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IN THE SUPREME COURT OF NEW ZEALAND SC 88/2025
I TE KŌTI MANA NUI O AOTEAROA

BETWEEN **MAXWELL RICHARD ALLEN PARORE**
Appellant

AND **ATTORNEY-GENERAL**
Respondent

Hearing:	19-20 March 2026
Court:	Winkelmann CJ Ellen France J Williams J Miller J Glazebrook J
Counsel:	D P Weaver and T J Conder for the Appellant M F Laracy, A B Goosen and D Jones for the Respondent R A Kirkness, H Z Yang and A J Campbell for Te Kāhui Tika Tangata | Human Rights Commission as Intervener M J McKillop and T P Westaway for Te Kāhui Ture o Aotearoa | New Zealand Law Society as Intervener

CIVIL APPEAL

MR WEAVER:

Tēnā koe. Counsel's name is Weaver and I appear with Mr Conder for the appellant.

WINKELMANN CJ:

Tēnā kōrua.

MS LARACY:

Tēnā koutou e ngā Kaiwhakawā, ko Ms Laracy. Kei konei mātou ko Mr Jones, ko Mr Goosen, mō te Karauna. May it please the Court. Ms Laracy, Mr Jones and Mr Goosen for the Crown. With the Court's permission, I request that Mr McDougall-Moore, who is not appearing, to spend time to sit at counsel's bench. He's willing to work the ClickShare for all the counsel but particularly for the Crown.

WINKELMANN CJ:

He's from Crown Law, is he?

MS LARACY:

He is from Crown Law.

WINKELMANN CJ:

Sorry, Mr?

MS LARACY:

McDougall-Moore.

WINKELMANN CJ:

McDougall. Tēnā koe, Mr McDougall.

MR KIRKNESS:

E ngā Kaiwhakawā, tēnā koutou. Ko Kirkness, ko Yang, ko Campbell tēnei. Ko mātou ngā rōia mō Te Kāhui Tika Tangata.

WINKELMANN CJ:

Tēnā koutou.

MR McKILLOP:

E ngā Kaiwhakawā, tēnā koutou. Ko McKillop ahau. Kei konei ahau, māua ko Westaway mō Te Kāhui Ture o Aotearoa.

WINKELMANN CJ:

Tēnā kōrua all the way back there.

MR McKILLOP:

It's hard to see your Honour but good morning.

WINKELMANN CJ:

Right, Mr Weaver?

MR WEAVER:

Yes, Ma'am. Just in terms of speaking arrangements today, we've conferred about that. The proposal, subject to anything your Honours may have to say, is that, of course, we'll be going first and then we'll hear from the interveners.

WINKELMANN CJ:

I think you're certainly going first.

MR WEAVER:

The Human Rights Commission will be first followed by the Law Society. In terms of the time allocations today, the anticipation is that I will be through to about the morning adjournment and then I'll be handing over to Mr Conder, perhaps through to around 3 o'clock, and then time for the interveners after that. That's as best as we can estimate subject to, of course, questions from your

Honours and that will give the respondent a clean run at this time tomorrow so subject to –

WINKELMANN CJ:

Right. So we've got a day and a half, haven't we?

MR WEAVER:

Yes, Ma'am.

WINKELMANN CJ:

Right. Go ahead then, Mr Weaver.

MR WEAVER:

I will say from the outset that there is no issue with questions from the Bench.

WINKELMANN CJ:

Well, we'll give you some time to get started.

MR WEAVER:

Yes, Ma'am, but I don't –

WINKELMANN CJ:

It's good discipline for ourselves.

MR WEAVER:

I don't need the 15 minutes, Ma'am, if that's any assistance. Of course, written submissions have been filed and I simply introduce the case by way of an appeal which concerns whether an award of damages should have also been made to Mr Parore to compensate him for the harm that he suffered in breach of his fair trial rights. We submit that an award under the New Zealand Bill of Rights Act 1990 should compensate him for the actual harm that he suffered and, in any event, the misconduct by the Commissioner of Inland Revenue warrants a financial reward. On this basis, Mr Parore seeks to have this Court restore the Court's damages award from the High Court which was, of course,

overturned by the Court of Appeal. That is by way of summary what the appeal is about.

The written submissions, your Honours, have set out the material background facts to this matter effectively from paragraph 2 onwards. I don't propose to go through those background facts which have been litigated before the District Court, the High Court twice, and in the Court of Appeal, and simply to go directly to paragraph 3 of my written submissions which is at page 14 of those written submissions.

WINKELMANN CJ:

Yes. Page 13?

MR WEAVER:

Page 14, Ma'am, and the title is "How the Breach Arose."

THE COURT ADDRESSES MR WEAVER – ADJUST MICROPHONE (10:09:24)

MR WEAVER:

So, in terms of the core of the misconduct in this case that was the use by the Commissioner of Inland Revenue to, and I'll refer to the Commissioner of Inland Revenue just as the Commissioner – I apologise if I use the words "he" or "she" because it changed throughout this – but, in any event, the Commissioner used the Statutory Civil Disputes Resolution Procedures to obtain information from Mr Parore about his tax affairs and then used that information in a subsequent criminal trial. That was in direct violation of his right to silence and the right not to provide evidence against himself. That issue itself is not a novel one and has been expressly discussed in previous cases, including the decision of *Skinner and Rowley v R* [2016] NZSC 101, a decision of this Court in 2016 where the appellant, in that case, argued that section 109 of the Tax Administration Act 1994, which bars the determination of the correctness of tax assessments outside of the civil process, "applied in both criminal and civil proceedings."

Effectively, what the appellant was arguing in that case, or what the appeal was about, is that the Commissioner had not made a reassessment of his tax position, therefore, the Commissioner could not prove the actus reus element of the charge which he faced. That was the nub of the appeal. Of course, the Supreme Court held that section 109 does not apply in criminal proceedings and whether or not an assessment has been made beforehand or not is irrelevant.

In short, in coming to that finding the Supreme Court discussed the impact upon a person's rights under section 25 of the Bill of Rights Act, if the Commissioner had made a reassessment of a person's tax position and required them to engage in the civil disputes resolution procedures. The reason for that was because the onus of proof in civil proceedings, under the Tax Administration Act, rest with the taxpayer entirely and, of course, the opposite onus of proof on the Commissioner in criminal proceedings.

So, the Supreme Court back in 2016 and in the decisions leading up to that had recognised the risk to fair trial rights of a defendant if the Commissioner triggered and engaged in the civil processes ahead of a criminal proceeding.

The Commissioner advised, in that case, that her practice at the time, or her practice still is, to commence any criminal proceedings first and deal with the statutory processes after the outcome of criminal proceedings are known. That order of events, of course, was found to be entirely consistent with the statutory scheme of the Tax Administration Act which allows for tax reassessment to be made after criminal proceedings, and in fact also is consistent with the prohibition under the Tax Administration Act commencing any criminal prosecution after the imposition of civil shortfall penalties. And the reference to that is section 149(5) of the Tax Administration Act.

In coming to that conclusion, the Supreme Court also drew the support from the earlier authority in *Allen v Commissioner of Inland Revenue* [2006] NZSC 19, where your Honour Justice Glazebrook, found that it would be a very startling

proposition if a valid assessment was required or precluded any challenge in a criminal proceeding, and her Honour was careful to cite what is the golden thread that runs through the web of criminal case law that the onus of proof is on the prosecution and conducting a civil proceeding first would be opposite to that onus when the onus of proof rests with the taxpayer.

So, in short, back in 2016 and earlier we say that, and of course it's been held in decisions before this, the Commissioner was warned about the risks that issuing tax reassessments and engaging in civil proceedings ahead of a criminal case would, or the risks that would have of that. Of course in *Skinner* that risk wasn't, didn't come to fruition because the Commissioner followed the right practice. She hadn't reassessed the person in that case, or Mr Skinner in that case, ahead of the criminal trial that he faced. And I would note that the Commissioner's position in *Skinner* was entirely supportive of the finding of the Supreme Court, and it was, had been recorded by counsel for the Commissioner that the practice had always been to conduct criminal proceedings ahead of the civil case.

And in terms of my written submissions I'm at paragraph 3.8 which is page 16. We had then the decision of *R v Safi* [2018] NZDC 19698 which followed *Skinner* but I would mention from the outset that there was a link between both *Skinner* and *Safi* because *Safi* was being adjourned pending the outcome of *Skinner*. The District Court was awaiting the outcome of that case. But in any event the decision in *Safi* in short, that the Commissioner had engaged in the same misconduct as this case in the sense that she had triggered and engaged in the required notices of proposed adjustment et cetera to be issued, engaged in the civil proceedings, and of course a stay application was then brought by the defendants in that case.

The District Court decision of Judge Collins makes it clear, and I've put the quotations from the judgment into my written submissions, that the Commissioner had been warned earlier on about the risk to fair trial rights and the likely outcome if a criminal proceeding came after.

GLAZEBROOK J:

Can I just check with you, is your proposition that it is absolutely forbidden for criminal proceedings to be instituted after the issue of a reassessment, and therefore the triggering of the civil disputes proceeding and that a stay is an inevitable outcome of that? Or is your position that just on the facts of this case, that was the right outcome? Because I should just indicate that I don't take that view, that a stay isn't an inevitable outcome of that and in fact the most usual response would be the exclusion of any evidence that was put in as a result of the coercive process related to a NOPA. In the same way that proceedings under the Commerce Commission can't use material that actually has been achieved through the compulsory processes under that Act.

MR WEAVER:

To answer the first part of your Honour's question, do I say that criminal proceedings could never happen after the issuance of a tax reassessment, if that's the question I think the first part of the question.

GLAZEBROOK J:

Yes, is that the position or is it in the particular facts?

MR WEAVER:

That is – there is an ability – there is nothing wrong with the Commissioner issuing a tax reassessment and then commencing a criminal proceeding. What is wrong is that the Commissioner compels, or the law compels a person to respond to that reassessment within four months of it, unless under the disputes resolution procedures and that cannot then be challenged later. So it is wrong for the Commissioner to compel a person to respond to a reassessment if in making that reassessment the Commissioner is also contemplating a prosecution at the same time. The process which the Commissioner has now adopted is that if that does occur, she will not compel the person to engage in those civil processes.

GLAZEBROOK J:

Well, the question is though, is stay the inevitable outcome of that, or is it merely exclusion of the evidence that's –

MR WEAVER:

Well, I'm trying to imagine, Ma'am, a circumstance where a person, in trying to preserve their position against tax reassessments, provides information to the Commissioner, and a Notice of Proposed Adjustment requires a person – the statutory requirement is that a person provides the law and evidence and how that applies to the reassessments. That is what has to happen as a prescribed form. I'm trying to imagine a circumstance where a stay wouldn't be an inevitable outcome –

GLAZEBROOK J:

So the answer is yes, a stay is an inevitable outcome as soon as a NOPA has been required?

WINKELMANN CJ:

Well, that's not a necessary part of your case, is it?

MR WEAVER:

It's not. I'm trying to respond to the question, but I would imagine it's dependent at some level on what information is provided in response to the reassessment. But I'm simply pointing out that the law requires that a person respond with a Notice of Proposed Adjustment and the Notice of Proposed Adjustment is a statutory document requiring law and evidence to be supplied in opposition to the reassessment.

But in terms of what the decision in *Safi* said and it's material because we know that the Commissioner's officials were considering the decision of *Safi*, which of course quoted extensively from *Skinner* as well, before the charges were laid in this case. It highlights that the Commissioner's preferred practice was always to deal with criminal matters first and civil second and the Judge's rejection of the Commissioner's submissions in *Safi* that the opposite was true.

WINKELMANN CJ:

Where's that in *Safi*?

MR WEAVER:

That's at page 3.9 of my written submissions, sorry, paragraph 3.9 of my written submissions.

WINKELMANN CJ:

What paragraph of *Safi*?

MR WEAVER:

Paragraph 44, Ma'am. When his Honour says: "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." So, I simply suggest that the same comments can be made in relation to this matter.

WINKELMANN CJ:

What is the timing of the – this conduct is after this, isn't it, that proceeds into the audit phase after this?

MR WEAVER:

Yes, so *Safi* was decided in September 2018.

WINKELMANN CJ:

Yes.

MR WEAVER:

Civil disputes processes in this case commenced effectively in January 2018 through to June 2018, thereabouts.

MR WEAVER:

There was a conference between the parties. The Commissioner then decided to pause or park the civil dispute and proceed with the criminal prosecution, but didn't file charges immediately.

WINKELMANN CJ:

But *Skinner* was 2016?

MR WEAVER:

Correct, Ma'am. So, in short, we say that the misconduct, and that's the way the High Court described it in the stay decisions as well, in the stay decision was the Commissioner's –

GLAZEBROOK J:

No, *Safi* was 2018.

MR WEAVER:

Yes.

GLAZEBROOK J:

September 2018, not 2016.

WINKELMANN CJ:

No, that was *Skinner* I said was 2016.

GLAZEBROOK J:

Oh, *Skinner* was, yes.

WINKELMANN CJ:

Yes.

MR WEAVER:

So we say that the misconduct, of course, is the Commissioner's use of the information disclosed which Mr Parore was compelled to provide to the Commissioner in the criminal case, and it wasn't just the information itself that

Mr Parore provided because we know that the Commissioner's officials went outside of the Department and then briefed prosecution witnesses, third party prosecution witnesses, to head off the defence that they knew about from the civil case. We know that because that was the finding of the High Court in the stay decisions and, of course, it was also directly put to the case officer, the officer in charge of the prosecution. It had been denied throughout the stay hearings. Of course, the Courts didn't accept that evidence but when the opportunity came to be able to put to the Commissioner's officials that the case officer had gone after the civil proceedings and gone to the Office of the Official Assignee, briefed those witnesses and then called them to give evidence in trial against the known defence, that was accepted by the Commissioner. Of course, that conduct had been entirely denied in the stay hearings. It was only in this proceeding, in the High Court damages claim, that the Commissioner finally accepted that is what she, or the officials, had done.

In terms of the various arguments that have been raised by the Commissioner throughout in opposition to the stays and also then the subsequent application by the Commissioner to extend time to complete the civil proceedings, which was dismissed, the Commissioner in the High Court raised new evidence in the High Court that the Commissioner's practice at the time –

WINKELMANN CJ:

Which High Court? Before Justice Wylie?

MR WEAVER:

Gwyn. Before Justice Gwyn, Ma'am.

WINKELMANN CJ:

Gwyn, before Justice Gwyn.

MR WEAVER:

In this proceeding before Justice Gwyn, raised this new evidence, and I say evidence because it was in a brief of evidence of the officer in charge, that the Commissioner's practice at the time, the time when the decision was made to

prosecute Mr Parore, was that civil proceedings go first and criminal proceedings go second. That was what was in the brief of evidence. Of course, that was entirely opposite to what the Commissioner had told the Supreme Court in *Skinner* and also what the evidence was before the District Court in *Safi*, and I say evidence in *Safi* because the Commissioner's officials gave evidence in that case that there was never any policy of conducting civil proceedings before criminal. But in any event, that was the excuse offered in that case – sorry, before Justice Gwyn. When the officer in charge was challenged as to the correctness of that or whether there was any evidence of such a practice, it was conceded there was none.

ELLEN FRANCE J:

Sorry, there was no what?

MR WEAVER:

No evidence of a practice by the Commissioner to commence civil proceedings before criminal.

WINKELMANN CJ:

So hang on, can you just go back through that again?

MR WEAVER:

Perhaps if I could re-state it.

WINKELMANN CJ:

Yes.

MR WEAVER:

Before Justice Gwyn the brief of evidence of the Commissioner's witness said that there was, at the time that this proceeding –

WINKELMANN CJ:

Yes, got that. Said it was civil first, criminal second.

MR WEAVER:

It was civil first. When – that is obviously opposite to what was said to the…

WINKELMANN CJ:

And when that was challenged?

MR WEAVER:

It was conceded that there was no evidence. The cross-examination went like this. Question: "I just want to be clear Mr Tully. Is there any evidence of the Commissioner's practice to start a civil dispute before a criminal case?" Answer: "No."

WINKELMANN CJ:

So, the assumption is he got it wrong, I guess?

MR WEAVER:

Well, it goes into the… Well, there's no doubt that it was wrong but it goes, what I would suggest, into the mix of various excuses that the Commissioner has run throughout the various decisions that we've dealt with about the misconduct. We say there was never any practice of the Commissioner doing what she did in this case.

ELLEN FRANCE J:

I mean, what Mr Tully said in his brief was: "It was only after a decision had been made to prosecute that any uncompleted civil dispute would be put on hold."

MR WEAVER:

Sorry, Ma'am, could you repeat?

WINKELMANN CJ:

Mr Tully, this is a different witness. Who was the witness you were talking about? Can I just ask –

MR WEAVER:

He's been the only witness Ma'am.

ELLEN FRANCE J:

All I'm saying is that in terms of the cross-examination that that's expressing Mr Tully's, although he doesn't respond in that way, views in a slightly different way from what his – his brief is a little bit more nuanced I suppose.

MR WEAVER:

We can go to the brief …

ELLEN FRANCE J:

Well that's what I was reading: "It was only after a decision had been made to prosecute that any uncompleted civil dispute will be put on hold."

MR WEAVER:

I'll just … If we go to the brief at paragraph 44.

ELLEN FRANCE J:

44, that's what I'm looking at.

MR WEAVER:

And that's what he says was the practice.

ELLEN FRANCE J:

Yes. All I'm saying is that to some extent it's a question of timing, is the point I think he's trying to make. Maybe not very well but… Anyway, I understand your submission.

MR WEAVER:

Okay. The next –

WINKELMANN CJ:

Well, is there anything you say about that because –

MR WEAVER:

Well, what I do say that there's never been a practice by the Commissioner ever of commencing civil proceedings before a criminal one. That's never been the case.

WINKELMANN CJ:

So, there's a sort of an arbitrage gap there though isn't there. So, when you're investigating someone for a criminal possibility, a possibility of a criminal offence, so you're investigating them, they're suspected of having committed a criminal offence and you're making enquiries, Mr Tully was saying, well, we carry on with our civil process, perhaps, but once we decide to prosecute we stop it.

MR WEAVER:

Well, on the facts of this case, Ma'am, it's even more clear because we know that for the first time in these proceedings, and I mean the damages proceedings, it was disclosed that the Commissioner had already approved the prosecution of Mr Parore before the civil case got underway.

ELLEN FRANCE J:

I understand that. The point it seemed to me is that in some circumstances as a matter of timing, some work may well have to be done in terms of the civil aspect before moving on to criminal, otherwise you might not have any basis for starting to even look at a criminal prosecution. But we don't need to go there because you rely on what occurred here.

MR WEAVER:

Perhaps, just in answer to, or just in general discussion, I acknowledge that the Commissioner may, in circumstances different to this, be undertaking an investigation and not sure whether it's going to go to criminal or civil and I accept that. You know, that might not be, but in the circumstances –

ELLEN FRANCE J:

Well, that's all I was trying to –

MR WEAVER:

Yes, I acknowledge that, but that is not this case here. We have an approved prosecution, signed off by senior officials within the Inland Revenue Department, then the Commissioner issues the default assessments, and I accept what your Honour's saying, that is certainly the case where investigations can be undertaken and it's not fair if it's a civil or a criminal or…

GLAZEBROOK J:

Can I just flag that that seems to me to indicate an issue of causation because if it had already been decided there was this sufficiency of evidence to contemplate criminal proceedings, then in fact there's an issue of causation as to whether the NOPA actually did anything at all in respect of those criminal proceedings. And I do note that in the letter of 19 January is it, or 22 January the possibility of criminal proceedings was put to Mr Parore and the OA approval to conduct business on his own account, on the condition that, that permission was granted on condition that he an accountant put aside in a separate account any GST collected. And that's all referred to in that letter of 22 January.

MR WEAVER:

Ma'am I accept that. I don't think there's any reference to any GST issue in there.

GLAZEBROOK J:

Well there certainly is in the attachment to the OA letter, the one that he –

WINKELMANN CJ:

Perhaps you can, just perhaps if we just take it one step at a time because Justice Glazebrook asked you about causation and she said that if the decision to prosecute had already been taken before the civil – before the notice of assessment had been issued, how does that, how is there an issue of – how is there causation of any harm or loss? Or prejudice in terms of the – yes.

MR WEAVER:

Yes, and because that, there was, Mr Parore was of course not informed of the decision to prosecute him. He was labouring under the apprehension that he was going to be dealing with a civil dispute. He was not – this is not something that he was made aware of. This is –

GLAZEBROOK J:

Well he was made aware that they were considering criminal proceedings on 22 January.

MR WEAVER:

And if he didn't, and the threat was if he didn't file tax returns then he would be prosecuted for that as well. So, he wasn't – he had a Clayton's Choice if you like. He either did nothing, the default assessments would then crystallise and he couldn't then later dispute those which were wrong anyway. Or…

GLAZEBROOK J:

Sorry, I understand that point.

MR WEAVER:

Yes.

GLAZEBROOK J:

But that's post the 22 January letter because the default assessments hadn't been issued but it was indicated that they were – it was being thought that they should be issued and that they were considering criminal proceedings in that.

MR WEAVER:

The default assessments were issued on 23 January 2018.

GLAZEBROOK J:

Yes, yes exactly. He'd been warned about that and then, that they were considering criminal – the only issue, well I suppose there are two issues there. That he had actually been warned about the GST in that letter and a reference

to the Official Assignee letter but also an issue of causation. If they had already decided that there was sufficient evidence to prosecute, what additional harm was caused by the NOPA?

