds had repaired the harm already, meaning the fundamental question was whether a discrete and additional award was needed to demark the breach of a fundamental right. Indeed, in *Van Essen*, the Court observed:<sup>139</sup>

*“The remedy must fit the case. It will be necessary to consider whether any relief is ‘within an appropriate range’, not only adequate to compensate for any suffering or harm caused, but also to vindicate the important rights breached.” (emphasis added)*

- 4.10 This language implies that a remedy is not effective unless compensation has been achieved. The exception to this approach came principally from cases in which either the impact of the ACC bar on personal injury litigation meant compensation was not available as a matter of law,<sup>140</sup> or where the harm sought to be compensated was purely intangible.<sup>141</sup> The development of Baigent damages in New Zealand has been significantly influenced by the effect of the ACC bar. As many of the claims brought for such awards occur in the context of personal injury (or mental distress), Baigent claims are often pleaded alongside claims for exemplary damages and Courts have been required to consider them strictly in the absence of compensatory factors. Accordingly, there is a clear trend to

<sup>137</sup> *Baigent’s Case* at [718]; *Dunlea v Attorney-General* [2000] NZLR 136 (CA) at [37] and [38].

<sup>138</sup> See especially Thomas J in *Dunlea* at [63].

<sup>139</sup> *Attorney-General v Van Essen* [2015] NZCA 22, (2015) 10 HRNZ 155 at [80].

<sup>140</sup> *Falwasser v Attorney-General* HC Rotorua CIV-2008-463-0701, 19 March 2010; *Archbold v Attorney-General* [2003] NZAR 563 (HC); *Pere v Attorney-General* [2022] NZHC 1069, [2023] 2 NZLR 725.

<sup>141</sup> For example *Small v Attorney-General* HC Christchurch CP157/99, 5 May 2000; *Attorney-General v Udompun* [2005] NZLR 204 (CA); *Lawrence v Attorney-General* [2025] NZHC 719.

treat *Baigent* damages (at least as awarded) as a near analogy to exemplary damages. This analogy also reflects the express commitment to only modest awards.<sup>142</sup>

- 4.11 Such an approach is not inevitable and in the absence of the ACC bar (which has no application in cases like the present) is largely without justification. Rather, the better analogy for *Baigent* damages may be aggravated damages – which first compensate for actual harm, and then are increased to reflect the special impact on the plaintiff, and the vindication of those rights. Indeed, even awards of exemplary damages reflect similar principles. Viewed in this way, what the Appellant seeks here, a compensatory award, which must also ensure vindication, sits tidily among monetary remedies available even in a civil law context.<sup>143</sup> Counsel again submits that while *Baigent* damages are a public law remedy, there is no principled reason why such an award should be more niggardly than that made in civil cases where the nature of the wrong is necessarily less egregious.<sup>144</sup>
- 4.12 The approach adopted by the Court of Appeal in this case – to begin with considering whether the non-monetary relief provided was adequate with reference only to the nature of the breach itself – is frequently traced to Tipping J’s approach in *Taunoo*.<sup>145</sup>
- 4.13 However, viewing this approach narrowly ignores the proper role of compensation, identified by Tipping J in the same judgment as follows:<sup>146</sup>

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<sup>142</sup> *Baigent*, above n 128, at 678; *Binstead v Northern Region Domestic Violence Approval Panel* [2002] NZFLR 832 (HC) at [35]; *Liston-Lloyd v Commissioner of Police* [2015] NZHC 2614 at [61]

<sup>143</sup> *Premium Real Estate v Stevens* [2009] NZSC 15, [2009] 2 NZLR 384; *Attorney-General v Blake* [2001] 1 AC 268 (HL); *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 (Ch). *Rookes v Barnard* [1964] AC 1129 (HL).

<sup>144</sup> This observation was also made by Tipping J in *Taunoo* at [46].

<sup>145</sup> See for example *Lawrence v Attorney-General* [2025] NZHC 719 at [61].

<sup>146</sup> The comments at [323] are also relevant.