MR WEAVER:

Well I understand. Yes, I understand your Honour's point.

GLAZEBROOK J:

I mean obviously a breach but what additional harm?

MR WEAVER:

Sorry to interrupt. I understand because the NOPA set out his defence to what was to be the criminal charges later, they'd set out why Mr Parore said that he was not liable for the GST which the Commissioner alleged he was. And then that, those default assessments got turned into criminal charges about a year later. But in any event the defence that was disclosed in the Notice of Proposed Adjustment was then used effectively against him by the Commissioner then going and briefing external witnesses about that – the defence argument raised and –

WINKELMANN CJ:

It's set out in Justice Wylie's judgment, isn't it?

MR WEAVER:

Yes Ma'am.

GLAZEBROOK J:

Although frankly he would have been insane not to raise that defence earlier. So if the default assessments hadn't been raised, I suggest that he would be, it would be almost inevitable that he would have disclosed his defence earlier because he would have hoped to have the criminal charges dropped.

MR WEAVER:

No, not at all. He didn't, Mr Parore elected not to give evidence at trial.

GLAZEBROOK J:

No, no.

MR WEAVER:

And he didn't, he's not obliged to – that's what *Safi* said.

GLAZEBROOK J:

Not but it was a legal defence that section 58 meant he wasn't liable. Surely, he would have said that to them in an attempt to get those charges dropped.

MR WEAVER:

Well, that's imagining I think a set of certain – well, no, I can't accept that, I'm sorry Ma'am, because as Judge Collins said, in New Zealand the criminal justice system is adversarial. There's no obligation to –

GLAZEBROOK J:

Well that's no obligation, but quite often people will make statements and say my defence is she consented, drop the charges, for instance.

MR WEAVER:

Well in my experience, having conducted a lot of criminal trials, is that it's almost never to tell the Commissioner what the defence is ahead of it. Why would –

GLAZEBROOK J:

Well because you hope to get the charges dropped if you've got a clear defence.

MR WEAVER:

Well, they're not very negotiable, I can tell you. But, in short Ma'am, his defence was disclosed through the civil processes. That's what happened in this case.

The next part of my submissions deals with the allegation that had been made by the Attorney that Mr Parore received a windfall as a result of the stay and his success in the civil proceedings, but I see from the respondent's

submissions that have now been filed, they have apparently abandoned that windfall argument. So I wasn't going to address it further.

In any event, for completeness, what I simply say is that Mr Parore's Notice of Proposed Adjustment, or the Commissioner compromised the civil disputes resolution procedures after the stay was granted by not issuing a disclosure notice within the time required to do that. That of course compromised those civil procedures the Commissioner applied to the High Court, made an application to extend time to have those civil procedures concluded and the High Court dismissed the application. The consequence of that is that Mr Parore's tax position as set out in his Notice of Proposed Adjustment, what is deemed correct is –

GLAZEBROOK J:
Well that's why the Commissioner's conceded that point I'm assuming?

MR WEAVER:
I think it was insurmountable because it's – there's –

GLAZEBROOK J:
Well that's why the Commissioner has conceded it.

MR WEAVER:
Yes.

WINKELMANN CJ:
So you were just covering it, but the Commissioner's conceded.

MR WEAVER:
I'm just covering the point.

WINKELMANN CJ:
Okay, we understand. We understand your submission, yes.

MR WEAVER:

Their windfall argument is apparently – it's gone. But I now wanted to move on to addressing some of what the Attorney suggests as the reasons why damages for Mr Parore are not appropriate. I've touched on the first part of that and in the Court of Appeal decision Justice Palmer said that the Commissioner has changed her practice in respect of the civil disputes resolution procedures at paragraph 100 of that decision, and the Attorney also made the submission before the Court of Appeal that the Commissioner has changed the practice therefore damages are not appropriate to deter the misconduct.

The point I make is that the Commissioner has never had a practice of conducting civil proceedings before criminal and that practice hasn't changed. It didn't change before *Skinner* and *Safi*, and it certainly hasn't changed after. This is just an example of the Commissioner acting in breach of an existing practice.

ELLEN FRANCE J:

The Commissioner has – it is a change in practice, isn't it, to accept that this was a basis for exceptional circumstances?

MR WEAVER:

What the practice –

ELLEN FRANCE J:

Not not filing a NOPA. That is a change, isn't it?

MR WEAVER:

The guidance that has been issued is –

ELLEN FRANCE J:

Yes, that is a change in practice?

MR WEAVER:

Well, I don't know that it's a change, it's an acknowledgement that it is an exceptional circumstance now that the Commissioner will not compel a person to respond to a default assessment or a reassessment with a NOPA on the grounds of exceptional circumstances. That wasn't a practice by the Commissioner previously. What they've done is adopted a process now to ensure that effectively the same issues won't occur in the future, but what I say is that the Commissioner's practice not to conduct criminal proceedings after civil has not changed. That's what that practice note says that the Commissioner recognises the risks that were recognised back in 2016. It's just been committed to a document.

WINKELMANN CJ:

So is there a – the issue of guidance, does that give people a clear pathway to follow if they're – so if the Commissioner says look we're considering issuing criminal proceedings against you but in the meantime here's our notice of assessment, you don't need to respond to it because – you may respond to but you don't need to because, if you can defer it for exceptional circumstances because of the risk of incriminating yourself, that's a pathway, a clear pathway. Was there a clear pathway before the latest guidance?

MR WEAVER:

Not that I'm aware of, Ma'am.

WINKELMANN CJ:

Is that what Justice Palmer is talking about or not?

MR WEAVER:

Well, the statement itself, which is relied upon by the Attorney and I suppose relied upon by the – from appeal has that aspect to it but it is simply – it also acknowledges the risks to – and it's in the bundle, Ma'am, at volume 301, tab 76.

ELLEN FRANCE J:

Well, what Justice Palmer says changed the guidance about how to proceed ensuring there is unlikely to be a repeat of this situation. That's correct, isn't it, in the sense that it's now clear you can refuse to respond and that will be treated as exceptional circumstances?

WINKELMANN CJ:

Is Mr Conder putting that guidance up on the…

MR WEAVER:

It's coming up on the ClickShare now.

WINKELMANN CJ:

Are you expecting us to read that fast, Mr Conder.

ELLEN FRANCE J:

6, isn't it, and 7.

MR WEAVER:

So, that is the statement that was issued, of course. It doesn't refer to *Safi* or *Skinner*. There's no reference to any case law in it and it was issued several years after *Safi*.

GLAZEBROOK J:

2020 I think, wasn't it?

MR WEAVER:

Yes, it was so it doesn't – but it doesn't explicitly refer to any just –

GLAZEBROOK J:

No.

MR WEAVER:

But what I'm suggesting is that the Court of Appeal said that this guidance that has been issued, well most of that statement deals with the recognition of a

person's fair trial rights and that was already recognised by the Commissioner. It just has a carve out that allows for people not to respond to a reassessment with a notice of proposed adjustment as occurred in the circumstances of this case.

GLAZEBROOK J:

Well, wouldn't you argue that that actually strengthens what you say anyway because at the time Mr Parore wasn't given any indication that he didn't have to respond with a NOPA, in fact, to the contrary, he was told that he did.

MR WEAVER:

That's precisely – and that's precisely the position and that's what Justice Wylie found in his decision. He was not given that opportunity.

GLAZEBROOK J:

I mean it may be because the Commissioner at that stage didn't think 89K did allow that, and I must admit I have some doubts about that myself but –

MR WEAVER:

I agree with you, Ma'am, and –

GLAZEBROOK J:

But, in any event, he wasn't given that opportunity and that he was compelled to and that was the breach of rights is your argument, as I understand it?

MR WEAVER:

That's right, yes. The issue – and we could discuss 89K more but it's not the time for it but, in any event, he wasn't given that opportunity, Ma'am.
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GLAZEBROOK J:

As I say, it was more than that because he was told he did have to respond.

MR WEAVER:

Yes.

GLAZEBROOK J:

Well, at least he did have to respond unless he was going to accept the re-assess – their default assessment.

MR WEAVER:

Yes, which turned out to be wrong anyway.

GLAZEBROOK J:

Yes.

MR WEAVER:

But what I do say about the Attorney's argument that the Commissioner has changed her practice and our argument that there was never any practice, this practice was not in existence at Inland Revenue anyway, is that the statutory scheme of the Tax Administration Act explicitly requires that civil proceedings are dealt with after criminal, and that's the section I referred your Honours to earlier, section 149(5).

WINKELMANN CJ:

This is to do with the imposition of penalties?

MR WEAVER:

Yes. The civil penalties that – in short, civil shortfall penalties, if they're imposed, prohibits subsequent criminal proceedings.

GLAZEBROOK J:

But that's similar to civil penalties in the Commerce Act 1986 precluding criminal proceedings, so it's a normal provision that doesn't say one has to happen before the other though. It just says if you do impose those civil penalties you can't then prosecute.

MR WEAVER:

That's correct, Ma'am, and –

WINKELMANN CJ:

It's kind of a tail-end thing, isn't it, because you can go through the entire civil process and then stop short of the penalties and not fall foul of that provision? That provision doesn't take you that far.

MR WEAVER:

But if the Commissioner had or the parties had gone through that civil – I accept that, Ma'am, if the civil penalties had not been imposed, are not imposed, then the Commissioner is still at liberty to then prosecute, of course, but – and going through that process it would have likely disclosed a person's right, sorry, defence to any subsequent criminal proceedings in any event. But I would say more – in *Skinner* the Supreme Court identified anyway that section 108 of the Tax Administration Act specifically allows for tax re-assessments to be made after the outcome of criminal proceedings are known. That's what the Supreme Court in that decision identified as a statutory signpost for the Commissioner. So for the Attorney or for the respondent to argue that there was any practice that was in place which was confusing to the Commissioner is simply not accepted.

The appellants maintain that the decision by the Commissioner after having completed much of the civil processes to charge Mr Parore was reckless and supports the finding of her Honour, Justice Gwyn, in the High Court where she held that the decision was reckless at best.

The Attorney says in opposition at paragraph 85 of the –

WINKELMANN CJ:

So what was reckless, exactly?

MR WEAVER:

The decision to prosecute in the face of the already-undertaken civil proceedings and the risks that had been explained to the Commissioner in *Safi* and in *Skinner*, and also in *Safi* when a stay had been awarded in that case for precisely the same reasons as this case.

The respondent says at paragraph 85 of their submissions in response is that the Supreme Court in *Skinner* only provided a statement of law at a level of generality which required interpretation and application to the facts of this case by the Commissioner. What I take that the Attorney is saying is that the Commissioner didn't in fact understand what the Supreme Court was saying in that decision nor did it understand what *Safi* meant. That is an argument that has now been raised for the first time. It has never been submitted to any prior Court that the Commissioner didn't understand those decisions.

ELLEN FRANCE J:

Well, isn't it a submission that you've got to apply *Skinner* to the particular facts, that is, it's making a more general observation, is simply the point being made and that on the respondent's argument, they're saying *Safi's* distinguishable, I don't know that it's amounting to saying we didn't understand it.

MR WEAVER:

Well, the submission is that it's a statement of law at a level of generality which required interpretation and application of the facts to the case. If we then were to go to what Judge Collins said in *Safi* at paragraph 50 of that decision. His Honour says: "The Supreme Court could not have more clearly signalled the risk to fair trial rights if the Commissioner issued an assessment and invoked the NOPA regime ahead of the criminal trial."

GLAZEBROOK J:

Just flagging when we come back to my point before that, in fact, I personally don't see this as anything different from when evidence, if wrongly compelled from a suspect and is just excluded as evidence in a criminal trial, and in those circumstances that's the normal remedy, which I think is the point the Crown makes in its submissions as well, but maybe you're coming to that.

MR WEAVER:

And Mr Conder will likely deal with that Ma'am.

GLAZEBROOK J:

Okay, okay.

MR WEAVER:

I'm not evading the question.

GLAZEBROOK J:

No, well, that's fine, that's fine. If you're coming to it don't get waylaid.

MR WEAVER:

But the point I do raise about the Attorney's submission is that the courts were clear. So, going back to the quote I just read, the Commissioner engaged the NOPA regime in this case and then conducted a criminal trial.

GLAZEBROOK J:

So, I'm sorry, can you…

WINKELMANN CJ:

Just repeat yourself.

GLAZEBROOK J:

Which is the passage we've just read and what he –

MR WEAVER:

Paragraph 50 of *Safi.*

GLAZEBROOK J:

Yes, so which –

MR WEAVER:

Sorry, where it says: "The Supreme Court could not have more clearly signalled the risk…" et cetera.

GLAZEBROOK J:

Okay, sorry, right.

MR WEAVER:

If the NOPA regime had been invoked ahead of a criminal trial. This case is exactly on point. That's what her Honour Judge Clarkson found in granting a stay, as did Justice Wylie. So, for the Attorney to suggest, for the first time I might add, that the Commissioner didn't know or didn't understand the Supreme Court where the Commissioner had in fact supported the proposition of not engaging in civil proceedings before criminal, to now say that that was not a well-understood position is simply not accepted.

WINKELMANN CJ:

So, how would you articulate the recklessness? So, what's the risk they're aware of? What's the conduct? You might say they're negligent not having availed themselves of the law and…

MR WEAVER:

Well, an orthodox proposition of recklessness would be simply knowing a risk and engaging in the conduct in any event.

WINKELMANN CJ:

Yes.

MR WEAVER:

That's –

ELLEN FRANCE J:

So, what –

GLAZEBROOK J:

So, it's knowing the risk to a fair trial through the NOPA process and continuing with the NOPA process, is that the submission or is that some –

MR WEAVER:

Knowing the risks to the fair trial through engaging in the civil disputes resolution procedures and then charging Mr Parore in any event.

WINKELMANN CJ:

Can you just take us to Justice Gwyn's finding on it?

MR WEAVER:

Sure.

WINKELMANN CJ:

What paragraph?

MR WEAVER:

At paragraph 80, Ma'am.

WINKELMANN CJ:

Paragraph 80. Thank you.

MR WEAVER:

That's her ultimate conclusion on –

GLAZEBROOK J:

Well, but it's knowing on the authorities there was a risk to the fair trial rights, as I understand your submission.

MR WEAVER:

Yes, Ma'am.

GLAZEBROOK J:

And engaging, well, engaging in the conduct anyway of requiring the NOPA at the same time as contemplating criminal proceedings and in fact instituting them.

MR WEAVER:

Yes, yes, that's the short point.

WINKELMANN CJ:

Okay, so if you could just help us with their reasoning as opposed to the conclusory paragraph?

MR WEAVER:

There's some bullet points above it, yes, there, paragraph 77.

WINKELMANN CJ:

73. It's earlier, isn't it?

GLAZEBROOK J:

I think it's possibly…

ELLEN FRANCE J:

Well, isn't it paragraph 80 –

WINKELMANN CJ:

It's a conclusion.

ELLEN FRANCE J:

– “highly reckless at best.”

MILLER J:

It's the conclusion.

WINKELMANN CJ:

That’s a conclusion. I was just asking what factors they took, the reasoning here?

MR WEAVER:

I believe if you go to, up to –

GLAZEBROOK J:

Well, it's probably 79: “… ought to have acted on the knowledge of the relevant court authorities at an earlier point” and then 80 therefore, is it?

MR WEAVER:

Yes, Ma'am.

WINKELMANN CJ:

And all the conduct that's related to.

MR WEAVER:

At paragraph 77 in the bullet points under the – sorry –

WINKELMANN CJ:

Well, it's 75 possibly critically: "Counsel also emphasises that it was not a question of the Commissioner overlooking the relevance of *Safi* to the present case. In email correspondence almost a year before charges were filed, the Commissioner's staff were discussing the relevance of *Safi* to Mr Parore's case. That is inconsistent with any submission that the breach was simply inadvertent."

MR WEAVER:

Yes, Ma'am. That's in the background facts to this which I didn't go over but, in any event, it's there.

MILLER J:

But to say that it was not inadvertent, that the Commissioner knew about *Safi*, is not to conclude that to proceed was reckless. That begs the question of what the implications of *Safi* were for the prosecution and it would not be subjectively reckless if there was a good faith basis for thinking that it didn't necessarily apply.

MR WEAVER:

And that's a possibility, your Honour, but the problem with, I would suggest, that proposition is that the Commissioner was aware of a problem, that the internal correspondence shows that they knew that there was a problem. Trial counsel was discussing the implications of *Safi* with the officer in charge and it's in the evidence that says we can't proceed at this time, we don't know so – but then

went ahead with the prosecution regardless. That's part of what Justice Gwyn's reasoning was.

MILLER J:

Well, who is the repository then of the subjective recklessness?

MR WEAVER:

The Commissioner.

MILLER J:

The Commissioner personally?

MR WEAVER:

Well, not personally, Sir.

WINKELMANN CJ:

Mr Tully, I suppose.

MR WEAVER:

He's the only person that the Commissioner has offered evidence from.

MILLER J:

The Judge didn't say that, did she?

MR WEAVER:

No. No, she didn't. She just said the decision to prosecute was reckless at best.

MILLER J:

Normally with subjective recklessness, you'd have to sheet that home to a human agent of the Commissioner, right?

MR WEAVER:

Mhm. Perhaps if I could move onto the next aspect of the Court of Appeal decision where the Court found that the breach of Mr Parore's fair trial rights

were at, what was described as, “the lower end of the scale.” At paragraph 96 of the judgment of the Court of Appeal, Justice Palmer found that the decision to prosecute Mr Parore was ill-advised and it was not reckless but the difficulty, in short, with that finding from the appellant’s perspective is that the Court does not know what the advice was.

WINKELMANN CJ:

Sorry, what paragraph are we at?

MR WEAVER:

96 of the…

WINKELMANN CJ:

96. And you say in relation to 96?

MR WEAVER:

Well I say this Ma'am. The Attorney’s chronology, if we link, try and find where the Court makes the decision to prosecute was ill-advised. What I'm saying there is that the Attorney relies on the evidence of Mr Tully in the High Court that he says that he received advice from Crown Law on 12 June 2018 – 2019, sorry. 12 June 2019, and that he – and it's reproduced in the Attorney’s submissions that he received legal advice in respect of the prosecution and then he decided to go ahead with it on the basis that he could distinguish *Safi*. But the issue is –

GLAZEBROOK J:

Where is the –

WINKELMANN CJ:

So your point –

GLAZEBROOK J:

Distinguished *Safi*?

MR WEAVER:

I beg your pardon, Ma'am?

GLAZEBROOK J:

Sorry, what we've got up there doesn't say on the basis. I know he did say it, I just was wondering where that was.

MR WEAVER:

Sorry in his, if you look at, it's in the respondent's submissions because, and I'll –

GLAZEBROOK J:

No I understand that, I was just wondering what the source material of that was.

MR WEAVER:

Of the?

GLAZEBROOK J:

Of his, is it in his brief of evidence or?

MR WEAVER:

It's in his brief of evidence.

GLAZEBROOK J:

Okay.

MR WEAVER:

But we're on –

WINKELMANN CJ:

Do you take the point that he'd waived privilege?

MR WEAVER:

No. No, no we didn't.

GLAZEBROOK J:

Well, well…

MR WEAVER:

If I could, if could just perhaps –

WINKELMANN CJ:

Make your submission.

MR WEAVER:

Make my submission.

WINKELMANN CJ:

Surely.

MR WEAVER:

What I'm saying is that the – Mr Tully says he received advice. The Commissioner claimed privilege on that advice and it hasn't been disclosed. The Court of Appeal does not know what the advice from Crown Law was.

GLAZEBROOK J:

But they make that point don't they, the Court of Appeal? So they didn't put too much emphasis on it all.

MR WEAVER:

No, the Court of Appeal says Mr Parore was ill-advised. They're making a judgment on the quality of advice from Crown Law without knowing what the advice was.

WINKELMANN CJ:

Sorry, what are you saying? That doesn't make sense, what you just said.

WILLIAMS J:

It's just a turn of phrase really, isn't it?

ELLEN FRANCE J:

I don't – yes.

WILLIAMS J:

Well, they're not really saying that he got bad advice.

MR WEAVER:

Well that is part of the basis for not considering that –

WINKELMANN CJ:

I mean there is an assessment, I agree with you counsel, there is an assessment by the Court of Appeal there as to what effectively the Commissioner's decision to proceed was and they're not making an assessment about Crown Law's advice because they don't know what it was.

MR WEAVER:

Yes, that's the point I make.

WINKELMANN CJ:

What do you say we make of the fact that they haven't produced, I mean you obviously – the decision was taken not to argue, that there was a waiver of privilege because you want to rely upon the content of advice and then decline to produce it.

MR WEAVER:

That's right. It doesn't –

WINKELMANN CJ:

It's the basic principle of admissibility and evidential law. What do we make of it in those circumstances?

MR WEAVER:

It goes nowhere. It goes nowhere. You can't infer that the advice was to – that to prosecute or not to prosecute. It's, privilege has not been waived, we haven't challenged it. The fact that –

GLAZEBROOK J:

I thought the Court of Appeal made that point but and accepted that and therefore didn't take it into account but.

MR WEAVER:

But then concludes that it was –

GLAZEBROOK J:

Or is that Justice Gwyn? But I thought the Court of Appeal did say that somewhere.

MR WEAVER:

Well Justice Gwyn didn't take it into account.

GLAZEBROOK J:

No, no I understand, but I thought the Court of Appeal also said that they couldn't make anything of it.

MR WEAVER:

Yes.

WINKELMANN CJ:

So where does the Court of Appeal deal with –

GLAZEBROOK J:

So did they sorry? What paragraph?

MR WEAVER:

Paragraph 93.

GLAZEBROOK J:

Sorry?

MR WEAVER:

Paragraph 93.

GLAZEBROOK J:

Yes, so.

WINKELMANN CJ:

Where does the Court of Appeal deal with why they disagree with Justice Gwyn, because she's got a carefully reasoned judgment as to why she says it's reckless. Where did they go through her reasoning steps?

MR WEAVER:

There's a – we're bringing it up now Ma'am. Is that of assistance? So what we say is that when Mr Tully gave evidence, and in his brief of evidence, that he received advice from Crown Law. He says then that he discussed the advice and that he, and it's reproduced in the Respondent's submissions at paragraph 82, he discussed that advice and decided that *Safi* could be distinguished and then decided to go ahead with the prosecution.

WINKELMANN CJ:

So the Court of Appeal is really saying that recklessness equals bad faith and we're not prepared to say the Commissioner was acting in bad faith?

MR WEAVER:

I don't, I just – that's not the proposition. The Commissioner knew the risks of what was – from the earlier decisions and chose to take that risk and prosecute in any event. That's the short point for the appellant.

ELLEN FRANCE J:

But on that question we were discussing about what they did with the advice at paragraph 93 the Court of Appeal said is: "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 whether the Commissioner was advised to go ahead", et cetera.

MR WEAVER:

But also says that –

ELLEN FRANCE J:

And so it's difficult to put weight on Mr Tully saying they form the view that *Safi* was distinguishable. You don't have any problem with that approach?

MR WEAVER:

No I don't but I do have a problem with the Court of Appeal finding that the Commissioner was ill-advised without knowing what the advice was.

GLAZEBROOK J:

Well –

MILLER J:

The Court is only saying that –

WINKELMANN CJ:

They're not talking about the advice.

MILLER J:

That when on its reading of *Skinner* it's not as narrow as the Commissioner evidently thought, and its ill advice for that reason. It's a wrong view of the law. It's got nothing to do with the legal advice, whether the legal advice was right or wrong. So it's intellectually consistent with what the Court is saying in paragraph 93. It doesn't put the legal advice in issue.

MR WEAVER:

No Sir, I accept that. What – I think I have taken the point as far as I can in terms of what the advice was.

WINKELMANN CJ:

Yes, I mean the point you're making is, I think that the Court of Appeal is going, is dealing with counsel's argument about the application of *Skinner* in the case

and saying that it's too narrow a view. But they're not really engaging with Justice Gwyn's arguments.

MR WEAVER:

The –

WINKELMANN CJ:

Because Justice Gwyn has set out reasoning as to why she says it's reckless. She says it was known *Safi* was plain in its face. It was being discussed as a risk and they proceeded anyway.

MR WEAVER:

Yes Ma'am. Just to round off this aspect of my submissions, there is some criticism of counsel contained in the respondent's submissions about not cross-examining Mr Tully on the advice received by Crown Law at paragraph 83.1. Of course privilege was claimed on the advice, so it was not a matter –

WINKELMANN CJ:

Are you sure that's what they're saying?

MR WEAVER:

Well it says he was not challenged on that part of his evidence, which referred to the advice.

WINKELMANN CJ:

Well, is that what they're saying? I don't know they're saying that.

ELLEN FRANCE J:

Well I'm not sure that is what they're saying.

MR WEAVER:

Although "Mr Tully was cross-examined on a number of topics; this part of his evidence was never challenged." And they refer to the evidence above that which is from the brief of evidence.

ELLEN FRANCE J:

Well they're talking about –

WINKELMANN CJ:

Hang on. Well, we need the preceding paragraph, do we? Oh okay, so I see your point. Because he's saying he stood on the legal advice.

MR WEAVER:

That's right. So we're in a position of the Commissioner's received legal advice. We're not going to tell you what it is and now being challenged for not cross-examining on the advice over which privilege was claimed. I'm just pointing that aspect of the respondent's submissions out. I don't accept it is a valid criticism of not –

WINKELMANN CJ:

Ms Laracy is standing behind you.

MS LARACY:

May it please the Court I am sorry to interrupt. I wonder if it would be helpful to have a look at that –

GLAZEBROOK J:

Can we just make sure –

WINKELMANN CJ:

You might need to move, yes.

MS LARACY:

Apologies, I wonder if it would be helpful to look at those paragraphs of the affidavit of Clint Tully, because my understanding is that that passage we have cited there relates to the 26 June 2018 decision to prosecute rather than the quality of the advice. But that's an assessment for the Court.

WINKELMANN CJ:

Right. Carry on counsel.

MR WEAVER:

I would simply also point out to the Court that there was no evidence of any discussion between Mr Tully and his team leader in June 2019, about distinguishing *Safi.* There was never any evidence produced about that other than what was put into a brief of evidence. The evidence we do have before the Court, and which was cross-examined on, is Mr Tully's discussion with his team leader a year earlier following the conclusion of the civil disputes resolution conference that Mr Tully and his team leader decided to park the dispute at that point in time and proceed with the prosecution then. That is the only evidence, other than what Mr Tully said in his brief about a later discussion, but that is the only evidence of a discussion about a prosecution decision.

GLAZEBROOK J:

So, can I just grab those dates again?

MR WEAVER:

Yes, Ma'am.

GLAZEBROOK J:

So, that discussion was when after parking the conference?

MR WEAVER:

After the conference, Ma'am, that was 26 June 2018.

GLAZEBROOK J:

That's what I thought, thank you. Sorry, I thought it was June 2018, I was just checking.

MR WEAVER:

Yes. It is confusing Ma'am because there's an allegation of a later discussion in June 2019.

GLAZEBROOK J:

Yes, I know, I know. Yes, I know that's why I was just making sure I understood.

WINKELMANN CJ:

So, that was a year earlier than what? Sorry, that was a year earlier than what?

MR WEAVER:

So, in the brief there's a suggestion that Crown Law advice was received and that Mr Tully and his team leader decided that *Safi* was distinguishable and then they could prosecute in June 2019. But, we don't have any evidence of any discussion between those two –

WINKELMANN CJ:

Well isn't that evidence of the discussion?

MR WEAVER:

It's the brief of evidence.

WINKELMANN CJ:

It's the brief.

MR WEAVER:

There's no third, there's no file notes, nothing to support it.

WINKELMANN CJ:

Right.

MR WEAVER:

What I'm suggesting is that the only evidence to support any discussion between Mr Tully and his team leader was one that took place in June –

WINKELMANN CJ:

Well, did you challenge that?

GLAZEBROOK J:

Which was before *Safi* was decided in fact is your point isn't it?

MR WEAVER:

Correct, Ma'am. His prosecution –

GLAZEBROOK J:

June 2018 discussion is before *Safi* was decided.

MR WEAVER:

Yes. But after *Skinner.*

In terms of the respondent's position that an award of damages could have a chilling effect on prosecution decisions in the future, I did want to highlight to this Court some evidence about the Commissioner's conduct in terms of this prosecution and steps that were taken to have the defence withdraw submissions about the stay and evidence of it because what I would suggest is it counters that and I think an award of damages not only serves as a deterrent effect and to compensate Mr Parore for his losses, but for the prosecutor to act in a way that is proper because in the circumstance of this case there was allegations made of submissions being put before the Court that were proper –

WINKELMANN CJ:

Improper.

MR WEAVER:

That were proper by the defence, accepted by the courts – perhaps we'll go to what that is in the bundle.

WINKELMANN CJ:

No, perhaps state what it is about and then we'll go to …

MR WEAVER:

In short, trial counsel, after the stay application had been filed before the District Court and submissions went in, the submissions alleged that the Commissioner had used the information from the civil disputes resolution procedures to brief prosecution witnesses and effectively try to head off the

defence case. That was true but the prosecutor took steps to try and have those submissions withdrawn through requests made to counsel. The difficulty with the Commissioner's – well the problem I say with that is the Commissioner knew that the – that Mr Tully and inhouse counsel had briefed these witnesses, it was denied and then in the civil – this proceeding before the High Court, it was finally able to be put to Mr Tully, who then accepted and conceded that is precisely what the Commissioner had done.

WINKELMANN CJ:

Now, is this in evidence or are we going down a new …

MR WEAVER:

No, no, that is a – that's in the bundle, Ma'am.

ELLEN FRANCE J:

So, I'm a bit lost as to quite where this takes us.

MR WEAVER:

It's in – in addressing the Attorney's argument about the chilling effect of an award of damages, the suggestion that prosecutors may be unlikely to take prosecution decisions if there was a prospect of damages being awarded later in the future. Well, I say in opposition to that this case has aspects to it where the prosecutor, we say, tried to have the defence withdraw proper submissions on the stay application on the basis that the allegations were untrue, which then in the High Court damages claim, the Commissioner conceded that, in fact, those allegations were true.

WINKELMANN CJ:

So, that doesn't really respond to –

ELLEN FRANCE J:

Well, how –

WINKELMANN CJ:

That doesn't really respond to the point though, does it? You're raising an issue of prosecutorial misconduct but it doesn't respond to the more fundamental or to another point. Both very important points but it doesn't respond to the point that it will have a chilling effect on prosecutorial decision-making and it's a different point.

MR WEAVER:

Well, maybe –

WINKELMANN CJ:

You're raising one of prosecutorial conduct.

MR WEAVER:

Well, maybe I'm –

WINKELMANN CJ:

I mean that may be to put it too high but you're concerned about prosecutorial conduct.

MR WEAVER:

There's suggestions that there's – that the criticisms of the prosecution was improper in this case and I'm suggesting that there is evidence here that shows that the Commissioner ought not to have taken those steps to try and have proper submissions put before the District and High Court, then later in the High Court the exact allegations that were made turned out to be true.

ELLEN FRANCE J:

Have there been earlier findings of fact in relation to the –

MR WEAVER:

No.

ELLEN FRANCE J:

No, so –

WINKELMANN CJ:

So, I mean we can't really investigate that –

ELLEN FRANCE J:

– on what basis are we going to determine that?

MR WEAVER:

Well, because if you had a look at the evidence, it's the suggestion that the trial counsel and Mr Tully had discussed the matter and had denied it and asked that the submissions be withdrawn on that basis. When that evidence was challenged in the High Court, it turned out that it was in fact opposite.

ELLEN FRANCE J:

Well, we don't know what trial counsel knew or didn't know at the time. For myself, I think you're better addressing the more substantive point about –

WINKELMANN CJ:

Can I just ask about this. So have you argued this before at any other level of court?

MR WEAVER:

No, Ma'am, but it –

WINKELMANN CJ:

Right. I mean I don't really think – I really think it's not going to help you on this point because this point is a different issue in any case and we're not likely to start making enquiry about prosecutorial conduct at this level.

MR WEAVER:

I accept that, Ma'am. I'm content to move on. The last, and I'll try and cover this quickly, the last part of my submissions are addressing what the Attorney suggests is a proper prosecution in terms of evidential sufficiency because the Attorney says that their – I took it from the submissions that in the round Mr Parore was guilty anyway and he got away with not being convicted because

in the submissions the Attorney says that there was “evidence that met the evidential threshold” at paragraph 70, and I take it the evidential threshold, which has been referred to, is beyond reasonable doubt.

GLAZEBROOK J:

No, no, it's there is sufficient evidence that he failed to register for GST, that he didn’t pay GST, having collected GST, and that therefore he evaded tax. I just saw it as that. There's obviously an intent issue there for which the section 58 issue is obviously relevant.

WINKELMANN CJ:

I think your response on that is just what Justice Wylie said was that it would be wrong to rule the section 58 issue could not have succeeded.

MR WEAVER:

Well, that’s right, Ma’am. The point that I raise in terms of those types of submissions that are being made by the Attorney, that there was sufficient evidence and that he received the benefit of a stay, is another right that Mr Parore has and that is a right to be presumed innocent. He can’t be presumed guilty or that he has any real benefit from a stay because he’s presumed innocent from the outset and is still today.

GLAZEBROOK J:

I think the submission is that there was sufficient evidence to prosecute and, in fact, what I put to you earlier, what they had actually indicated in that letter of 22 January set out what the evidence was that they were relying on in terms of that. It doesn’t mean that he’s guilty; it just means there was sufficient evidence to put him on trial.

MR WEAVER:

Well, that might be the Attorney’s view but certainly from the appellant’s perspective there was a complete lack of evidence, and the only person that has made any finding about the evidence to any criminal standard was her Honour, Judge Clarkson, when she was dealing with the section 147 decision.

So a section 147 application was made in terms of liability for GST. Her Honour had heard and seen the evidence. The Commissioner had closed the prosecution case and her Honour issued a section 147 decision dismissing seven of the charges but in doing so her Honour also addressed the element of intent, which is obviously part of the charge, and her Honour found that it was impossible to infer any intent to evade GST. That was her words.

WINKELMANN CJ:

So isn't the point that you need to address what the right is engaged here because Mr Parore is not complaining of a right not to be prosecuted. He's complaining of a right, a breach of his right to a fair trial, and the prosecution and trial that did occur was tainted by the breach of rights because his rights to silence had been impinged upon.

MR WEAVER:

Yes, Ma'am.

WINKELMANN CJ:

So the issue for you is whether a stay was the appropriate response, or did you need more than that, and I think the Crown says, well, look, you got a lot when you got a stay, because in fact there could've been a ruling that there was a mistrial and that you go to another trial without that evidence.

MR WEAVER:

Well, what I'll – I'll probably defer to Mr Conder to address the precise points, but what I was just simply responding to is the suggestion by the Attorney that this was a good prosecution or that it – from the outset, and he received a real benefit from a stay because from the appellant's perspective, and certainly from the Judge that heard the evidence, it was impossible to infer intent to evade tax. She wasn't even asked to look at that and she found that all without, as part –

WINKELMANN CJ:

Was that the ruling that was overturned on appeal?

WILLIAMS J:

Wasn't that overturned?

MILLER J:

Justice Jagose overturned it.

WINKELMANN CJ:

Yes.

MR WEAVER:

And it was overturned on the technical basis that there was some evidence her Honour, in terms of liability, that was the section 147, that her Honour had overlooked the fact that –

WINKELMANN CJ:

Is your submission that it wasn't clear cut at all? This is not –

MR WEAVER:

It wasn't clear cut. What was the Commissioner expecting? That for a Judge to dismiss charges under section 147 and find that there was no evidence of intent, and insufficient evidence, to then find that he was guilty beyond – or that the charges could be proven beyond reasonable doubt?

GLAZEBROOK J:

But there's a difference between a situation where you have enough evidence upon which a jury reasonably directed or a judge reasonably directed could find beyond reasonable doubt and whether or not the person would be found guilty beyond reasonable doubt. So there's a different threshold of each stage, isn't there, because it has to be proved beyond reasonable doubt and –

MR WEAVER:

Yes, but the point –

GLAZEBROOK J:

The fact that it wasn't proved beyond reasonable doubt doesn't mean that the charges weren't reasonably laid in the first place.

MR WEAVER:

Well, yes, your Honour's –

GLAZEBROOK J:

I mean it can do and there have been instances of that but it doesn't necessarily mean that.

WINKELMANN CJ:

Anyway, it's morning tea. You might want to come back to that question if you have more answers to it.

COURT ADJOURNS: 11.30 AM

COURT RESUMES: 11.50 AM

MR WEAVER:

Yes, your Honours, that was effectively the end of where my submissions –

WINKELMANN CJ:

So you're doing well in terms of timing then Mr Weaver.

MR WEAVER:

Trying to be as fast as I can.

WINKELMANN CJ:

No, no, don't – we're not requiring you to rush.

MR WEAVER:

Unless there was any further questions about those submissions then I was going to hand now over to Mr Conder who's going to be addressing substantive Bill of Rights Act matters.

WINKELMANN CJ:

Mr Conder.

MR CONDER:

E ngā Kaiwhakawā, tēnā koutou.

GLAZEBROOK J:

For some reason you're not coming through as well.

MR CONDER:

No, I'm grateful for that indication, is that a little better?

WILLIAMS J:

It's better now. You probably needed to wake it up, and your mihi woke it up, well done.

WINKELMANN CJ:

It probably is actually because it's directional, it's whether you're speaking into it, so go ahead Mr Conder.

MR CONDER:

I'm very poor with microphones so please don't hesitate to correct me again if the need arises. I'm going to be addressing the submissions on this part in three pieces. I am going to begin first by talking about the core submission that we're making about the manner in which the Court should apply *Baigent* damages. I'm then going to look at the factors that we say that even on the Attorney's vindicatory approach would still justify an award of damages here, and then I'll move on to talk at that point about costs.

Before I do that, I think it's probably appropriate at this juncture to address the causation point head on, because I think that's an important component of all the submissions that follow. In doing that I want to begin –

WINKELMANN CJ:

So is that your third part? You said: "three pieces".

WILLIAMS J:

Your first, is it?

MR CONDER:

So I'm ahead of my first part, going to talk about causation which is –

WINKELMANN CJ:

Okay so first is manner in which the Court should apply damages which is your broad part, and then second ground is even on vindicatory approach the Attorney-General approach is – advance, as you say, damages should still be awarded. What was your third part?

MR CONDER:

The third part is a brief address on the topic of costs.

WINKELMANN CJ:

Right. Sorry.

GLAZEBROOK J:

And this is a pre the three points that you're now dealing with?

MR CONDER:

This is prior to the three points, yes that's correct.

WINKELMANN CJ:

Yes, so are you now on causation?

MR CONDER:

Yes, I'm on causation. This is relevant to the first ground but I'm dealing with it first because it's clearly an important issue here.

In addressing that point I wanted to begin with paragraph 72 of Justice Wylie's stay decision where his Honour observed that: "When the Commissioner was dealing with the civil dispute, she had not charged Mr Parore." Obviously, that's an indication that the rights that are guaranteed by the Bill of Rights for persons charged had not yet been engaged. However, his Honour went on to say that when she subsequently charged him on 26 August 2019, in His Honour's judgement, she put Mr Parore in an impossible position because by that point she had used her statutory powers under the TAA to effectively require him to disclose his prospective defence, to deprive him of the right to silence, and to get him to acknowledge the actus reus of certain offences and to disclose his hand in relation to the others. "When the charges were laid, a fair trial for Mr Parore was already an impossibility."

The reason I begin there is because we accept two things here. We accept that prior to the default assessments being issued there was the possibility of a prosecution here. It would have been appropriate; it would have been licit for the Commissioner to commence criminal proceedings against Mr Parore prior to the issuing of a default assessment. We also accept –

GLAZEBROOK J:

Is that an acceptance that there was a basis for prosecution which must mean sufficiency of evidence or is that –

MR CONDER:

No the concession doesn't reach quite that far your Honour.

GLAZEBROOK J:

No, no that's fine. I was just checking what the –

MR CONDER:

I acknowledge your Honour's point that there is some indication that by that point a decision to prosecute had already been made. The evidence on exactly how that decision to prosecute memorandum was created and completed and the points in time at which different points in that memorandum were added

gets quite complicated. I don't think it's constructive to go through it here, other than to say it's the appellant's position that it was not necessarily appropriate on an evidential sufficiency basis to go forward with the prosecution in January, but it was a lawful thing for the Commissioner to have done in the abstract to commence criminal proceedings. We don't contest that prior to the issuing of the default assessments.

We also accept that issuing default assessments is a power that the Commissioner can rightly use –

GLAZEBROOK J:
Can I just make sure I've got your concession down properly, because I'm not entirely sure I understand it, I think this is quite important.

MR CONDER:
Certainly. It is.

GLAZEBROOK J:
Yes. So, your position is "to go" – I got to "to go ahead" and then sort of slightly lost you so…

MR CONDER:
So, the submission is that the Commissioner had the power, if you like, to begin a criminal proceeding that would not have been a violation of Mr Parore's fair trial rights, had it been commenced prior to the default assessments. That is not to say that that would've been the right decision for the Commissioner or it would've been an appropriate decision, but it would not have been in breach of his rights to a fair trial.

GLAZEBROOK J:
So, yes, okay so I understand. So, I mean, it's a fairly obvious point really that if you haven't breached fair trial rights and there's no issue about breaching fair trial rights then you can start a prosecution. Whether it would've been right to

start a prosecution in this case is not a matter that, well, it's not a matter that you accept, so, it's a concession in the abstract if you like.

MR CONDER:

Yes, I accept it's not a particularly generous concession your Honour.

WINKELMANN CJ:

So you need to move onto your next point.

MR CONDER:

Yes.

WINKELMANN CJ:

Right. And your next point is?

MR CONDER:

The next point is that it was entirely within the Commissioner's rights to issue default assessments. There's no concern that that is an improper process but what is improper is once default assessments have been issued, and in particular once they have been responded to, to then go and commence a criminal prosecution. In our submission by issuing a default assessment and certainly by the time the response is received, the Commissioner needs to be taken to have effectively made an election to pursue now the civil process, rather than the criminal one because otherwise the risks that attend a criminal prosecution arise from the very outset of the process and are entirely insurmountable. We say that the moment in time where the Commissioner did the wrong thing was when the Commissioner elected to lay criminal charges, having already received a notice of proposed adjustment.

WINKELMANN CJ:

What happens if you've commenced the civil and then you discover material that makes clear that the criminal route is the correct one?