*"[322] The other principal ingredient of an effective remedy is compensation. Everything relevant to compensating for what the plaintiff has suffered as a result of the breach is potentially available here. Economic loss clearly qualifies, as does compensation for non-economic or intangible damage or detriment..."*

- 4.14 In counsel's submission, these two themes may be harmonised in this way – an effective remedy must satisfy both compensation of tangible harm, and vindication of the intangible value of the right breached. In practical terms, what is required is for the Court to first determine what is necessary by way of compensation. In cases where there is no harm, or where the ACC bar applies, this will be nil. In other cases, this component may be fully satisfied by other causes of action. In cases like the present, a compensatory award may be required under the Bill of Rights itself. Then, once this award has been determined, the Court should consider whether some further award is required by way of vindication.
- 4.15 This approach is not novel. Indeed, the comments of the High Court in *Liston-Lloyd v Police* reflect an identical view:<sup>147</sup>

*[47]...it has been suggested common law damages should "set the floor rather than the ceiling" for NZBORA damages. Or, as it was put by Tipping J in Taunoa v Attorney-General, the approach involves considering how much is necessary to achieve the vindicatory purpose, how much is necessary to achieve the compensatory purpose, and then awarding the higher of the two sums.*

- 4.16 Nor does this approach require the Court to depart from the discretionary nature of public law damages.<sup>148</sup> Such a discretion may be retained – but should be exercised with caution, and only in cases where there is proper

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<sup>147</sup> *Liston-Lloyd*, above n 142, at [47] (citations omitted). See also *Dunlea* at [63] and *Manga v Attorney-General* [2002] 2 NZLR 65 (HC) at [130] and [144].

<sup>148</sup> See for example *Taunoa*, above n 131, at [46], *Liston-Lloyd*, above n 142, at [45], *Lawrence*, above n 145, at [61].

cause to refuse relief to a plaintiff. This too is consistent with the comments of Tipping J in *Taunoa*:

*[46] Although in this field relief is discretionary rather than as of right, it must generally be appropriate to compensate for demonstrable harm suffered as a result of the breach of a right of sufficient importance to be affirmed in the [Bill of Rights]. The law would be in a strange place if relatively innocuous common law breaches were compensated as of right whereas breaches of a statutorily affirmed human right of an important kind were deemed less worthy of compensatory redress.*

- 4.17 This is also broadly consistent with the Canadian approach to such awards, where compensation, vindication and deterrence are all factors to be weighed in determining an award.<sup>149</sup>
- 4.18 In counsel’s submission, if the Court adopts this approach then the appeal should be allowed. This is a case where the Appellant has suffered direct, tangible, harm as a consequence of the breach. He was forced to defend criminal charges that should not have been brought against him. In doing so, he incurred financial costs and faced personal emotional harm as a result of that decision. Accordingly, there is harm to compensate.
- 4.19 Nor is this harm that arises separately from the breach. In the Court of Appeal the respondent sought to argue that the harm arose from the fact of the prosecution – not from the fact it was in breach of Mr Parore’s rights. Respectfully, this submission is equivalent to saying that evidence obtained by an illegal search is not improperly obtained if it might have been obtained by other means.<sup>150</sup> This argument should be rejected.

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<sup>149</sup> [Ward v Vancouver \(City\)](#) [2010] 2 SCR 28. This approach remains current: *R v Varennes* [2025] SCC 22 at [76]

<sup>150</sup> See also the remarks in *Attorney-General v Morrison* [2025] NZCA 240 at [86].

- 4.20 Nor is awarding legal costs in this context contrary to the schemes that otherwise apply to costs.<sup>151</sup> Costs may be awarded as damages in appropriate cases.<sup>152</sup> *Morrison* demonstrates that costs may be available under the Bill of Rights in addition to costs awarded under the relevant criminal schemes.<sup>153</sup> Indeed, were such an award not available it would create a perverse incentive where a defendant whose rights were breached could only obtain relief by subjecting himself to an unfair trial to obtain costs. Such an outcome should not be countenanced.
- 4.21 Finally, neither Mr Parore’s conduct nor circumstances warrant relief being refused on a discretionary basis. To presume he would be guilty of evasion had the trial proceeded would be to deprive him of the presumption of innocence.<sup>154</sup> Nor Court cannot consider him the beneficiary of a windfall without ignoring the deemed correctness of his NOPA. Nor should the Court presume in these proceedings that the Commissioner would ultimately have been successful had the civil dispute process not misfired. Finally, the failure of the civil proceedings arises not from the stay – but from the Commissioner’s own conduct in “parking” that proceeding beyond the statutory limitation period.
- 4.22 On this basis, adopting the compensation-first approach that was first described in *Baigent*, and which can be observed in practice in the early cases, the award of the High Court should be restored.

## 5. Vindication Warrants an Award of Damages

- 5.1 Even if the narrower approach taken by the Court of Appeal were adopted, counsel submits that the combination of a stay and a declaration is inadequate, even when measured by the standard of vindication alone.

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<sup>151</sup> Costs in Criminal Cases Act 1967, Criminal Procedure Act 2011, s 364.