MR CONDER:

In my submission it probably depends on at what stage in the civil process you are and where that information has originated but I would suggest that there needs to be very strong grounds for it to be proper for the Commissioner, having received a NOPA, to then turn around and determine that the only appropriate pathway is a criminal prosecution. The Commissioner has been on notice for some time that the issuing of default assessments creates a risk that a fair trial will be impossible, and in my submission the Commissioner must be taken to understand that the issuing of default assessments carries with it a risk that criminal prosecution will not be able to be conducted beyond that point.

WINKELMANN CJ:

I mean, I suppose it would have to be case-by-case because even though you may have commenced the civil procedures, it might be that absolutely nothing comes out of those that in any way bears upon fair trial rights.

MR CONDER:

I accept that in the abstract. I have some hesitations with it in practice for this reason. If one follows the Commissioner's new practice to its logical conclusion, taxpayers are invited to maintain their right to silence while the civil process runs to its conclusion, they face all sorts of consequences in the civil jurisdiction.

WINKELMANN CJ:

Yes.

MR CONDER:

And then they are provided the opportunity after they've already been, say, bankrupted over –

WINKELMANN CJ:

Yes, but if you have a situation where no one knows they would be in any criminal context and then suddenly it springs up that you are and nothing has been disclosed that could prejudice your fair trial rights, then it wouldn't prevent you proceeding.

MR CONDER:

I accept that in principle, your Honour, I accept that it would be a case-by-case assessment but in my submission the Commissioner must know that upon the issuing of default assessments and certainly once a detailed response is provided the risk –

WILLIAMS J:

Would that be a situation where exclusion of the prejudicial evidence would be the most BORA-consistent approach?

MR CONDER:

In my submission no, for three reasons. The first is that this is not an accidental situation or a situation that arises but rarely through a misunderstanding. This is something that the Commissioner has been warned that taking this –

WILLIAMS J:

No, no, I'm not talking about this case, I'm talking about the situation where there's a disclosure in the NOPA that gives rise to the prospect of criminal charges. It doesn't come to light until that exchange which causes the Commissioner, in proper exercise of his or her discretion, to say there is a criminal issue here.

MR CONDER:

What I would say in response to that is exclusion is at least necessary in that situation but in my submission may well not be sufficient. The reason why I say that is exactly what occurred in this case, which is that the fact that that information was known to the Commissioner opened up lines of enquiry that would not otherwise have been available. Opened up an ability to prepare for a defence that was otherwise unknown. At that point, exclusion of evidence –

GLAZEBROOK J:

Can you detail what that is quickly? What are the aspects that were previously not known?

MR CONDER:

This is the entirety of the section 58 defence, your Honour. What happened with the NOPA being provided is the Commissioner was advised that section 58 would be relied upon in that particular fashion and then proceeded to go and gather evidence on the part of the Official Assignee as to what the appropriate processes were, and so on and so forth. Preparations were laid to respond to this argument at trial. Mr Parore, and I accept your Honour's point that in some cases a defendant would choose to disclose that material earlier, but he was deprived of that choice. A strategic decision was made for him.

GLAZEBROOK J:

But how has that affected him? Because if he'd left it until trial then presumably there would've been some kind of application to say well we need to be able to adduce the evidence to counter this and can you give us an adjournment to do this.

MR CONDER:

In my submission your Honour, in the criminal jurisdiction, trial by surprise is not an unusual practice, nor is it one that typically invites the prosecutor an opportunity to repair their case. I would submit that in many cases the Commissioner would not have that opportunity if the defence were not raised until the close of the prosecution case.

I intended to talk about this later into my submissions but perhaps I'll say it here. In a criminal trial one of the most important moments in the trial is the point at the close of the Crown case where the defendant is put to the election whether to give or call evidence. It is a tangible reminder in the courtroom of the presumption of innocence that up until that point there has been absolutely nothing for the defendant to prove and, other than a handful of very narrowly constructed exceptions, there has been no requirement that he provide any answer until that moment. Everything that erodes that, in my submission, goes directly to the heart of a fair trial, to the right to silence, and indeed to the presumption of innocence.

GLAZEBROOK J:

Although you are obliged to put in cross-examination anything that you're bringing up that counters that, aren't you?

MR CONDER:

You are at that point, so you have your duties to cross-examine based on relevant factual matters that might arise, but there is a great deal that may not be revealed until the close of the prosecution case.

WINKELMANN CJ:

I must say, I don't think your microphone is all that well directed toward you, Mr Conder.

MR CONDER:

Thank you, your Honour. I'll try and be a little bit more straight on and see whether that helps.

WINKELMANN CJ:

I mean, microphones are very badly placed in courtrooms, I don't know why. It seems to be a constant feature.

MR CONDER:

I think the combination of my short height and the tall stature of the lectern is not helping either your Honour but I will proceed.

GLAZEBROOK J:

I wonder if that other microphone there is actually better.

MR CONDER:

If you give me a moment to move we can find that out.

WINKELMANN CJ:

As a matter of logic, the shorter you are the better those microphones should be, but doesn't seem to be the case.

MR CONDER:

If that were the case then I'd be coming through loud and clear, your Honour.

WINKELMANN CJ:

No you are better there actually.

MR CONDER:

All right, well I'll stay here then. I apologise, I've lost the train of your Honour's question.

WINKELMANN CJ:

So, we were just saying, it was Justice Glazebrook and she said well, you know, how are you prejudiced because the Crown could've just got an adjournment and called these people and you said trial by surprise is part of the defence world. Point at which time the defence makes its election is a critical point of trial. Up until that point they've been resting on the presumption of innocence. You may have said two sentences or so that I have missed but I can't recall what they were.

MR CONDER:

Well your Honour, that's the submission. I think the rest of it was waffle, so perhaps I'll proceed from there. Where this takes us in terms of causation, which of course is where this point began, is that we say that the critical moment is where the Commissioner lays charges in breach of the various fair trial rights and, importantly from our perspective, the right to silence. At that point a wrong decision has been made and everything that happens in a criminal proceeding flows from that breach.

The Crown has at times in this case made the suggestion that there would have been a prosecution anyway had it not been for the violation of fair trial rights, and this is what I understood your Honour's question to be directed at. If a decision to prosecute was already a likelihood in January, then has Mr Parore really lost anything by the fact that it was this prosecution and not a lawful one that was conducted. In my submission that is not an appropriate course for this

Court to take. That is akin in many ways to saying if a lawful search warrant could have been obtained, then the violation that flows from the breach has not flowed from the breach.

In our submission this criminal prosecution flowed from the decision to disregard Mr Parore's fair trial rights and, as a consequence, the effects of this criminal proceeding are effects directly from that breach. I begin with this because this is foundation of the things that I will go on to say about the way that pecuniary losses –

WILLIAMS J:

It may affect – you're going to come to this I'm sure, I'm sure you're going to come to this – but it may affect what you do about the breach though.

MR CONDER:

I think that is – I accept your Honour that there are situations where that would be appropriate, and probably the place where I would talk about that is when I talk about the fact that this is a discretionary remedy and that the Court may find causation, and may then find effectively for policy reasons that it is appropriate to withhold or tame down the relief that would otherwise be ordered. But, in my submission, it shouldn't be viewed as interrupting causation, it shouldn't be viewed as meaning that the loss has not flowed directly from the violation. It rather means that there might be other public interest factors that go to the question of whether that relief should be as fulsome as we would submit that it ought to be.

GLAZEBROOK J:

And the violation in this, is actually the way you put it there, is actually instituting criminal proceedings after you have already instituted the civil proceedings.

MR CONDER:

That's correct, your Honour. That is the moment –

GLAZEBROOK J:

So, it's just as simple as that?

MR CONDER:

That's correct, your Honour. That is the violation we say is that instituting criminal proceedings once the NOPA had been lodged was immediately a violation of those fair trial rights and that was the unappealed conclusion of his Honour Justice Wylie in the stay that's foundational to the decision that's made there.

GLAZEBROOK J:

I should say, having articulated that, that doesn't mean that I accept that. In fact, I don't accept that as a proposition because what say the NOPA says nothing at all that might be seen to be incriminating for instance? I mean, it says you've made an arithmetical error.

MR CONDER:

This comes back to the earlier discussion, I suppose, about are there situations where this course of conduct could happen and then a criminal prosecution would still be illicit? I suppose I'm going to stand on the submission and say no and say, once you have a NOPA that contains information, the defendant has committed themselves to a position, they've put themselves in a situation where their rights are lost and at that point it's inappropriate to continue.

WINKELMANN CJ:

Do you really need to put it that high because they may have put themselves to almost no position. It might be, as Justice Glazebrook says, they may just say you've added this up wrong?

MR CONDER:

No, your Honour, I accept that that submission is not necessary, and so while I'm saying, I'm not stepping back from that submission, at the same time there is a submission short of that that is available on the facts of this case, that the degree of violation here is sufficient given the volume of information that was

provided, the acknowledgement, in effect, of intent, the fact that a line of inquiry was opened up, and this goes to what his Honour says at paragraph 69 of that same decision. His Honour says there precisely what was received as a result of the NOPA. So, while I am saying that it is my –

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MILLER J:

But isn't your position, the position that's sufficient for you surely is that if the Commissioner elects to commence civil proceedings while keeping open the possibility of criminal ones, then the Commissioner takes the risk that the taxpayer in the NOPA will disclose something that precludes the criminal prosecution or at least makes what is said in the NOPA inadmissible. So it's a risk that's assumed by the Commissioner. The NOPA might merely say you've done your maths wrong but it might also say I've got a defence on the facts, or admit you don't have a defence to a criminal proceeding on the facts.

MR CONDER:

I accept that, your Honour, that that submission would be sufficient here and I adopt that submission to the extent that my earlier one is not accepted.

GLAZEBROOK J:

I suppose one of my issues with this is that in no other context does a breach of the right to silence mean other than that evidence is excluded and the trial, if it can proceed on the other evidence, proceeds on the other evidence. There's no suggestion that you couldn't have a fair trial in those circumstances, and in the Commerce Act situation you just ignore or can't take into account the incriminating material that's been put forward. There's no suggestion you can't have a fair trial. There may be situations where you can't have a fair trial because of the extent of the information. But just per se you can't have a fair trial, I'm having real difficulty with that submission.

MR CONDER:

I accept that, your Honour. I'd respond to it in two ways and again I'd pitch two levels of submission in response to that. One is the simple one that on the facts

of this case that line was crossed. The other submission though is to draw a distinction between cases where the right to silence is violated, and I think your Honour is right to point to the Commerce Act as an example for that and at the same time I would also put the proceeds of crime legislation in the same category. The reason why I think those two are an important comparator is because in, I would say, the majority of the right to silence cases or the cases where that right seems to be placed at risk, there is not compulsion to the extent that there is here, but those are probably the other two statutory regimes that I can think of where there is in fact – sorry, I would add to that probably the Health and Safety at Work Act 2015 might be another one. There's only a handful of situations in the law where there is in fact a mechanism for actual compulsion of an answer and I would put here the Tax Administration Act into this context. The difference is that in, for example, the proceeds of crime legislation there's very clear provisions that distinguish what may and may not be done with that information. It's clearly anticipating that this process will be conducted in parallel to a criminal proceeding.

WINKELMANN CJ:

The rules of the game are clear up front. Is that your point?

MR CONDER:

That's it, and it would be open to Parliament here to say in the Tax Administration Act if you go through the civil process, the information is generated, then that must be set aside if a criminal proceeding is pursued, and at that point I would have to say Parliament has chosen to deal with the issue in that way. But in my submission without such a clear statement –

GLAZEBROOK J:

Well, I'd put to you the Courts would actually impose that whether or not the rules were in the legislation because on the same sort of principle that you're suggesting we do here they would say, well, there's a statutory compulsion to do something but you have the right to silence, you have the Bill of Rights and that overrides that statutory compulsion at least being taken into account in criminal proceedings.

MR CONDER:

I accept, your Honour –

GLAZEBROOK J:

And then that's what you're saying should happen here in fact but you're saying that it goes further than just setting aside that information. It actually affects the fair trial. I'm just putting to you that that isn't the case in other aspects of evidence that seem to be obtained in breach of rights.

MR CONDER:

And the distinction that I'm drawing is that in those regimes where the Courts have adopted the exclusion-only model, if I might call it that, there is clearer parliamentary warrant, I would say, for choosing that pathway and –

WINKELMANN CJ:

Isn't –

GLAZEBROOK J:

Well, there isn't in the general exclusion of evidence because that was in fact a remedy that was sought out by Judges under the Bill of Rights.

MR CONDER:

I accept –

WINKELMANN CJ:

Can I just say, I mean you're placing your case very high and much higher than your client needs. It must be that one must look at what is disclosed to work out what the appropriate response is, whether it's simply exclusion or whether it is in fact a stay, although I take your point that shouldn't be seen to detract from the importance of the rule that has now been established by the Commissioner. I think that's what you're trying to defend isn't it? The rules that's established by the Commissioner.

MR CONDER:

I think in effect it is. But I accept that the Court could well take a view that there will be cases under the same regime where a stay or where exclusion would be adequate. It's my firm submission that this is not such a case. It's my submission that the Court should be hesitant to conclude that that is a sufficient remedy and certainly it would require very careful consideration of the real advantage gained by the Commissioner from a NOPA before that decision could be safely made. But I accept that for the purposes of this case, all that is necessary is that the Court be satisfied that this was a prosecution that should not have proceeded following the issuing of the NOPA. And I submit that the grounds that Justice Wylie found, particularly at paragraph 69 of his decision, make quite clear that this was an unremediable breach. Once the NOPA was provided there was simply no way by exclusion alone, which his Honour directly considered, to remedy this situation. It was a prosecution that from the outset was incapable of being a fair trial.

WINKELMANN CJ:

I mean I suppose it's possible that should we find that this Commissioner is regularly breaching this, the Court takes the view that it has to impose stays to vindicate the right because otherwise the Commissioner will keep on breaching it. But that's not the situation we have where we have a Commissioner who has responded now with clear guidance.

MR CONDER:

Yes, I would just pause at this stage, and I don't think I need to go to the part of the decision but in *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429, and I will go there later at paragraph 255, his Honour Justice Blanchard said words to the effect of, in New Zealand one of course can presume that government departments will always follow declarations of the Court, that that will be sufficient. In my submission the Court should have some hesitation accepting that here when the history is observed that we have, what I would submit is a very clear comment in *Skinner and Rowley* as to the risks that attend running the civil process before the criminal process. There is then a decision of the District Court in *Safi* where that risk has come to pass and

after both of those things the Commissioner proceeded to continue with this prosecution and as recently as the Court of Appeal decision in this proceeding to argue that in fact a stay was unnecessary in the circumstances.

In my submission this is a case where there has been some recalcitrance from the Commissioner in the past that should factor into remedy. But that really fits into my second submission about what we do if we get to vindication.

MILLER J:

What you're asking us to do is to adopt a rule in effect that puts control of criminal prosecutions in the hands of the taxpayer. Because the Commissioner may start with civil proceedings, as would be perfectly normal, and the taxpayer, simply by putting in issue information that would be relevant in a criminal proceeding, can put a stop to it. Now we can meet that by saying well the remedy may be exclusion of that evidence, it's a case-by-case thing.

MR CONDER:

Yes, your Honour I accept.

MILLER J:

And so we – yes, okay.

MR CONDER:

I accept the criticism of the submission that taken to its full extent what I'm proposing here would carry that, placing a certain power of decision in the hands of the taxpayer. I accept that my submission would have that consequence and I accept that the Court may feel that that is a bridge too far.

I would submit that the decision remains with the Commissioner whether to take that risk or not. These are coercive powers. They should be used with caution. It's not the only pathway open to the Commissioner, and in those circumstances as your Honour commented earlier, a Commissioner who issues default assessments is aware that they are taking a risk, that the prosecution that follows may not be able to continue. And indeed, I would submit that any

formulation of the rule here, any minimum remedy that would be provided as a result of a NOPA being filed would have that risk attached to it. So the Commissioner must accept that issuing default assessments –

MILLER J:

What it overlooks is that criminal prosecutions must be very much the exception, whereas NOPAs are done routinely. And that should be the normal process for sorting out tax liabilities.

MR CONDER:

I accept that your Honour. I suppose my submission in response to that is to say if you're in a situation particularly like here where the criminal alarm bells are already ringing loudly, the Commissioner is writing to the taxpayer before the default assessments are even issued to say we are considering criminal prosecution against you –

MILLER J:

I understand your case, this is not that case but you're putting to us a rule that should govern the Commissioner's behaviour and I'm questioning whether that is not overbroad.

MR CONDER:

I accept that criticism, your Honour, I can see that it does have some risks associated with it that the Court would need to consider carefully before adopting.

WINKELMANN CJ:

Well, we've tested it pretty thoroughly, Mr Conder.

MR CONDER:

Yes.

WINKELMANN CJ:

You'll get a very clear impression that there's some resistance from your very high watermark approach, but you need to address the situation of your client.

MR CONDER:

Yes, your Honour. And turning to that situation it's my submission that this is a case, very clearly, where once the NOPA was returned prosecution was foreclosed. The decision to issue default assessments was taken in circumstances where the Commissioner had already turned her mind to the question of prosecution. The NOPA then provided material that goes directly to the actus reus in terms of intention and simultaneously opened a line of enquiry as to what was to be the defendant's principal defence. In those circumstances the harm for Mr Parore, particularly, was irremediable once his NOPA had been filed and, therefore, the Commissioner should have recognised, and I will go on to say a little later, in fact did recognise, that any prosecution must carry a significant risk that his fair trial rights would be undermined. And for that reason it's my submission the decision to issue proceedings, even if it wouldn't be wrong in every case, was certainly wrong in this case and the consequences that flow from that decision are, therefore, consequences of the breach.

That's my preliminary point and I might move onto my first point now.

WINKELMANN CJ:

Yes.

MR CONDER:

So, fundamentally what we are saying concerning what the correct approach to damages in a case like this is, is that while we accept that public law damages must be a discretionary remedy to the extent that they are being awarded, they should be set at a level that reflects the overlapping requirements of vindication and compensation and may well consider also elements of deterrence.

Going into that in a little bit more detail we accept that the remedy is discretionary but we push back on what appears to be the Attorney's submission that discretionary is synonymous with vindicatory. A remedy can be compensatory and nevertheless, refused on grounds that the compensation that would otherwise follow is inappropriate in this particular case. That obviously exists in the civil law, also in particular, in equitable remedies and in our submission that's an appropriate analogy for how this component should be run. It obviously has different factors that fit into it. They are public law-focused factors and my friends for the Law Society point in particular to the factors enumerated in section 92O and section 92P of the Human Rights Act 1993, I would adopt that part of the submission and say that it's a discretion that is to be exercised judicially but with reference to those factors to consider whether the compensation that would otherwise be necessary may be inappropriate in a particular case.

And I would say further that this approach doesn't represent a major change in terms of the cases that have most commonly come before the courts. The majority of the cases involve either personal injury, which of course is barred from compensation under the ACC legislation, or they involve intangible or subjective harm where the compensation is less direct and is, in its very nature, somewhat esoteric or subjective. In those cases we would submit that the approach that is recommended by the Attorney here, that the Court must consider whether there is something special that requires monetary relief for intangible harm, remains appropriate. But what we would submit is that none of those cases sought to say, and indeed a number of those cases seem to say the opposite, that in cases where there is pecuniary loss that flows from the breach, that that should be disregarded in setting what is the necessary remedy to repair the breach of rights.

WINKELMANN CJ:

So, they did not say – what was that, can you just repeat that submission?

MR CONDER:

They did not say that compensation should be disregarded when assessed and what was the required relief, what would be an effective remedy. Rather, the question of compensating pecuniary loss simply did not arise on the facts of those cases, and I'm going to go through some examples and suggest that, in fact, it was considered and that the approach consistently has been that that probably requires a different approach.

At this point I intend to turn to the decision in *Taunoa*. What we are saying fundamentally about *Taunoa* is that this is not a change from the practice that's set out in that case, so we disagree with the suggestion that this would require the Court to overturn that decision. But to the extent that it does set out a different position to the position that we're inviting the Court to take, we would also submit that *Taunoa* was dealing only with those intangible harms, not with the kinds of pecuniary losses we say arise in this case, and that that would be valid grounds for the Court to recognise that the approach in *Taunoa* was a separate species from what we are talking about.

WINKELMANN CJ:

Intangible harms. You're saying the Court was dealing with intangible harms there?

MR CONDER:

Yes, intangible in the sense of being pecuniary – I'm sorry, being subjective rather than pecuniary loss. It was a different kind of harm.

WINKELMANN CJ:

Okay, subjective not pecuniary.

GLAZEBROOK J:

It's fairly serious behaviour.

MR CONDER:

It is serious.

WINKELMANN CJ:

Yes.

GLAZEBROOK J:

In terms of what they were subjected to in *Taunoa*. I'd have some difficulty saying it's subjective.

WINKELMANN CJ:

The distinction you're drawing is pecuniary as against other kinds of harms, pecuniary loss and other kinds of harm, which is not pecuniary?

MR CONDER:

Yes, I am and the reason –

WINKELMANN CJ:

Because otherwise your submission is very unattractive.

MR CONDER:

I'm not trying to –

ELLEN FRANCE J:

Well, I'm not sure. So Mr Tofts, who does have tangible harm, where does he fit into your analysis?

MR CONDER:

I suppose perhaps the word "tangible" or "intangible" is an inappropriate framing, your Honour.

WINKELMANN CJ:

Yes. You're talking about pecuniary, aren't you?

ELLEN FRANCE J:

Well, then –

MR CONDER:

I'm talking about pecuniary or non-pecuniary. What I'm describing here is that the kinds of losses that are being dealt with in *Taunoa* and other similar cases are things that don't come with a figure on them, where the Court is having to assess the meaning of those things and then convert them to a monetary value, and that that influences the way that Courts in cases like *Taunoa* are approaching this question because how you value that indignity is not necessarily a financial question. It is a question that may or may not be financial.

MILLER J:

But in the context of the Bill of Rights you seem to be making an argument for the Crown.

WINKELMANN CJ:

Yes. It's not a particularly – if this is what the Courts are doing, I'm feeling bad about it, Mr Conder.

MR CONDER:

Well, what I'm saying is that the – so the submission I'm attempting to respond to, the Attorney-General seems to say that what we do is we tailor all of our non-monetary relief and then we look at whether, on a vindication basis alone, we still have something that is unremedied, that there is still a need for further vindication of the right, and we don't ask ourselves whether the breach has been properly compensated. Now, I may be misrepresenting my friend's position but that is what I understand as being his submission.

WINKELMANN CJ:

Are you sort of making – are you saying that the Courts are taking the approach that look it's really quite clear-cut and it's cases of whether you can put a figure on it, there's something else that requires vindication and the Courts are perhaps not focusing enough? Are you making a submission that the Courts are not focusing enough on the intangible non-pecuniary, or are you saying this is pecuniary and therefore we fit nicely into this approach?

MR CONDER:

What I am saying is that – so I'm pushing back on the idea that vindication is the only metric. I'm saying that awards need to consider vindication alongside compensation as two things that are ingredients of an effective remedy. The purpose of this scheme of damages is to provide an effective remedy in terms of what the ICCPR requires. And so it's our submission that that can't be done only looking at the dimension of vindication but that it requires consideration of the dimension of compensation. It's our submission that when you are dealing with harms that are non-pecuniary, those two things will often run in the same direction in the sense that the reason why we give a financial remedy for the kinds of harm that are subjective in *Taunoa* is because that is the only way to recognise the degree of harm that has happened. The only way to vindicate that is through a financial remedy. So compensation and vindication are running in parallel there.

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There are cases though where this requirement of an effective remedy may not just require vindication of the right but may require compensation of harm that is directly measurable but where vindication and compensation don't necessarily run in parallel, and this is where Justice Tipping talks about an approach, and perhaps if you give me a moment I'll go to that passage. This is where Justice Tipping talks about, at paragraph 300, that what is really required here, his Honour says that: "The question will often be whether, for the purpose of vindication or compensation, a money sum should accompany the declaration in order to make the remedy effective." So, he's putting at that point those two principles in parallel with one another. That is effectively what we are submitting is appropriate to do here.

WINKELMANN CJ:

I mean, I must say, it's all dancing around the head of a pin because if you are going to vindicate someone's right personally, I mean there's a societal vindication but if you're going to vindicate someone's right personally and if they've lost by virtue of breach of it, well why shouldn't you compensate them for that loss as part of vindication? Seems to me –

MR CONDER:

Yes, your Honour, that's another framing for the same submission. I accept.

WINKELMANN CJ:

It seems more a straightforward way of framing it.

MR CONDER:

I accept that –

WINKELMANN CJ:

Because there's general group vindication but there's also vindicating the right for the person.

MR CONDER:

Yes.

WINKELMANN CJ:

Not the "breach of the right", which is an expression used in *Taunoa*, strangely, not vindicating the breach, it's vindicating the right.

MR CONDER:

Yes your Honour, and that's probably the important distinction here is that in my submission what the Attorney-General is arguing for this idea that we ask, do we really need money to say that this breach was incorrect, that this breach has not been vindicated, is the wrong question. The question is has the right been vindicated, and that requires both a consideration of has it been recognised and affirmed in terms of its seriousness, but also, has it been compensated? Has the citizen been put back to the position that they would have been in had their rights not been breached? I would say that the failure to do that is not just a failure to vindicate but, fundamentally, a failure to provide an effective remedy.

GLAZEBROOK J:

What do you say about the initial exclusion of evidence decisions which say well you could give a monetary right but the better remedy, both for the person and for society in terms of vindication, is to exclude the evidence. So the argument would be well in this case Mr Parore's had a stay, I mean I think he was really lucky to get a stay and there should've been exclusion of evidence, but that's really beside the point, because whatever happened, his right has been vindicated and compensated in that sense, otherwise every time you have an exclusion of evidence you would also be paying money which is actually against what the cases have said in that.

MR CONDER:

This comes back, fundamentally, to the question of causation that we began with. This, in my submission really, is the critical question here. The reason for that is because what I would say about all of those exclusion of evidence cases is they are dealing with a problem that occurs within the criminal proceeding. They are looking at situations, and I was going to talk about this when I come to fair trial rights but it's probably convenient to address it here, they're talking about things that can be remedied on appeal where the underlying process remains acceptable and there's language in one of the cases in particular, cited by my friends for the Attorney, that when we're considering a fair trial we need to consider the whole process. We need to consider whether it is a fair trial once reference is had to things like the ability to get bail and the ability to appeal a wrong finding and have it corrected.

Clearly there is a regime for fixing those problems but what we say here is that the original decision to charge Mr Parore was wrong and that it cannot be remedied by those subsequent answers of trying to reconstruct a fair process. We say that a fair process was so far lost at the outset, that at no stage could a fair trial have been provided to Mr Parore and that is the distinction that we draw. In those other cases there is a remedy within the criminal process that can still deliver on those rights. We say that that wasn't possible for Mr Parore from the outset and so he needs to be repaired back to the position that he should've been in.

I understand your Honour's point about the exclusion of evidence, but if we compare it to other stays, then in my submission when we talk about the kinds of stays that involve lengthy delay for example, the defendant is saved from further delay when the stay is granted, but on the terms of Justice Wylie's decision, this is a stay that should've been available to Mr Parore at the very outset of the proceeding.

GLAZEBROOK J:

Well, I mean the same with delay though, isn't it? Because if there's been prosecutorial delay then you're in exactly the same position and I would've thought the same arguments would apply in terms of compensation if you've incurred expenses in the course of the criminal proceeding which should never have occurred because it should've been stayed, and it's the same argument isn't it? So it's much wider, if you are right, than just the Tax Administration Act.

MR CONDER:

That language that your Honour has just used there, the stay of prosecution, it never should've started, is the really important component of this because a lot of those delay stays are not in situations where the prosecution never could've commenced but where, because of delays that have occurred during the process, they have become unfair at a certain point in time and that has become unremediable. So, that is the point in time where the stay is issued and it's not to suggest that the process that occurred prior to that was fundamentally unfair and never could've been fair. If there is a case where a stay would've been appropriate at the outset to reflect the fact that this was prosecution that never could have been fair, then in my submission that is an appropriate case where a reasonable prosecutor aware of that risk shouldn't commence it and does so in violation of those rights.

ELLEN FRANCE J:

So, what happens in the case of a malicious prosecution then? Monetary compensation?

MR CONDER:

In my submission that would be an appropriate remedy in a case of malicious prosecution. There's obviously additional elements in that tort and I would submit that in a case of malicious prosecution what is absent is probably the public law dimension because it's already been concluded by the satisfaction of the elements that this is a prosecution that was not brought for a publicly-minded, if reckless or misguided purpose. It was brought entirely for personal factors and indeed there are cases where not even in the context of malicious prosecution, but at the conclusion of particularly ill-advised private prosecutions, private prosecutions that have an ulterior motive, the High Court has, on occasion, given indemnity costs under the Costs in Criminal Cases Act 1964 to reflect that.

ELLEN FRANCE J:

Costs, yes.

MR CONDER:

Now, of course the reason why this argument can't occur in the context of the Costs in Criminal Cases Act here is because the Act provides two rights. Those for convicted defendants and those for acquitted defendants and provides no right for a person who is neither acquitted nor convicted.

GLAZEBROOK J:

I'm sorry, I didn't catch that last… "No right", for what sorry? I just didn't catch it.

MR CONDER:

The Costs in Criminal Cases Act does not provide a right for a person who is neither convicted nor not convicted. It has two rights.

GLAZEBROOK J:

No, no, so it doesn't apply to stays, is that –

MR CONDER:

That's what I'm saying, yes, that this couldn't be done in that way which would've been appropriate if it had been an acquittal because of the unique way that that Act is structured.

MILLER J:

Isn't that just a lacuna in the scheme that we shouldn't try to fix with compensation, because the cost regime is there to deal with problems of this kind, just envisages that it will end in an acquittal or a conviction.

MR CONDER:

So, I'll address this part of my submissions now and talk about why we say that this Court should fill the gap in the costs regime and there's probably three submissions I would make there.

One is that by contrast to the Australian authorities that my friend for the Crown cites to suggest that the Court shouldn't order costs when the legislation doesn't provide for it, those are regimes that specifically exclude costs in certain cases and say costs shall not be awarded in this kind of proceeding or if these factors are not satisfied. The Costs in Criminal Cases regime doesn't do that. It provides two stand-alone rights but is silent about what happens outside of those rights.

The second submission is that this can be seen in operation by virtue of the fact that Parliament appreciated that the Costs in Criminal Cases Act was incomplete when in the Criminal Procedure Act 2011 it provided –

WINKELMANN CJ:

Can you just go a bit more slowly on this. You're saying the Australian cases are distinguishable because in fact that legislation contains provisions that say that costs cannot be awarded in these cases and are you saying those cases deal with those cost prohibition categories?

MR CONDER:

Yes, your Honour, so I will go to those decisions and show the passages that I'm referring to there. So, the first decision that's referred to is *Anderson v Bowles* [1951] HCA 61, (1951) 84 CLR 310, and this is a decision that relates broadly to a tenancy-type situation and there, it's at page 323 of the reported decision, there is a description, not unhelpfully a full copy of the regulation, but there is a description: "Regulation 75, corresponding with section 62 of the Act, provides, however, that no costs shall be allowed in any proceedings in relation to which the Part applies not being proceedings in respect of an offence." So there's a prohibition on the award of costs in those circumstances.

Similarly, the other case that's relied on, *State of New South Wales* –

WINKELMANN CJ:

And that's the situation they're in in that case?

MR CONDER:

That is the situation in that case, in that it said, well we can't go around that by ordering costs in a civil case because they are prohibited by the statute. It goes on to say in the same passage: "This is a legislative declaration that the parties to proceedings for the recovery of possession or proceedings arising thereout shall not be liable to one another for the costs of those proceedings. In the face of this legislative declaration can costs be properly included in the damages", and they go on to conclude that no they can't, because that would be to undermine the statutory prohibition.

That is similar, in my submission, to what is said in *State of New South Wales v Cuthbertson* [2018] NSWCA 320, (2018) 99 NSWLR 120. There it's at paragraph 24 of the decision. This is: "Section 70(1) provides that costs may not awarded against a prosecutor unless the appeal court ... is satisfied," and then provides criteria. So it is a prohibition that is only lifted in fixed circumstances and it becomes inappropriate for a court to then circumvent that in other proceedings.

GLAZEBROOK J:

Can I just check, you're answering the submission that you can't award costs as damages, is that what you're answering this submission at the moment?

MR CONDER:

Yes, the submission is –

GLAZEBROOK J:

Rather than a submission that you would award costs in these circumstances as damages or whatever in an analogous way to the Costs in Criminal Cases, because that's two different submissions there.

MR CONDER:

It is your Honour and I would say that I make the firm submission that the first part –

GLAZEBROOK J:

No, you're answering the first one at the moment, is that right?

MR CONDER:

Yes, I am taking the first position here and I am saying that there is no prohibition on using a civil regime to order costs as damages.

GLAZEBROOK J:

Yes, yes, just checking yes.

MR CONDER:

I accept that there is some sense in using the guidebook that Parliament has provided us for how those costs should be assessed. I believe in the Court of Appeal we made much more detailed submissions about the ways in which those factors would justify an award of costs in this case and an award of increased or indemnity costs effectively. But I accept that some guidance could be taken from those two regimes and there would be sense in this Court adopting a practice where all three regimes worked together.

So that first submission is that the authorities relied on by my friends to say that this is prohibited is inconsistent with the language of our three statutory authorities which are all permissive in their terms rather than being prohibitive or exclusive in the way that these provisions are. There is no barrier to this Court doing it.

The second submission then is to say that the way in which the Costs in Criminal Cases regime, and I use that phrase in a wider sense to incorporate both Acts, has developed, demonstrates an understanding on the part of Parliament that costs can be appropriate outside of the section 5, section 6 situations. Because they have now added an additional right, for example breaches of timetables and breaches of disclosure obligations, and I would submit in that regard that it would very surprising if Parliament, in recognising the breaches of obligations around criminal disclosure or breaches of individual timetable directions could give rise to costs awards, was taken to be deliberately concluding the breaches of the Bill of Rights were not to be compensated in the same fashion.

The final component is that if the Court were to adopt the position that a convicted defendant may receive costs, an acquitted defendant may receive costs, but a defendant who obtains a stay may not, then that places defendants who are entitled to a stay in a very difficult position and offers them the Clayton's Choice of proceeding with an unfair trial to try and arrive at an acquittal. Or, requiring them to assert their rights and to forgo the entitlement that they might otherwise have for costs. In my submission that would be a deeply unfair outcome that the Court ought to reject.

WINKELMANN CJ:

Can you just repeat that submission?

MR CONDER:

If the Court concludes that section 5 and section 6 of the criminal cases, Costs in Criminal Cases legislation, are all there is, that a convicted defendant may

receive costs, an acquitted defendant may receive costs, but one who obtains a stay is prohibited from receiving costs, then that places any defendant who is entitled to a stay in the position of having to choose between undergoing an unfair trial and then seeking the costs that they might be entitled to there, or having the unfair trial stopped but not receiving costs. That is an unfair choice that should never be put on a defendant, in my submission.

MILLER J:

It's also wholly unrealistic, is it not, the idea that you would abandon a stay, go through a trial incurring further costs on the basis that you would then get some level of partial compensation for the costs that you incurred? Can you not just dismiss that as a realistic possibility?

MR CONDER:

I think, your Honour, the fact that all defendants might feel forced into making the same choice, foregoing costs in electing to choose the stay, doesn't mean that it's not a choice that they're being forced to and an inappropriate one at that. I accept that the –

WINKELMANN CJ:

You don't really need to put your submission this high, do you? Isn't your point there's no policy reason to extend that – to treat the Act as a code prohibiting a defendant who gets a stay of getting costs is just inconsistent with the scheme of our legislation.

MR CONDER:

Yes, I suppose I'm engaging in a sort of reductio ad absurdum type argument –

WINKELMANN CJ:

Yes, exactly, and not particularly –

MR CONDER:

– saying that if you go down this line it takes you to a really dark place, is really the submission. That's all I have to say on the question of –

WINKELMANN CJ:

Yes. It has the difficulties Justice Miller has pointed out though.

MR CONDER:

I probably still maintain the submission that the fact that defendants feel forced to elect an obvious choice doesn't mean that they're not being treated unfairly but I acknowledge that defendants almost invariably would choose –

WILLIAMS J:

The point is there's no good reason in principle to discriminate between those two cases. The effective substantive outcome is the same. Why should one get costs and the other not? It's not right.

WINKELMANN CJ:

It's a policy argument, yes.

MR CONDER:

Yes, I accept that, and in broader terms I think when the Criminal Procedure Act was first passed there was some initial sense that section 147 might include dismissing charges in situations of unfairness that might effectively subsume stays which would have remedied this situation. That's not the path we went down but that would have solved the problem in this regard, and that would have changed the nature of this proceeding quite significantly.

Returning then to what I was saying about the decision in *Taunoa*, really what I'm emphasising here is that *Taunoa* doesn't say that compensation should be set aside as irrelevant which –

ELLEN FRANCE J:

Doesn't say what, sorry?

MR CONDER:

That compensation should be set aside as irrelevant. That's not the upshot of that decision. I had intended to go through the decision in quite some detail.

I think it's probably not helpful. What I would point to is just a handful of paragraphs that I'll give references for but not read in full, beginning with the comments of the Chief Justice at paragraph 108 that her Honour didn't see this as a case that was setting down a fixed guideline for the manner in which costs should be done in these cases going forward. It was rather a quite factually specific case. Her Honour still engaged in reasoning that has a sort of mathematical component to it which shows an element of compensation, in my submission, is being considered. Her Honour suggested that the approach taken in the High Court, which was to work out the duration that a person had been subject to the regime and then multiply it out, was an appropriate approach. In my submission that's sort of an analogy as to civil law and certainly her Honour said that while tort law is not a good analogy some value could be gained by comparison with the two regimes. That speaks, in my submission, to engaging compensation.

WINKELMANN CJ:

I mean it's not a straightforward decision when you read all the judgments at all on this point.

MR CONDER:

It is not, your Honour, and probably the one quote that I will go to because –

WINKELMANN CJ:

So your submission is it's not amenable to reading as clearly precluding compensatory damages and there is suggestion in some judgments which are permissive of it, or how – which judgments?

MR CONDER:

Yes, your Honour, I would say that there is suggestion and the two most detailed judgments are the judgments of Justice Blanchard and Justice Tipping. Justice Tipping says quite clearly at the paragraph that I already cited that vindication and compensation can sit in that parallel sense that an award needs to reflect both. Probably the strongest statement in the other direction is Justice Blanchard at paragraph 259 of the decision where his Honour says: "In

public law, making amends to a victim is generally a secondary or subsidiary function. It is usually less important than bringing the infringing conduct to an end and ensuring future compliance with the law…" He then concludes the paragraph: "Thus the award of public law damages is normally more to mark society's disapproval of official conduct than it is to compensate for hurt to personal feelings."

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And that language at the end there, in my submission, is critical when we talk about that distinction between harm that is subjective in nature and harm that is not subjective in nature, his Honour was really focused in on that first category when making these comments, wasn't considering a case like the present where there is a financial harm that attends the breach.

ELLEN FRANCE J:

That seems to me underlying the idea that the harm that occurred in that case is somehow not as significant as the harm you say occurred here.

MR CONDER:

No, so I would I think, as I must, thoroughly reject that submission. I'm not suggesting that the harm in cases like *Taunoa* is not as serious as the harm in this case. There's a breach of section 9 in *Taunoa* and I accept that that really needs to be at the top of the flagpole in terms of seriousness.

ELLEN FRANCE J:

Why then a different approach? I mean, that is what you're saying. Your submission is that it wasn't dealing with the sort of case we're dealing with here and there can be a different case here which involves compensation.

MR CONDER:

I'm saying that they're different in kind. I'm not saying that the seriousness ranking here should be different. And this runs into the submission that my friend quite properly makes that what we're arguing for here could result in a position where financial harm receives compensation of a substantially higher

level than what is occurring in cases that are analogous to personal injury or where there's indignities to a person that are not measurable in financial terms. I accept that that is an unattractive part of the submission that we are making but in my submission that more goes to the problem that we have that the awards that are being given on this vindicatory basis for subjective harm are out of step, perhaps, with what we see are the actual harms that are suffered as a result of breaches and that's a problem at that end, not at this end, if you like, that –

MILLER J:

Yes, and that does rather walk into the Crown's point that you're really asking us to depart from *Taunoa* because this paragraph 259 properly states the Court's view, does it not? Even Justice Tipping concurred in this judgment, and I appreciate there's some difficulty in reconciling the two, perhaps.

MR CONDER:

I suppose what I'm saying here is that in making these comments Justice Blanchard was concerned very much with a situation that related to this kind of subjective harm and that that is different from the situation we are in here, partly because one of the difficulties of subjective harm is that it is immeasurable. And so as I said earlier, there is this question where vindication and compensation run in parallel because the reason why we compensate this kind of harm is to vindicate, whereas when we compensate for financial harm we're engaged in a separate task. What I would say is that this is a problem that already exists in the law much more widely when one considers the approach taken to tortious claims, generally, it is the case that violations, by way of trespass or some such thing, will receive these awards that are based on a modest, subjective assessment, even exemplary damages falls into that sort of category and then we have violations that are not overly serious but which fulfil the elements of a tort, say, of negligence and where the full financial harm, notwithstanding that the breach may've been small, are rewarded in full. So, this is a problem that runs throughout the law, in my submission. This is not unique that it arises here when we are comparing subjective harm with a pecuniary loss. But in my submission –

WINKELMANN CJ:

So, in this case *Taunoa*, of course, it's in the accident compensation regime, isn't it, which is the point that's being made in paragraph 259, so it's looking at compensatory damages around the edges, is that correct?

MR CONDER:

That is true in other decisions. I think –

WINKELMANN CJ:

Is it not true here?

MR CONDER:

There was less discussion in this –

WINKELMANN CJ:

Well, at paragraph 259 there is.

MR CONDER:

Yes, yes, your Honour, I accept that. There is that reference to personal injury which is directly on point that we're concerned at not filling in the gaps created by the ACC bar, so we are effectively dealing with something akin to exemplary damages here.

ELLEN FRANCE J:

Well, is that quite right for those other than Mr Tofts?

MR CONDER:

I suppose what it's identifying is that the damages that are being considered in *Taunoa* are in that final category. They relate to "…hurt to personal feelings" to the subjective experience of having undergone this regime rather than to compensation in a personal injury sense. I accept that not all of them are in the same position as Mr Tofts.

WILLIAMS J:

Your point is that it shouldn't be read any more widely than that. One, it doesn't need to be and two, Justice Tipping expressly departs on this point from Justice Blanchard.