<sup>152</sup> *Rainey v Kwok* [2021] NZCA 199, [2021] NZFLR 406.

<sup>153</sup> *Morrison*, above n 150, at [92].

<sup>154</sup> It would also ignore the fact that the District Court initially dismissed the charges: [DC 147 Decision](#).

5.2 The breach here was serious. It concerned a fundamental right that is central to a fair trial. It was committed in circumstances where the Commissioner had been warned of the precise risk that arose, and where the immediate harm to Mr Parore was obvious. It was denied and minimised by the Commissioner at every stage – even in the Court of Appeal – and the Commissioner has never apologised for the breach. An award of damages is proportionate to the breach that has occurred.

*The Right to Silence is Engaged*

5.3 Before turning to the question of why the stay alone was an incomplete remedy, it is necessary to consider the nature of the breach of rights that has occurred. In particular, it is necessary to consider the Court of Appeal’s conclusion that in cases that engage the right to a fair trial, damages should be awarded but rarely.

5.4 Observations to this effect have been frequently made by the courts.<sup>155</sup> These comments are founded on the principle that the usually appropriate remedy for a miscarriage of justice is found on appeal – not in an award of damages. This view plainly has a floodgates component, but also reflects the fact that not every error in trying criminal cases warrants financial redress.

5.5 In this respect, however, a distinction may be drawn between a trial that has misfired, and a trial that should never have occurred. As the Court of Appeal observed in *Morrison*, there is a distinction between a miscarriage of justice and an unfair trial.<sup>156</sup> Counsel would suggest that a distinction may also be made between a trial that is unfair in the sense referred to in s 232 of the Criminal Procedure Act 2011, and a trial that is unfair in terms of the Bill of Rights.<sup>157</sup>

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<sup>155</sup> *Clayton v Currie* above n 132, at [82]; *Brown v Attorney-General* [2005] 2 NZLR 405 (CA) at [142].  
<sup>156</sup> *Morrison*, above n 150, at [86].

<sup>157</sup> This is similar to the distinction between sentences that are disproportionately severe in terms of s 8(h) of the Sentencing Act 2002 and those that offend against s 9 of the Bill of Rights.

- 5.6 Here, regardless of the manner in which the breach is categorised, counsel submits that this was a criminal proceeding that was wrong from its very beginning.<sup>158</sup> The granting of a stay demonstrates it is not in the category where appellate relief can remedy what went wrong.<sup>159</sup>
- 5.7 However, counsel submits that it is significant to acknowledge what went wrong in precise terms – that the right breached was Mr Parore’s right to silence – which is codified (in part) in s 25(d).
- 5.8 The right to silence is a tangible reflection of the right to be presumed innocent. It is at its zenith when, at the close of the prosecution case, the Defendant is invited to elect – for the first time – whether to call or give evidence. This step demonstrates that the defendant does not need to make this decision until the full case against him is known. Until the prosecution case is concluded, with few exceptions, the defendant cannot be required to give an answer to the allegations against him.
- 5.9 The breach of Mr Parore’s right went to this core issue. He was forced to admit the actus reus of an offence,<sup>160</sup> and his statement became a tool the prosecutor could use against him. From the moment of the statement, the possibility of a fair trial was lost.<sup>161</sup> While this occurred before proceedings commenced, the s 25(d) right requires that it cannot be circumvented by actions taken before charges are filed. Accordingly, once the default assessment was issued, or at the latest, when the NOPA was filed, laying criminal charges became unlawful.
- 5.10 Counsel submits that this is an important right, and the need for vindication is accordingly heightened in this case.

### *The Stay Does Not Repair the Harm*

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<sup>158</sup> As the Attorney submits, the common law right to silence is broader than the explicit terms of s 25(d). However, much of the right is a necessary ancillary of that right, or otherwise preserved by s 28.

<sup>159</sup> The link to the trial process and the alternative of a fair trial is made explicit in *Brown*, above n 159 at [142].

<sup>160</sup> Stay Decision at [72].

<sup>161</sup> At [72].

5.11 The Respondent again seeks to argue that no remedy was required beyond the stay granted by the District Court. However, this submission fails to recognise that the purpose of the stay was not vindication but to preserve the integrity of the Court. It was a prospective remedy. It also did nothing about the significant prejudice that Mr Parore had already suffered through the criminal process which at that stage had lasted 28 months and had included a two-day judge alone trial. While it stopped the breach continuing, the stay did not repair any of what had gone wrong. It was an inadequate remedy, vindication has not been achieved.