MR CONDER:

Yes, that's precisely correct. That's correct. And so I'm saying that when we come to cases where there is measurable compensation that is not for personal injury, that's not what these comments are relating to.

WILLIAMS J:

And the Chief Justice appears to side with Justice Tipping. Unfortunately, Justice Henry seems to side with both of them.

MR CONDER:

Yes, your Honour. So, we are left in a somewhat confusing position.

WINKELMANN CJ:

So, it's unclear. It is a difficult case.

MR CONDER:

Certainly, I suppose to sum up the submissions on *Taunoa* that your Honour has captured very clearly what I'm trying to say, I would say simply that it is not a barrier to the argument that we're making here in the way that my friend suggests. That's really where this submission takes us to.

WINKELMANN CJ:

What else have you got to cover Mr Conder?

MR CONDER:

I was then going to talk about –

GLAZEBROOK J:

In a way that was accepted by the Court of Appeal in this case wasn't it? I mean, do you say there's anything wrong with the Court of Appeal's analysis

in terms of the availability of damages? Sorry, not whether they should've been awarded in this case but the discussion of when they should or should not be awarded.

MR CONDER:

So, where I would say difficulty arises and the part of the decision that I would argue against, I believe it's at paragraph 100 of that decision, where the statement is to the effect that what one has to do in cases like this is not to assess whether there is still something that is unremedied – apologise. I've got slightly the wrong paragraph here.

So, the phrasing here is: "The correct approach to remedies for breaches of the Bill of Rights, including public law damages, is to carefully examine what package of remedies" –

WINKELMANN CJ:

Is it at paragraph 85?

MR CONDER:

Paragraph 84. "… is effective to vindicate the relevant right, appropriately and proportionately in the circumstances — taking into account the seriousness and nature of a particular breach, the particular right and the conduct of the particular right-holder." I suppose where I would criticise that is I would say that it leaves aside the question of compensation and treats that as not a component of this assessment.

WINKELMANN CJ:

Well, you would add in the impact on the person whose rights has been breached would you?

MR CONDER:

Yes I would. I'm proposing it as standing alongside vindication, but I accept your Honour's comment that it could equally frame part of vindication, the harm that has been suffered and remedying the harm that has been suffered.

WINKELMANN CJ:

What do you say about the relevance of the fact that there is a compensatory scheme in New Zealand for miscarriages of justice which shows an awareness on the part of the State of a need to compensate?

MR CONDER:

Yes, so I come to talk about this when I talk about fair trials and the fact that my friends say, look we need to deal with fair trials differently, and the two things I say there are that on the one hand New Zealand has a reservation to the ICCPR specifically around compensation for the wrongfully convicted and said we have a regime for that and to the extent that you don't think it's an effective remedy that's what we're sticking with, is the upshot of that reservation.

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And so, I acknowledge your Honour's point. New Zealand has said we do compensate people in that category and we have our own regime for doing it. We think it is an effective remedy and that is the way that we are going to approach this. That does two things, in my submission. A lot of the cases where there's been discussion about compensation for fair trial right violations would fall within that bucket of the way that we approach compensating the wrongfully convicted and there is very good reason why we approach those cases differently, because Parliament, or the Executive, has already said we're not committing to a broad-brush remedy in those situations. But the other thing that your Honour has said is quite correct, it still shows that there is an intention to compensate for the harm that arises there.

Similarly, the other argument that I make in terms of why fair trial rights might be treated differently is because Parliament has provided remedies in a number of other situations by way of an appeal. As observed in the decision of *Independent Publishing Co Ltd v Attorney General of Trinidad and Tobago* [2004] UKPC 26, [2005] 1 AC 190, when considering whether a trial has been fair we should look at it from the outside of that process and consider all of the constituent parts of the trial process. Has an appeal been able to remedy the unfairness already? Clearly Parliament considers that it can because that is

the mechanism that it has put in place for those cases and therefore in most cases the appeal results in a fair process and remedies the error completely. That's the way Parliament has approached it and the Courts have rightly accepted that.

But when we are in situations where the criminal process viewed from the outside was wrong when it shouldn't have commenced, we are in a different category altogether and that is where we say that the fact of the criminal process can only be remedied by undoing everything associated with it.

WINKELMANN CJ:

So what do you say *Trinidad and Tobago* – are you relying on that case, *Independent Publishers v Trinidad and Tobago*?

MR CONDER:

So what I am saying is that my friends rely on that as an example of the ways in which fair trial rights should be treated differently from other rights for the purposes of compensation, and I'm saying that the rationale given in that decision at page – sorry, I've got a reference of paragraph 88, so I'll just see if I can find paragraph numbers – suggests that – I may have to come – no, sorry, I've now found the numbers – at paragraph 88 suggests that the rationale behind that is because a fair trial can usually be achieved through the criminal process by exercise of those remedies that sit within it.

So at paragraph 88 of the decision the Board comments: "The fundamental human right, as Lord Diplock said, is to 'a legal system ... that is fair'. Where, as in Mr Maharaj's case, there was no avenue of redress (save only an appeal by special leave ...) 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. Where, however, as in the present case, Mr Ali was able to secure his release on bail within four days of his committal—indeed, within only one day of his appeal to the Court of Appeal—their Lordships would hold the legal system as a whole to be a fair one."

So they're drawing a distinction between what I've described earlier as a process that misfires and where there is a remedy that is capable of resulting in a fair process, that's what's described here, and cases where the process itself was unfair, and we say that *Parore* falls within that example.

WINKELMANN CJ:
Okay we will take the luncheon adjournment, thanks Mr Conder.

MR CONDER:
Thank you.

COURT ADJOURNS: 1.03 PM

COURT RESUMES: 2.16 PM

WINKELMANN CJ:
Mr Conder.

MR CONDER:
Thank you, your Honour. In the course of the conversation before the break we've covered most of the points I intended to cover under my first ground. I am just going to touch on a handful of points briefly and then move through to the second round. One submission –

GLAZEBROOK J:
You're fading again.

MR CONDER:
Thank you, your Honour I'll try and speak up and see if that helps us.

GLAZEBROOK J:
I don't think it's really your fault, I think it's the microphone. But I appreciate it, thank you.

MR CONDER:

I appreciate, I think I may be an operative cause in this case also though. So one thing I wanted to submit on is the language itself of effective remedy. In our submission that remedial language is something that fits more comfortably with a meaning for vindication that incorporates compensation than one that excludes it. And this probably comes back to your Honour's comment earlier that there is a difference between vindicating the right and vindicating the breach. The right remains unvindicated, the breach remains unremedied so long as the citizen does not have the benefit of what they would have had if that right had been observed. And in our submission that language of effective remedy carries with it a strong connotation that compensation would be part of an effective remedy.

We've talked a little about the early decisions and the ways in which the nature of subjective harm and the ACC bar have been a factor. But it is useful also to note those decisions where there was pecuniary loss that were dealt with in the manner that we are proposing here. The decision in *P F Sugrue v Attorney-General HC Christchurch CP19/96, 3 May 2002* was overturned on a number of other grounds but never really disturbed on the fundamental question of what the appropriate quantum would have been, which was done on a very civil law basis for what the value of having or losing a helicopter would be. Similarly, *Wilson v NZ Customs Service* (1999) 5 HRNZ 134 (HC) was again an approach that was equivalent to detinue, almost a rental for the vehicle that was unavailable during that period. So those are both examples where directly measurable financial loss was compensated as part of what was a remedy for a breach of the Bill of Rights.

I would note at this point that we would seek to adopt the submissions of the Law Society on this approach being consistent with what is provided for in section 92M of the Human Rights Act. I don't intend to advance that submission, but we are assisted by, and we say it supports our position that the Law Society suggests that compensation is a conventional remedy, at least in that setting. And similarly we would adopt the submissions of the Human Rights

Commission that the international law obligations appear also to require compensation to be a component of remedy.

In our written submissions we have pointed to the decision in *Ward v Vancouver (City)* [2010] 2 SCR 28 as showing that the Canadian approach is to sit alongside compensation, vindication, and deterrence as three principles that need to be reflected in an award of public law damages. We submit that that approach, at least insofar as vindication and compensation are concerned, should be adopted here. I'd also point to the decision my friends have cited, and I am going to mispronounce this, *Anufrijeva v Southwark London Borough Council* [2003] EWCA Civ 1406, [2004] QB 1124 where there is both –
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WINKELMANN CJ:
Can you just spell what you just said?

WILLIAMS J:
Yes. No criticism intended by that.

MR CONDER:
Thank you.

WINKELMANN CJ:
Spell the case you just said.

MR CONDER:
I'm going to pull it up, mostly for the spelling of the name. *Anufrijeva v Southwark London Borough Council*. There are probably two paragraphs in that judgment of particular significance. I point to paragraph 66, mostly because it contains this language of a remedy that is "'just and appropriate' and 'necessary' to afford 'just satisfaction'". The reason why I point to that last phrase in particular is because that is also language used by Justice Blanchard in *Taunoa*, referring to "just satisfaction" and what is described there

is an approach that is described as being an inequitable one. Again, we've submitted that that analogy is a helpful one here.

It's also useful to consider earlier in that decision what is the approach that the Court is referring to? Well at paragraph 59 they're talking about the approach that's taken in the European Court of Human Rights and the purpose of the decision really is to say England must follow that because otherwise people would be put to the expense of going to Strasbourg to get the same remedies.

They say that the Court should be trying to achieve what here, the European Court of Human Rights describes as restitutio in integrum, obviously taking that language directly from the law of tort as being applicable to compensation in the context of what would be public law damages. So we would submit that seeing compensation as a central component of these awards is consistent with the practice in both of those jurisdictions.

I had spoken earlier about the ways in which the discretion inherent in public law damages bears some comparison to the discretion that applies in equity to the awards of financial damages. Obviously, a significant part of the case law draws comparisons between tort law and public law damages, but one area that hasn't been explored, which we mentioned in our submissions, is the law that otherwise applies to voluntary obligations, so, contractual cases.

The reason why we say that analogy could be helpful here is for two reasons: one is that from the perspective of the States, the obligations of the ICCPR, and of the Bill of Rights are voluntary obligations. They're obligations that the Crown has chosen to place on itself, and so in some ways the analogy there is stronger than the analogy with tort which is obligations that are imposed on a party externally. There are also examples throughout the law of contract and we've pointed in particular to the decisions in *Attorney-General v Blake* [2001] 1 AC 268 (HL) and *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 (Ch), I would also add, and this is not in our written submissions or in the casebook.

WINKELMANN CJ:

I must say, I find this analogy quite hard because the State is not really voluntarily assuming obligations. It's part of the entire societal setup, just like tort is allocating risk and cost within a societal setting. So too we are dealing with that with public law damages. Contractual damages don't seem to me to be a good analogy.

MR CONDER:

I suppose the two things I am trying to draw on are the fact that the obligations that bind the Crown here are obligations that the Crown has chosen to accept. While there is a moral sense in which they are overarching, through entering into the ICCPR and passing the Bill of Rights Act, the executive and the legislature have said that the Crown in New Zealand should abide by these norms.

WILLIAMS J:

Do you really need to talk about a contract to get yourself to that point?

MR CONDER:

No, I suppose what I'm saying is that it's a recognition of what's sometimes called the social contract and the reason why I suppose I've raised –

WINKELMANN CJ:

I think you might be pushing a very large stone up a very slippery slope at this point.

MR CONDER:

Thank you, your Honour, I have taken that as far as I will then. I'll leave it at that point. Then, briefly, in terms of the discretion, I had mentioned that the Human Rights Association have pointed to sections 92O and 92P of the Humans Rights Act and those might be potential grounds. I would also suggest that the discretion could extend to the items that are listed in paragraph 50 of the respondent's submissions arising from the decision in *R v Varennes* [2025] SCC 22: "(i) respect the separation of powers; (ii) avoid imposing substantial

hardships or burdens on the government; and (iii) avoid negatively impacting good governance." In my submission all of those are factors that properly fit into the discretion stage of the assessment and we would see that –

WINKELMANN CJ:

What paragraph is that of the respondent submissions?

MR CONDER:

Paragraph 50 of the respondent submissions.

WINKELMANN CJ:

Paragraph 50.

MR CONDER:

In our submission the Court should look at what's necessary for compensation and then see whether it is necessary to reduce that –

GLAZEBROOK J:

Sorry, I'm not sure I'm on the right –

MR CONDER:

Oh, sorry. This is the respondent submissions at paragraph 50, point to the English case of *Varennes.* I'll pull up the submissions because they have the most useful summary of it.

WINKELMANN CJ:

Your point is that you would accept that to the criteria listed in sections 92O and 92P of the Human Rights Act, you would add the factors that have been listed by the respondents at paragraph 50 of their submissions?

MR CONDER:

Yes, those are all elements that could be considered in the exercise of the discretion as indeed are the comments that are extracted from the decision in *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA) and the remarks that were made in *Brown v Attorney-General* [2005] 2 NZLR 405 (CA) about that

being a situation where it appeared very likely Mr Brown was otherwise to be convicted of the offending.

GLAZEBROOK J:
Sorry, I'm just not getting the point.

MR CONDER:
So, I am saying the Attorney-General has suggested that these are reasons why compensation should not be considered in these settings, or at least that's the way I understand their submission. I'm saying that these might be factors that get taken into account when the Court is exercising a discretion not to grant a remedy but that it should first assess compensation and then determine whether that remains appropriate, having regard to these factors.

GLAZEBROOK J:
Okay.

WINKELMANN CJ:
Right.

MR CONDER:
My friends for the respondent suggests that what's proposed here would cause significant problems for prosecutorial discretion and that the Court should be hesitant to step into territory where prosecutors may experience a chilling effect.

In my submission one of the recognised reasons why awards are given is to deter breaches of the Bill of Rights, and that is appropriate in a situation like this where this was a prosecution that was made over the strong warnings that had been given in both *Skinner* and in *Safi*, and that that is the sort of prosecutorial decision that ought to experience a chilling effect. That's part of the purpose of these damages and there are reasons why there should be a curb placed on some exercises of prosecutorial discretion.

I would also respond to my friends' submissions that awarding compensation in this situation would undermine the integrity of the criminal justice system. It's my submission that that's diametrically opposite to the truth of the situation where a person has had their rights violated by the criminal justice process. The integrity of that process is enhanced by the fact that they can be compensated for that injustice, not diminished by it.

GLAZEBROOK J:

I suppose your answer in terms of the difference between other breaches in the course of a trial process or contributing to the trial process is that this prosecution should never have been instituted in the first place. That's the nub of your submission, because everybody whose rights have been violated in the course of a trial, whatever that might be, are going to be in the same position and have incurred legal costs for instance.

MR CONDER:

That they will have, I accept that. I –

GLAZEBROOK J:

And yet the cases on exclusion of evidence say, well that is the remedy and that it actually would be contrary to the public perception, et cetera, et cetera, to provide a monetary remedy in those circumstances.

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MR CONDER:

Yes, so I have three responses to that. The first is the one that your Honour has identified which is that we say this is a process that shouldn't have commenced and so it is different. The second is the submission I made earlier which is when assessing whether or not there has been a fair trial process, it is appropriate to step back from the process, look at it in the whole and ask whether once the conclusion of all appeals and such processes has been reached, whether that process viewed from the outside can be said to be fair. Those two are quite closely linked but they're not necessarily interchangeable. There can be situations where a prosecution that started in an appropriate

fashion reaches a point where any continuation of it is unjust and cannot be remedied within the process, that that might arise in some situations and provide another example where compensation might be appropriate in addition to what we say that first category should never have been begun, and then I fall back on my earlier submissions as well and say there are good reasons for saying that when it comes to the wrongfully convicted the executive has established a process there for how that should be dealt with when it comes to errors that are capable of remedy on appeal. Parliament has identified the remedies and the pathways that should be available to people in that situation. We are in a situation that could not be resolved by either of those prescribed remedies and it calls out for an effective remedy of its own.

GLAZEBROOK J:

I'm not understanding the last reason.

MR CONDER:

What I'm saying is that the rationale behind excluding damages in the context of the breach of a right to a fair trial generally is, I would submit, more than simply a concern about floodgates. There is a good principled basis for hesitation in either compensating the wrongfully convicted by a mechanism other than that which has already been provided of and which is the subject of our reservation to the ICCPR and to compensating or providing an additional remedy over and above the remedy that Parliament has established in the Criminal Procedure Act for certain errors by way of appeal and Parliament, in imposing that particular remedy, can be taken to have considered that that was the appropriate remedy for those situations. What I am saying is when neither of those two remedies are available it is then for the Court to determine what is the appropriate remedy. That is the situation we are in here.

Earlier in my submissions we talked extensively about whether costs could be available for breaches that sat outside of the existing regimes. I would simply point to the decision of *Attorney-General v Morrison* [2025] NZCA 240 as an example where costs under the Bill of Rights, costs under the Criminal Cases

legislation and costs under the CPA were all available as side-by-side remedies to indicate that the three can operate together.

GLAZEBROOK J:

So, sorry, what was that?

MR CONDER:

That's *Attorney-General v Morrison*.

WILLIAMS J:

You said the costs in the CICCA, CPA?

MR CONDER:

And an additional award to recognise the breach of the right to a fair trial.

WILLIAMS J:

And a damages award? Right.

MR CONDER:

They can exist in tandem, whatever the equivalent word is for three things.

I apologise. That was a little disjointed but that's the balance of what I had to say about the first component, the compensation component of our submissions.

WINKELMANN CJ:

Does it cover your costs one as well, your third one?

MR CONDER:

No. No, that's what should be done with the costs of this proceeding.

WINKELMANN CJ:

All right, so we'd better move on to your second ground then because –

MR CONDER:

Yes. I'll speak to the second ground only quite briefly. It's covered in relative clarity in the outline to our oral argument. We say that particular vindication was required in this case. The reason why we say that's the case is that this was a breach that was reckless for the reasons that Justice Gwyn found. It's not the case that when the prosecution was laid the Commissioner simply had not turned her mind to the fact that fair trial rights might be breached. What we do know is that it was actively being discussed, that advice on precisely that issue was being sought and a decision, knowing that that was a live risk, was then made to violate Mr Parore's rights in that way. We're not suggesting intentionality or bad faith but we are suggesting that when you have actively considered the risk, you've taken advice which you're not prepared to disclose and you've then proceeded anyway, those are the ingredients of a reckless decision in our submission. Once that decision had been taken it was pursued persistently. And that covers off the material that my friend had already pointed to.

WILLIAMS J:

Sorry, the last part of that sentence, once that decision has been taken?

MR CONDER:

It was pursued persistently.

WINKELMANN CJ:

You need to speak up a bit Mr Conder.

MR CONDER:

Thank you

WINKELMANN CJ:

Maybe lift that microphone up in an angle, see if that helps. I think that will help.

GLAZEBROOK J:

Sometimes I think possibly just slow down slightly because I think it gets a bit – because it's hard to hear, it gets even harder if you rush.

WINKELMANN CJ:

Speak quickly.

GLAZEBROOK J:

And we can talk, both the Chief Justice and myself have the tendency to speak quickly.

WINKELMANN CJ:

Very quickly.

MR CONDER:

I have been receiving that feedback from the Bench for about a decade so far and I anticipate there will be several decades yet of the same advice, but I will try.

WINKELMANN CJ:

That’s all right, some of us never get it right Mr Conder.

WILLIAMS J:

Really, there might be some costs exposure there Mr Conder.

MR CONDER:

Not for unnecessary delay though, your Honour.

WINKELMANN CJ:

All right, so you're saying, if you know there’s risk you need to decide to proceed?

MR CONDER:

That’s the recklessness.

WINKELMANN CJ:

Yes.

MR CONDER:

The second component is the persistence, which is the manner in which the Commissioner continued to pursue the matter in the High Court, and then in this proceeding, and the Court of Appeal continued to argue the stay was unnecessary although it had not been appealed. That is a level of persistence that shows that it had not been sheeted home to the Commissioner the seriousness of what had been done. In our submission this touches on a foundational right. We say that it goes beyond the mere generic right to a fair trial but that the right to silence is in fact engaged because the purpose of that right, the ability to keep your powder dry, not to have your own words twisted against you, are precisely the things that Mr Parore lost in this case. And in that regard, it is significant that the exact risk that the Commissioner talks about in the policy promulgating this new approach allowing people to avoid having to file a NOPA is to protect that very right, to protect their ability to maintain their silence.

It's the language in paragraph 4, the purpose is to ensure that the “taxpayer is not compelled to respond”, and in the very first paragraph “a defendant cannot “be compelled to be a witness or to confess guilt”. The purpose of a policy recognises that the true nature of the violation is of that right to silence, although it's only engaged at that later stage.

The consequence of the breach was significant for Mr Parore, and this relies on paragraph 69 of Justice Wylie’s decision which sets out exactly what it was that the Commissioner gained that Mr Parore lost as a result of the breach. And while in other cases courts have spoken about the fact that an apology may go some distance to vindicating a right, no apology has ever been provided here.

Taking those factors together it is our submission that even on a purely vindicatory basis, setting aside the question of compensation, this was a case where an award of damages was appropriate.

Turning then to the final submission on costs. Our core submission here is that if the Court accepts that the financial harm that is suffered in breach of rights should be compensated as part of an effective remedy, it undermines that remedy if that needs to be done at the plaintiff's own expense. It undermines the value of what the plaintiff might receive. It also makes it significantly more difficult for those who have suffered a breach of their rights to pursue relief in the courts and therefore creates a barrier to relief in what is a very important area.

We largely adopt the submissions of the Law Society here, and we acknowledge that there is significant force in what they have to say about the principled basis for an increased rather than an indemnity costs award, but it is our submission that if there is any shortfall in the costs being paid, the result is that the plaintiff is required to pay for their own vindication and that is, we would submit, anathema to what is supposed to be achieved in an effective remedy. This was the approach that was taken in *Attorney-General v Van Essen* [2015] NZCA 22, it was discussed but not ultimately imposed in both *Archbold v Attorney-General* [2003] NZAR 563 (HC) and *Binstead v Northern Region Domestic Violence Approval Panel* [2002] NZFLR 832 (HC), those are the only things I really have to say on the topic of costs.

WINKELMANN CJ:
Well, thank you, Mr Conder.

MR CONDER:
Thank you, your Honour.

WINKELMANN CJ:
Have you finished?

MR CONDER:

Those are my submissions.

WINKELMANN CJ:

Thank you. Mr Kirkness.

MR KIRKNESS:

Thank you, your Honours. On behalf of the Commission we have two hand-ups that I'm just providing to the Court that are hopefully useful especially in shortening the time they take. And just while the Court's receiving those hand ups the Commission has five broad points that it wishes to make and one preliminary observation if I may. And I just wanted to set out those five broad points at the outset because it may be that not all of them are points that your Honours would be assisted on.

So, starting with the first proposition that the Commission wishes to advance today is that New Zealand Courts have relied on the right to an effective remedy in Article 2(3) of the ICCPR, the International Covenant on Civil and Political Rights to develop Bill of Rights remedies.

The second point is that this approach to fashioning an effective remedy provides a useful and flexible framework for responding to the particular breach of the particular right, including breaches of the right to a fair trial.

The third point is that the question for the Court when applying this framework to determine if compensation is part of an effective remedy for breach of a fair trial right, is whether it has been demonstrated that the breach caused financially assessable loss.

The fourth point is that there is no majority in *Taunoa* for the proposition that compensation is a subsidiary purpose of remedying a breach of the Bill of Rights.

WILLIAMS J:

Sorry, can you give me the third one again?

MR KIRKNESS:

The third one, Sir, was that the question for the Court when it turns to applying the framework –

WILLIAMS J:

As to compensation –

MR KIRKNESS:

– as to compensation, specifically compensation as part of an effective remedy for breach of a fair trial right, is whether it has been demonstrated that the breach caused financially assessable loss, and I'll come back to why we use that phrase “financially assessable”.

WILLIAMS J:

So, it’s a question of fact only?

MR KIRKNESS:

No, it would be a question of fact and law, there’d be a causational and it was factual but there would be some legal limits on where the causation lines were drawn, Sir.

The fourth point is that there’s no majority in *Taunoa* for the proposition that compensation is a subsidiary purpose of remedying a breach in the Bill of Rights.

And the fifth is that the Costs in Criminal Cases Act does not preclude the courts from awarding costs as part of a remedy for a Bill of Rights Act breach where it is necessary to ensure an effective remedy. And the proposal is that I will deal with the first three points and my co-counsel, Ms Yang, will deal with the last two points.

The preliminary observation I foreshadowed is this, that the key issue in this case appears to be whether some form of monetary –

WINKELMANN CJ:

Perhaps Mr Kirkness, you could slow down a teeny bit too. Everyone seems to be, it's not a thing I normally ask people to do, but everyone seems to be speaking very fast today and we do have time.

MR KIRKNESS:

Thank you, your Honour, understood. So, the point I was making is that as we apprehend it, the Commission apprehends that the key issue in this case is whether some form of monetary relief is available for breach of the appellant's right to a fair trial and we understand it to raise two sub-issues.

First, in respect of compensation as part of an effective remedy, whether the breach caused the loss, and Justice Glazebrook appears to have gone straight to this at the outset of the hearing and we understand those questions in that exchange to be going to the heart of that issue that is in this case.

The second sub-issue is whether it is necessary to award some amount of monetary relief or damages to mark the breach, that wouldn't be by way of compensation though.

And I just wanted to flag that the Commission's submissions are addressed to the legal framework that the Commission suggests it would be appropriate to apply, but the Commission does not purport to take a view on whether, as a matter of fact, those core issues have been made out or not, and your Honours have heard the submissions of my friend this morning. We'll hear from the Crown as well. So that's for the parties.

Turning to the general proposition the New Zealand Courts have relied on the obligation to ensure an effective remedy in Article 2(3) to develop Bill of Rights remedies, it's accepted by all parties before you that breaches of the New Zealand Bill of Rights Act require an effective remedy. That concept was

central to the majority's reasoning in *Simpson v Attorney General [Baigent's case]* [1994] 3 NZLR 667. It was affirmed by this Court in *Taunoa*. You have those in the appellant's authorities at 19 and 20. I don't propose to turn to those, and I'm conscious that the Commission has already been before this Court in SC 31/2024 *Putua v Attorney-General* extolling the virtues of *Baigent's case*, exactly the same membership of the *Putua* court, and again I think at least two of your Honours were also in *Attorney-General v Fitzgerald* [2024] NZCA 419, [2024] 3 NZLR 817

So I don't propose to go through *Baigent's case* except to say in an attempt to speed the process up, and obviously it is a case that the Commission endorses very strongly, the first hand up seeks to extract core propositions that the Commission submits are valuable from *Baigent's case*. So if your Honours would be assisted, you have propositions along the left-hand margin of that hand up and then the pinpoint citations that the Commission says stand for those propositions from the different Judges and the majority, and just to call out a few of those.

The first is a point of approach which is that the Bill of Rights Act should be given a generous interpretation or, as President Cooke says, generous approach to ensure that the affirmed rights are practical and effective. It's a point that this Court has also made.

The second point, both paragraphs of the long title of the New Zealand Bill of Rights Act are relevant. We've given the citations there and this point requires one footnote which is it is interesting to read the Crown's submissions and to find repeated references to one paragraph only of the long title and no references at all to the other paragraph which is paragraph (b), the objective of affirming New Zealand's commitment to the International Covenant on Civil and Political Rights. We simply draw your attention to that because the Commission says that is a fundamental feature of the way that the *Baigent* Court developed the monetary remedy.

The third proposition here is that the majority of *Baigent* relied on Article 2(3) to develop a public law damages remedy and there's two pieces of that. There's the effective remedy component in Article 2(3)(a) of the International Covenant and there's also the need to develop judicial remedies which is Article 2(3)(b), and the fourth is that before *Baigent's case* exclusion of evidence was the main remedy but this was due to the nature of early cases, not because compensation was somehow inapt, and we've got the citations there. The point I would say here, again by reference to the Crown's submissions, is a submission there and it's an important one, it's at paragraph 20 of the respondent's submissions, and I'm interested in particular at page 5 where it is asserted that each of the four Justices in *Baigent* in the majority "held that criminal law already contained 'effective' and 'ample' remedies for breach of fair trial rights". That's not correct, and none of those pinpoint citations are correct in the footnote, and again we say –

GLAZEBROOK J:
So why do you say that, sorry?

MR KIRKNESS:
Because that's not the proposition that is contained in the *Baigent* reasoning. The reasoning –

GLAZEBROOK J:
So what do you say the proposition in *Baigent* is?

MR KIRKNESS:
The proposition in 4 in the hand-up is the point that they were making, so the idea being that exclusion of evidence had been used but it wasn't purporting to make some statement that compensation was inappropriate or inapt.

GLAZEBROOK J:
Well, doesn't *Baigent's case* rely on the fact that in that particular case exclusion of evidence wasn't an effective remedy?

MR KIRKNESS:

Yes. Yes, we accept that.

GLAZEBROOK J:

And that was because you'd actually searched somebody who had absolutely no reason whatsoever to be searched and there was no evidence to be excluded.

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MR KIRKNESS:

So the Commissioner would accept the proposition that there will be cases where the effective remedy is an exclusion of evidence and there's no need to have compensation as part of an effective remedy, but the point that we make, stepping back from these particular points, the more general one, is simply that there may be cases where compensation is part of an effective remedy. We wouldn't exclude that. But exclusion of evidence may well be the more likely way, the more common way, more frequent way that a concern around criminal process issues or fair trial rights is dealt with.

GLAZEBROOK J:

I just don't quite understand why paragraph 20 says something other than that. Or are you just saying that it's too wide in the sense of saying that you would never get something in the course of court proceedings. What's the –

WINKELMANN CJ:

Do you want to go to the paragraph in *Baigent's case* at 676?

MR KIRKNESS:

The critique is that it's too wide, your Honour.

WINKELMANN CJ:

Second paragraph.

MR KIRKNESS:

So, to Justice Glazebrook's point we're simply saying it's too broad in the circumstances.

GLAZEBROOK J:

Oh, too broad, thank you.

MR KIRKNESS:

And we say that's shown by the language at "hitherto" in President Cooke's reasoning.

So those were the only points I wanted to draw up from *Baigent's case* except to say that obviously that approach is one that, as the Commission submitted in *Putua*, as the Commission submitted in *Fitzgerald* and repeats here, that case is a critical case for understanding the start and the evolution of the public law damages remedy in our legal system.

The phrase "effective remedy", as it is used in *Baigent's case*, has a particular meaning. It is taken from New Zealand's obligation under Article 2(3) of the International Covenant on Civil and Political Rights. I don't propose to take your Honours to it. I did take you to it in *Putua*, but *General Comment No. 31* of the United Nations Human Rights Committee, at paragraph 16, which is in the respondent's authorities at 29, elaborates on the concept of an effective remedy and the way that that is understood and applied by the United Nations Human Rights Committee. We would endorse that as reflecting a correct statement of what effective remedy in Article 2(3) comprises.

Also, in the interests of time, I don't propose to take your Honours to this document but we have included in our authorities, Commissioner's authorities at tab 6, the report of the International Law Commission on the articles on state responsibility with the commentaries, and that includes some, in my submission, very helpful discussion of these concepts, cessation and reparation and the different elements that are within that concept of reparation, set out at Articles 30 to 31 and 34 to 37. That can be found at pages 88 to 107 of the

report. We'd just simply commend that to you in the interest of time here, your Honours.

One point to flag, when we speak in domestic law of public law damages, it captures two types of monetary relief that would be characterised differently in international law. One of those is compensation and another is where the monetary amount is deemed necessary to mark a breach, which international law would characterise as satisfaction. So those would be different elements of an effective remedy. None of that should be taken to preclude the ability of a domestic court that is, or has secured an effective remedy for the purposes of the international obligation to also set a need to provide some sort of monetary award for societal reasons, but at least what the international law position would require is if the effective remedy requires compensation, then it's part of it, and you may also have a situation where the Court or Tribunal says some additional amount is needed as a symbolic marking of the particular breach which would be characterised as satisfaction. You find a discussion of that, in case it's helpful, at page 106, paragraph 5 of that same International Law Commission report.

The second hand-up, your Honours, is again, trying to cut short the submissions by simply setting out here what the Commission understands to be covered by the concept of an effective remedy in Article 2(3). And so we've set out there some formal requirements, but then also the substantive requirements broken down into cessation and then full reparation and then under full reparation the different strands that are taken to comprise that and some bullet points with examples that are hopefully useful simply to explain how we understand that concept to be working in Article 2(3) and to be the concept that the *Baigent* court is drawing on.

WINKELMANN CJ:

And what about restorative justice, such as an apology?

MR KIRKNESS:

That would typically be considered to be, if we're speaking international law terms, part of satisfaction.

WINKELMANN CJ:

Yes.

MR KIRKNESS:

But it would be entirely possible for domestic court to consider that appropriate simply for domestic reasons. This is simply indicating what the international law position would say it might be, characterises a baseline rather than limiting a domestic court to just what the international law requires, especially when constitutional rights are involved. But that would – typically an apology would often be a form of satisfaction that is well-used and recognised in international law.

The leading statement on the objective of full reparation is that set out in the *Factory at Chorzów (Germany v Poland) (Merits*) (1928) PCIJ (series A) No 17 case. That's in the Commission's authorities at 3, and the leading statement is at page 47. In the interests of time I won't take your Honours to it except to say that that is a statement that you then find repeated in broadly the same terms throughout the international and comparative case law.

WINKELMANN CJ:

So where is that in your submissions?

WILLIAMS J:

Page number again?

MR KIRKNESS:

Sorry I missed the question.

WINKELMANN CJ:

Where are your submissions?

MR KIRKNESS:

So that's in the Commission's authorities at page – tab 3 sorry, and it's the *Chorzów Factory* case from the Permanent Court of International Justice at page 47.

WINKELMANN CJ:

Is it referred to in your submissions?

MR KIRKNESS:

It will be in the submissions; I'll just get the footnote for you. I think it's – so I'll get the footnote for you. I'll just ask Ms Yang to pull that up. But just to continue that point –

WINKELMANN CJ:

Footnote 23.

MR KIRKNESS:

In footnote 22 and 23 your Honour.

WINKELMANN CJ:

Chorzów Factory.

MR KIRKNESS:

I'm not going to pretend I know how a Polish person would say it.

WINKELMANN CJ:

Anyway. No, quite.

MR KIRKNESS:

The point I'm making is –

WINKELMANN CJ:

But I'm just – it helps. And it's at your footnote 23?

MR KIRKNESS:

Footnote 23, it's page 47 of that very famous judgment in the Commission's authorities at tab 3. And your Honours, the reason why it may be useful to draw that to your Honours' attention is because in the case law, and some of the cases that you've been taken to, we see that same language reproduced fairly consistently albeit with some slight variations. So for example, you find similar language –

GLAZEBROOK J:

Similar language to what exactly, are you referring to?

MR KIRKNESS:

So perhaps it would be useful if I could turn to *Chorzów Factory* at tab 3 of the Commission's authorities, page 47 of that judgment.

GLAZEBROOK J:

So "is that reparation must, as far as possible, wipe out all consequences of the illegal act and reestablish the situation".

MR KIRKNESS:

Yes that's the – from the words: "The essential principle …".

GLAZEBROOK J:

Right.

MR KIRKNESS:

Through to "to determine the amount of compensation due for an act contrary to international law". The discussion there about: "... reparation, must" – as your Honour Justice Glazebrook had just said "as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed." That's the bit that we see captured in various other authorities and repeated.

GLAZEBROOK J:

I mean I'm having some difficulty here. Is the submission that the whole idea that exclusion of evidence is enough without actually having financial compensation in breach of international law? You can see my difficulty can't you if the remedy is exclusion of evidence?

MR KIRKNESS:

That's not what's being advanced, your Honour.

GLAZEBROOK J:

Do you say that that's not sufficient because it doesn't compensate for say costs that have been incurred in respect of evidence that has been wrongfully obtained?

MR KIRKNESS:

No your Honour, we wouldn't say that. So our position –

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GLAZEBROOK J:

Well, why not?

MR KIRKNESS:

Our position would be that you would look at the approach to causation and you might have a difference between a situation where a fair trial was the reason, or the unfair trial, the breach was the commencement of the unfair trial as opposed to a situation where something happens during the course of a proceeding that renders it unfair. In causation terms the first would be one where you might look at the potential for compensation, the latter would not but even then, with that first example, you would still have the consideration of what, in all probability, would have been the alternative. So, if I understood the position that your Honour was putting to my friend earlier today correctly, a concern might be that this trial was going to happen anyway.

GLAZEBROOK J:

That's irrelevant really because what would be the alternative? The alternative would be they would never have proffered that evidence in the first place. So, any expenses that were incurred in actually fighting that or getting it excluded should be part of reparation.

MR KIRKNESS:

Yes, if it can be established that the breach has led to an unfair trial that would otherwise not have happened –

GLAZEBROOK J:

Well, no, nothing to do with the unfair trial whether it otherwise wouldn't have happened or not, so – actually, are you coming back to the trial should never have occurred in the first place, which is what the appellants are saying?

WINKELMANN CJ:

Yes.

MR KIRKNESS:

Yes. Yes, I'm sorry for being unclear, that's –

GLAZEBROOK J:

So is it a trial that should never have occurred in the first place?

MR KIRKNESS:

That would raise the type of concern that you might start looking at compensation. Outside of that I don't see why an exclusion of evidence wouldn't be an effective remedy, although it would depend on the nature of the breach.

GLAZEBROOK J:

All right.

MR KIRKNESS:

But we're certainly not suggesting that you always need compensation and we're not suggesting that you could never have it.

WINKELMANN CJ:

Well, of course, the difficulty with that though is that when you have a successful appeal and there's a retrial, there is an additional cost of a new trial.

MR KIRKNESS:

So, I think where you would get to, and I accept this is where perhaps the question becomes difficult, it would be that there would be to some extent an expectation that being part of society, when you're subject to litigations and court proceedings, there will be costs associated with that, there will be some degree of anxiety that you have as a result of being subjected to a process such as that. That wouldn't necessarily translate into something where compensation is awarded, and the anxiety comment is touched on by Lord Bingham in *R (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14, [2005] 1 WLR 673 saying, we simply understand that there will be some degree of anxiety you just have to live with, it needs to be something more than that before, he's summarising the European Court of Human Rights Case law, but he says something more than that before the European Courts would step in and consider there to be a financially assessable loss such that you have compensation. But I accept that would be a very fact-specific issue.

ELLEN FRANCE J:

I'm not sure where you draw the line with this concept of the trial should never have occurred in the first place, because let's say there's critical evidence that it turns out should've been excluded. Why can't it be argued then, well, that trial should never have occurred in the first place? How do you distinguish the various situations that might arise?

MR KIRKNESS:

Well, I'm not sure there's a clean way of distinguishing them but one way that I was trying to suggest earlier was that where you have a situation where the trial

was only going to happen, or only happens because of the breach, but you might get a situation where there's an indication that criminal proceedings were already under consideration for example, and so it wouldn't be necessarily always correct in that situation to say, the only reason you're subjected to a trial that incurred those costs is because of the breach that's occurred. It might be that the evidence shows that was going to happen anyway in all likelihood. That would be a situation where it would be difficult, in my submission, to argue for compensation for the incurred costs, for example.

WILLIAMS J:

Those are the scenarios referred to in *Greenfield?*

MR KIRKNESS:

Greenfield is a very useful discussion of that, and not as directly aligned with what I just said, so it's not exactly every scenario they refer to but *Greenfield* is one of the best discussions that I've seen of this type of logic, yes. It's summarising the European Court of Human Rights' approach and explaining –

WILLIAMS J:

Which I think they say is quite conservative in terms of constructing the counterfactual that the prosecution could never have proceeded in the absence of the breach?

MR KIRKNESS:

Yes, and *Greenfield* would say – so *Greenfield* was a case involving, just to go back to financially assessable loss, if you broke that into two things, pecuniary and non-pecuniary loss, as the International Law Commission does, *Greenfield* wasn't concerning pecuniary loss, it was concerning non-pecuniary loss and it said in that context you applied essentially what looks like, to me at least, something similar to a but-for type of approach, but you might have variations in how you express that depending on whether you were challenging an outcome or the likelihood or reasonable opportunity to have a different outcome.

So that has led to what the appellant in that case submitted was an unprincipled approach, and Lord Bingham rejected that and explained why, I'm happy to look at that decision, but for pecuniary loss the Commission's put into the authorities the Ukrainian case, which is *Agrokompleks v Ukraine (Just Satisfaction)* (23465/03) Section V, ECHR 25 July 2013, again, apologies for the pronunciation, but that would be a case where you're dealing with pecuniary loss and that was where you had a situation where there was a judgment issued recognising a debt to a company that was then quashed, well the rights breached was the quashing of that, contrary to the principle of res judicata, and the European Court said well, you're entitled to restoration the amount of compensation that reflects that judgment debt that you missed out on as a result of the conduct, albeit there needs to be a few adjustments because of some subsequent share transfers. But that is a pecuniary loss example from the authorities. For non-pecuniary loss, *Greenfield* is the best authority that is in the authorities, in my submission.

WILLIAMS J:

Presumably, causation does the same job in respect of pecuniary loss that the other considerations you just talked about do in respect of non-pecuniary loss.

MR KIRKNESS:

Yes.

WINKELMANN CJ:

So, under the European Convention, do people often bring claims when they've had an unfair trial because of some sort of procedural issue regarding evidence and then have to have a retrial? Because there is a clear pecuniary loss there which is the cost of your lawyers.

MR KIRKNESS:

Perhaps you could turn to *Greenfield* briefly to see the discussion there since it's a useful case.

WINKELMANN CJ:

Yes.

GLAZEBROOK J:

Whereabouts is that?

MR KIRKNESS:

I'm just finding it.

GLAZEBROOK J:

I'm just wondering whose authority is it.

MR KIRKNESS:

The respondent's authorities, tab 21.

GLAZEBROOK J:

Thank you. Which I've now lost but no doubt I'll find.

MR KIRKNESS:

Let me know when you have that case. So *Greenfield*, this was the case involving a serving prisoner, he was under a two-year sentence. He failed a mandatory drugs test in prison and was charged with administering a controlled drug to himself and that was in breach of the prison rules, he pleaded not guilty to that, and there was a hearing conducted by a deputy controller within the prison, not a judge, not a magistrate, who refused the prisoner's request for legal representation.