*The Commissioner was Highly Reckless*

5.12 The relevance of the mental state in which a breach has been committed has been a controversial factor in Bill of Rights cases. As the Court observed in *Udompun*, the experience of violation is not ameliorated by the fact that it was not malicious.<sup>162</sup> Counsel acknowledges this is true.

5.13 However, compensation is not the sole motivation behind an award under the Bill of Rights. Although not punitive, awards are intended to have a coercive effect and to incentivise compliance.<sup>163</sup> Where an agency has shown a persistent lack of care, the need for vindication is greater. Likewise, while appropriate steps taken by an agency can ameliorate harm and demonstrate that the Court need not fear future violations, the reverse is also true.

5.14 Here, the Commissioner had been warned by this Court of this precise risk in earlier proceedings. A stay had already been ordered in identical circumstances. Despite this, the Commissioner persisted in prosecuting Mr Parore. She did so in reliance, it is said, on advice that has never been disclosed. After the fact, the Commissioner provided a plethora of arguments and rebuttals to explain this decision – none of which have

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<sup>162</sup> *Udompun*, above n 141, at [177]. See also *Manga*, above 147, at [37]; *R v Goodwin* [1993] 2 NZLR (CA) 153 at 172

<sup>163</sup> *Attorney-General v Fitzgerald* [2024] NZCA 419, [2024] 3 NZLR 817 at [156].

been accepted. It was described as standard policy – without foundation and in direct contradiction to the Commissioner’s earlier position in the Supreme Court. No apology has ever been made, and as recently as the Court of Appeal hearing, the Respondent has adopted the position that even the stay that was granted was excessive. In *Taunoa*, Blanchard J noted that a declaration should usually be sufficient to obtain executive compliance.<sup>164</sup> The experience of Mr Parore suggests that words alone may not persuade the Commissioner to follow the law.

- 5.15 In terms of this specific case, the Commissioner identified that there was a risk, arising from *Skinner* and *Safi*, that Mr Parore’s right to silence would be breached. The Commissioner proceeded despite that risk, and did not raise the matter either with defence counsel or the Court. This was a reckless decision and the Commissioner’s subsequent conduct is aggravating. Even if the Court looks only at the need for vindication, this is a case where the importance of vindication is particularly pronounced.

#### *An Award for Vindication*

- 5.16 Against this background, a stay alone – or even combined with a declaration – is simply the ‘toothless’ remedy that Cooke P warned against in *Baigent*. Mr Parore has suffered real harm. It has occurred in circumstances where the Commissioner knew of the risk, deliberately ran that risk, and persisted in it long after the Court had intervened. This is a case where no remedy is effective without a financial component. Accordingly, the orders of the High Court should be restored.

## **6. Indemnity Costs under the Bill of Rights**

- 6.1 A final consideration for the Court is the manner in which costs should be determined in cases where relief is granted under the Bill of Rights.

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<sup>164</sup> *Taunoa*, above n 131, at [255].

- 6.2 In a number of earlier cases,<sup>165</sup> the Court has adopted the position that indemnity costs should be ordered to ensure that the vindication of a citizen's rights is not obtained at a financial detriment to him or her. This is particularly important where awards are typically modest and where scale costs are already designed to provide less than full recovery. The result of this is that in the average Bill of Rights case, a plaintiff who receives only scale costs will be in a worse financial position after obtaining relief than if it had never been sought. This is a significant disincentive to what is important litigation in the public interest.
- 6.3 Although Mr Parore is in receipt of legal aid for this phase of the proceeding, this was not the case in the High Court or the Court of Appeal. Importantly, in both courts (as in this Court) the Respondent took the position that the declaration that Mr Parore obtained should not have been made. In this regard, counsel points to the example of *Van Essen*, where even though no financial award was made, indemnity costs were ordered to the point where the Crown offered to consent to a declaration.
- 6.4 On any metric, Mr Parore's vindication required a declaration. Obtaining such a declaration should not have come at his own cost. Counsel submits that indemnity costs should be ordered for the High Court and the Court of Appeal steps. Costs are also sought in this Court, but the realities of legal aid mean that the quantum in this Court will be significantly less.

**DATED** 16 February 2026

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**D Weaver/T Conder**  
Counsel for Plaintiff

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<sup>165</sup> *Manga*, above n 147, at [155]; *Binstead*, above n 142 at [39(f)]; *Attorney-General v Van Essen* [2015] NZCA 22, (2015) 10 HRNZ 155 at [160]; *Udompun*, above n 141, at [187].