That then went up through the courts and you had a breach of the Article 6 fair hearing right. What the Court says, there's some useful commentary here from Lord Bingham, with whom all the other members of the House of Lords agreed, it starts at paragraph 7 of Lord Bingham's reasons under the heading: "Damages for breach of article 6." He talks about the purposes that Article 6 is seeking to secure and he says, and it's the point we picked up on in our written submissions, that in the context of these fair trial type cases there's one feature

that distinguishes them from violations of different types of rights. He gives some examples there, which is: "... that it does not follow from a finding that the trial process has involved a breach of an article 6 right that the outcome of the trial process was wrong or would have been otherwise had the breach not occurred."

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And so we say in our written submissions, and again today, that's a critical distinction explaining a reason why you do not often see monetary relief rewarded for fair trial rights breaches. The particularly useful discussion –

WINKELMANN CJ:

So at paragraph 8 he says: "In the great majority of cases ..." just simply finding a violation is enough and he says: "The routine treatment of a finding of violation as, in itself, just satisfaction for the violation found reflects the point already made that the focus of the Convention is on the protection of human rights and not the award of compensation."

MR KIRKNESS:

Yes, that's a key paragraph that we would also rely on if your Honour turns to the – it's paragraph 10, but over the page where his Honour cites to endorse as a statement stated by the Grand Chamber in *Kingsley v United Kingdom* and that's where he picks up on the *Chorzów Factory* language and then at paragraph 11 you see a discussion if – that you get "just satisfaction", and that term is directly drawn from Article 41 of the European Convention. And I know Justice Blanchard used it, but it arguably shouldn't be transposed into our case law necessarily...but: "... just satisfaction under article 41 only where the Court finds a causal connection between the violation found and the loss for which an applicant case be compensated." But he says this is not a case of pecuniary damage.

At paragraph 12 he deals with "non-pecuniary damage" and talks about two bases on which such cases have come before the Courts. A straightforward one which says: "that but for the Convention violation found the outcome of the

proceedings would probably have been different", and then he calls it a: "more problematical basis that the violation deprived the applicant of an opportunity to achieve a different result which was not ... valueless".

And then he goes through how the European Court has dealt with those two types of non-pecuniary damage cases including the formulations where the European Court has sought to characterise the link between the breach and establishing that. It's the State's responsibility. And I'd simply say it's a very helpful discussion and it, in my submission, certainly does not convey the impression that there's always going to be compensation. In fact the European Court is being incredibly sparing in its approach to that.

But the point I was making in response I think to Justice Williams was at paragraph 16, there's a point there by the "second head of general or non-pecuniary damage ... described: "physical and mental suffering", and further down that paragraph in the middle of it Lord Bingham talks about how: "In considering claims under this head the [European Court of Human Rights] has, consistently with its general approach, only been willing to award compensation for anxiety and frustration (however described) attributable to the article 6 violation." And that needs to be more than just standard types of anxiety that you might experience in day-to-day life. And as Lord Bingham says, "the court has been very sparing in making awards" on that basis.

And the reason for taking your Honours to this is it's one of the better discussions, in my submission, on the way the courts or Lord Bingham has summarised for us one of – the way the European Court of Human Rights case law has developed including as to causation.

WILLIAMS J:

So, is your point that the reticence in respect of non-pecuniary harm is not reflected with respect to pecuniary harm, provided causation is established?

MR KIRKNESS:

Yes, that reticence is different there, yes Sir. And so that's – the *Ukraine* case would be an example of the lack of reticence there where it's a much more simple matter to say the judgment said you had a debt owed to you of X amount. That was quashed wrongly. Your remedy is what you should have got, the debt, but there's been a share transfer subsequently so we're going to subtract that benefit from that amount, and that would be a fairly standard approach, not just in a rights context but more generally to that type of issue I would have thought, your Honour.

But to go back to the Chief Justice's question, my understanding is, no that's not a common case pattern that would arise and that the European Court is fairly sparing in its approach to awarding compensatory damages for breaches of fair trial rights. In some classes of case they don't appear to do it at all, the example given by Lord Bingham is structural bias.

And to pick up on Justice Ellen France's point I'm not going to pretend that there's an easy line to draw there, your Honour, that is, in my submission, a very difficult line to draw and it will, in all likelihood in my submission, be very heavily influenced by the facts. In fact, I think Lord Bingham basically says that, at the end of paragraph 15, talking about the criticism that he's rejecting about the different formulations that come through in the European Court of Human Rights case law and he says that the starker position it's taken in terms of awarding damages: "…has softened … where [the Court] was persuaded that justice required it to do so. The variations of language used are such as occur when a court addresses itself to the detailed facts of the case before it, rather than endlessly reproducing a form of words stored in the court's word processor. Wisely, in my opinion, the court has not sought to lay down hard and fast rules in a field which pre-eminently calls for a case by case judgment, and the court's language may be taken to reflect its assessment of the differing levels of probability held to attach to the causal connection found in individual cases."

Or to pick up Justice Williams' point, it turns on the counterfactual and how likely that's going to play out.

The cases your Honours, unless there are any questions on that, I would simply give the pin cites for two cases that pick up on that *Factory at Chorzów* formulation. *Greenfield* is one of them as we just saw, picking up on the *Kingsley v United Kingdom* language. The other was *Vancouver v Ward* 2010 SCC 27, [2010] 2 SCR 28 that my friend took you to earlier in the appellant's authorities at 40, at paragraph 27, adopting the approach of the UK courts, *Anufrijeva,* however you say that, but that again is that same language from *Factory at Chorzów* coming through. So, there's a normative convergence at least than the objective that's being sought.

To move very quickly through the second point that the approach that the *Baigent* Court adopted in that Article 2(3) mandates an effective remedy, provides a useful and flexible framework for responding to the particular breach of the particular right, including breaches of the right to a fair trial – in the Commission's submission the first point is the deliberate steps taken by the *Baigent* Court to develop judicial remedies for breach of right in line with New Zealand's international obligations under Article 2(3) are appropriate and should be continued. It avoids a gap between domestic evolution in this area and New Zealand's international obligations. New Zealand obviously has ratified the Optional Protocol to ICCPRs, I think Justice Casey makes a point of in *Baigent's case* and that has applications for the New Zealand State including the judiciary.

So you take *Thompson*'s case, *Thompson v New Zealand* CCPR/C/132/D/3162/2018 (7 June 2022), that the late Douglas Ewen KC took to the United Nations Human Rights Commission successfully and that is a recent example where New Zealand was found in breach and ordered to make full reparation, including compensation. And the short point to make is because of this ratification of the Optional Protocol, if there's a breach New Zealand must remedy it and if the courts do not remedy it, it's going to fall on another branch to do it. The breach is going to continue until it's remedied.

The second point about this area and the reason why the framework is useful is that categorical exclusions need to be avoided. Fair trial rights and criminal process rights generally are not a class apart, that's language drawn from the Court of Appeal in *Morrison* at paragraph 43(c)**,** it's the appellant's authorities at paragraph 42, and we see the Crown's, in my submission, appropriate recognition at least in the abstract in *Morrison,* it's recorded at paragraph 44 and again in this case that there may be cases where damages are an appropriate remedy for breach of fair trial rights. It's unclear when they say that might arise but at least in the abstract that's recognised consistently now.

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The third point is that it's not consistent with this framework to introduce a gloss based on seriousness of the breach when considering the availability of compensation in the sense of pecuniary or non-pecuniary loss or, as the International Law Commission characterises it, financially assessable loss for breaches of rights. So this is a different point from where a Court is marking the breach with a monetary amount, a satisfaction type remedy, and this is one of the confusing elements of the compound phrase "public law damages" because, in my submission, it's not appropriate to suggest that the seriousness of the breach determines whether compensation is available. The seriousness of the breach may very well determine whether a court decides that some amount marking the breach is appropriate.

The fourth point is that –

WINKELMANN CJ:

Sorry. You're saying it's not appropriate to suggest the seriousness of a breach indicates whether compensation is, should be available, is that what you're saying?

MR KIRKNESS:

Yes. So there's –

WINKELMANN CJ:

But then you went on to say it might be relevant.

MR KIRKNESS:

My apologies, your Honour, for being unclear. So the distinction I'm seeking to draw is that when we talk about compensation the seriousness of the breach should not have a role in that, in my submission. If we're talking about the Court deciding that because of the seriousness of the breach it considers it appropriate to mark that, symbolically or otherwise, what we called satisfaction, that's entirely appropriate to take into account in that context, but compensation is something different.

WILLIAMS J:

Narrower meaning of vindication.

MR KIRKNESS:

Yes. Fourth, observations as to the rarity of compensation for breaches of fair trial rights should be understood as empirical or descriptive in nature, and this is a point I'm taking from *Morrison*, Court of Appeal, at 88, and that's endorsing counsel assisting Dr Butler KC's submission there. So they should not be elevated into a threshold requirement or given some sort of normative force. They are descriptors, accurate descriptors. When we say it's "rare" or "exceptional", that may well as a matter of fact be true but it's not part of the test.

The third point that the Commission wished to address was when you turn to the question for the Court when applying the framework to determine whether compensation is or should be part of an effective remedy for breach of fair trial rights, the key issue is whether it's been demonstrated that the breach caused financially assessable loss and that requires a clear causal connection. As we say in the written submissions, the injury must be proximate or foreseeable and not too remote. The requirement is not the same in every case. It will turn on the nature of the breach, and there's authority for that. I've already taken your Honours to *Greenfield* but very similar sentiments, the ILC Report in the

Commission's authorities, tab 6, page 93, para 10, making a similar point to Lord Bingham. This area can't be satisfactorily solved by search for a single verbal formula, the ILC says, and we endorse that.

The remaining points I had under this head were simply to address your Honours on *Greenfield* which I've already done.

WINKELMANN CJ:
Which you've done, yes.

MR KIRKNESS:
And so just to conclude, the third point –

WILLIAMS J:
Can I just ask you to – you referred to paragraph 88 of the Court of Appeal decision. Can you just remind me which Court of Appeal decision you're referring to there?

MR KIRKNESS:
That was the *Morrison* Court of Appeal.

WILLIAMS J:
It was *Morrison*?

MR KIRKNESS:
And I've made the point that they are explicitly accepting the submission made by counsel assisting in that case, which I think is useful and I didn't want to not attribute that submission to him, so I made sure to mention it.

So the final point here is just that there's no rule that violations of fair trial rights should not result in compensation where such an award is a necessary element of an effective remedy on the facts or that such awards can never be necessary for fair trial rights breaches as all parties accept here.

WINKELMANN CJ:

Can I just ask you about this because there is this underlying tension, so let's make it explicit, which is a concern when there are some things that just happen, so breach of fair trial rights. You know, it's a – number of trials that occur in New Zealand is large and it's a complex process, so there is breach of fair trial rights and there is a concern regarding setting something running that would be unworkable, and that's why I think that at times the language of "rare" or "exceptional", trying to limit this down in some way, has been attempted perhaps or suggested. So do you have any general response? Do you say that what Lord Bingham is acknowledging in *Greenfield* is really that?

MR KIRKNESS:

That would be how I would understand the point he's making, although to be fair to Lord Bingham he is purporting to give an accurate summary of the European Court of Human Rights' approach as opposed to his own. There's a few interpolations but broadly he's summarising the European Court of Human Rights there, but I think it's an accurate summary. In response to your Honour's point, yes, I would absolutely agree, as the previous distinction between the empirical and normative suggests, with the idea that one of the reasons why we see certain types of limiting language, descriptive language, slipping into playing a normative role in the test is because of this concern about, I've forgotten your Honour's phrase, but that this is something that may create a significant issue more generally within a system because it's a large issue.

WINKELMANN CJ:

I think Justice Cooke said something about it, about it would be undermining the entire rights framework if it became a playground, or something like that, for damages.

MR KIRKNESS:

And that, in my submission, is a concern that the Courts are always alive to. There was a good judgment by Lord Justice Sedley in the Court of Appeal, an immigration case involving Zaire at the time, where he refused to accept an asylum claim to do with retroviral drugs from a person who was alleging that

the failure to give him asylum would breach the right to life. I don't have the name of it on me but Lord Justice Sedley made the point there that there's a risk for the Court there that in granting that claim they would be essentially swamping the whole rights protection logic of the entire Convention because of the consequences that would happen, so even a very human rights aware Judge, Lord Justice Sedley, conscious of those broader systemic issues, as he should be in his role as a Judge of the Court of Appeal.

The point, and Ms Yang has just made a good point which is it comes through the international authorities and I should have raised it, thank you, Ms Yang, which is that proportionality is also a criterion throughout this. So when you look at the effective remedy framework that we suggested to your Honours was the international one, the proportionality considerations apply throughout that and that would be another limiting factor, and with apologies, your Honour, Justice Williams, probably a broader response than to your earlier question which is it would be both the causation approach and how that was limited and concerns around proportionality that would both be limiting factors I said to you that would just be causation.

WILLIAMS J:

Yes, these are the sorts of things raised in section 92O and P.

MR KIRKNESS:

Yes.

WILLIAMS J:

Effect on governance and burden on the broader taxpayer base and so on and so forth.

MR KIRKNESS:

Yes, and on one view be common sense considerations that should be taken into account in this type of context.

WINKELMANN CJ:

And what do you say about – because I think it's the Law Society referred us to those provisions, but you're the Human Rights Commission.

MR KIRKNESS:

Well, we agreed with the Law Society that we would not be saying the same things and so I think it's a good submission –

WILLIAMS J:

Even if invited.

WINKELMANN CJ:

The only reason I'm raising it is because it is your legislation in a way, isn't it?

MR KIRKNESS:

It's a good submission. We endorse the submission but because of that agreement they will be able to make that good submission to you, not us, but we certainly accept it as a point well made albeit in a different context.

WINKELMANN CJ:

You don't demur.

MR KIRKNESS:

So I ask that you recognise Ms Yang for the final two points.

WINKELMANN CJ:

Yes.

MS YANG:

Apologies, your Honours, I'm just setting up quickly.

WINKELMANN CJ:

That's all right. You take your time.

1530

MS YANG:

Good afternoon your Honours, as my friend, Mr Kirkness, alluded to, I'll be covering two main points. The first point is that there is no majority in *Taunoa* that for the proposition that compensation is a subsidiary purpose to NZBORA remedies. The second point will be that the Costs in Criminal Cases Act should not preclude courts from awarding costs as part of an NZBORA remedy where that is necessary to ensure an effective remedy.

So, on that first point that there is no majority in *Taunoa* for the proposition that compensation is subsidiary, the upshot of that, I suppose the reason we're making this submission is that this Court is not required to overrule *Taunoa* in order to reaffirm the proposition that Bill of Rights remedies should be consistent with the obligation under Article 2(3) of the ICCPR. And as part of this I wanted to first talk about the two different conceptions of vindication which we discussed at paragraphs 19 and 20 of our submissions. That was alluded to by your Honour the Chief Justice and also by Justice Williams. So I was not proposing to go into too much depth about that distinction on the basis that the Court is across that.

WINKELMANN CJ:

Well please restate it should you choose to.

MS YANG:

I'll restate it briefly. There is a broad conception of vindication which is that it merely describes the outcome when an effective remedy is provided consistently with the ICCPR, and Chief Justice Elias uses the word vindication in those terms in *Taunoa*. We take the *Baigent* majority to be using the word vindication in that sense, in that case. And then there is the narrow conception of vindication which is a society-oriented conception. It means to mark the breach in an abstract sense in order to repair the harm that has occurred to society when a right is breached. And the narrow conception of vindication is adopted – is used by Justice Blanchard, Justice Tipping and Justice McGrath in *Taunoa*.

Now obviously the broad conception of vindication would be consistent with the ICCPR obligation. The narrow conception does not necessarily lead to inconsistency, and on that we would say it depends on how one views the relationship between vindication and what an effective remedy requires. And so Justice Tipping's reasons in *Taunoa* are useful on this point because his Honour adopts a narrow view of vindication, but in relation to what an effective remedy is, his Honour is quite clear that you need both vindication and equally you need compensation as a distinct purpose. Compensation is victim oriented; vindication is society oriented, and in order to provide an effective remedy Justice Tipping says you need both.

And that, so despite taking a narrow view of vindication, in our submission Justice Tipping's reasons are also consistent with – are ICCPR consistent.

WINKELMANN CJ:

So even if you put Justice McGrath and Justice Blanchard in the narrow view and treat that as inconsistent with compensation being a significant remedy, you'd say there's no clear majority because Justice Henry agrees with both camps?

MS YANG:

Yes, Justice Henry agreed – was I think the wording was in general agreement with both Justice Blanchard and Justice Tipping. So I think on this issue, in which there is a difference, is a point in either direction.

WINKELMANN CJ:

Even Stevens?

MS YANG:

Yes. So that was really all I had to say on the first point, unless your Honours had any further questions about *Taunoa*? No. In that case I'll move to the second point which is about the CCCA and I think I can be quite brief on this as well.

The Commission's position is that the CCCA should be interpreted consistently with Article 2(3) of the ICCPR and that is by virtue of the presumption of compatibility that Parliament is presumed not to legislate inconsistently with international obligations, and it was a point made by Mr Conder earlier that the CCCA does not preclude or prohibit the awarding of costs in particular cases. It permits it in certain circumstances, and in that case where you do not have clear wording that courts are prohibited, in our submission it is open to the Court to interpret the CCCA consistently to allow the awarding of costs as Bill of Rights Act damages where that is shown to be necessary for an effective remedy.

WINKELMANN CJ:

So you're agreeing Mr Conder I think then that it doesn't expressly exclude it, so consistency with the ICCPR would rise to interpret it as not excluding it?

MS YANG:

Yes. I just want to acknowledge the point that was made by Justice Miller earlier that it might be said that the Act creates a lacuna. Now we would say that the is no need to read in a lacuna because you can read the Act consistently with the ICCPR but, in the event that your Honours disagree with that, it would be an appropriate thing to do to bring that lacuna to the attention of Parliament because if the lacuna continues to exist then, in the eyes of international law, that New Zealand as a state could be seen to be in breach of its obligations. But our main submission is that the CCCA can be read consistently with the ICCPR.

WILLIAMS J:

So I guess the point is reading the CCCA in that prohibitory way simply shifts the dispute to the Human Rights Committee under the optional protocol?

MS YANG:

Yes, and if the Committee finds that New Zealand is in breach, it comes back to New Zealand and there has to be a response from New Zealand so it just shifts the response.

ELLEN FRANCE J:

In terms of criminal proceedings what you have is two quite specific regimes. So the more limited one in terms of disclosure under the CPA and then this. So why is it you say, apart from the need to read consistently with the international obligations, why can't you say well that's a code in terms of criminal proceedings, costs in criminal proceedings?

MS YANG:

Well the lack of prohibitory language and the need to read consistently I think are strong reasons themselves why you would not read it as a code to the extent of covering the field where Bill of Rights Act breaches are involved. You could read it as a code in ordinary circumstances, so where Bill of Rights breaches are not involved. That's I think a potentially legitimate way to read it and I think certain High Court decisions have indicated that the Act is read that way but – 1540

WINKELMANN CJ:

Well that's kind of consistent with *Baigent's case*, isn't it, in terms of its interpretation of the Crown Proceedings Act 1950?

MS YANG:

Yes.

WINKELMANN CJ:

Yes, *Baigent's case*, when it's interpreting the Crown Proceedings Act, it says I'm not going to read this to exclude public law damages.

MS YANG:

Yes. So I suppose your Honour Justice France, the point is that the CCCA could be read as a code within ordinary cases, the ordinary sphere of operation of criminal proceedings where Bill of Rights Act rights have been fulfilled, but once we step outside of that sphere then there's no reason to read that as a code in those circumstances.

MILLER J:

Does that legislation give us some sense of parliamentary policy towards the approach that courts ought to take when awarding costs? For instance that they ought be done according to a scale rather than on actual costs, or perhaps that some standard of fault has to be met on the part of the prosecutor before an award is appropriate?

MS YANG:

I would say not because if it is the case that the CCCA is to be read as applying in cases where Bill of Rights Act rights have been fulfilled in the ordinary cases, there is a different wrong that is occurring that needs to be addressed when you do have a Bill of Rights Act breach, and the Commission would say the response should just be what is required to provide an effective remedy.

GLAZEBROOK J:

That seems to be much broader than the submission made by the appellant.

MS YANG:

I might need to be reminded what the submission was for the appellant.

WINKELMANN CJ:

The appellant conceded that the framework of the CCCA might give us guidance in the issue of costs.

GLAZEBROOK J:

And they also limited it to the case where the proceeding wouldn't have been instituted in the first place, where it seems to me that you're actually saying whenever there's a breach the CCCA costs are part of that. But you could actually go over and above that, in all cases, even ones that are specifically covered by the Costs in Criminal Cases. Whereas I think the appellant's submission says that this isn't covered by the Costs in Criminal Cases and therefore it should be treated differently. I can understand that submission, but the broader submission I have some difficulty with.

MS YANG:

Well I think the position that there is a principled reason why we're taking this position, which is that if the driver of what the remedy should be is the obligation to provide an effective remedy, that is the anchoring point for the assessment of what needs to be done to address the breach. And if the Court finds that what is needed to address the breach is in excess of what would be awarded under the CCCA that would only be an indication that what Parliament has provided under the CCCA is not sufficient as an effective remedy, and in Bill of Rights Act breaches there should be an ability to provide that effective remedy.

WILLIAMS J:

And you say that in the case of pecuniary loss anyway the issue is not seriousness of the breach?

MS YANG:

Yes.

WILLIAMS J:

It's causation.

MS YANG:

Causation and proportionality.

WILLIAMS J:

Subject to proportionality?

MS YANG:

Yes.

WILLIAMS J:

It's only in non-pecuniary that you focus on the vindicatory issues of seriousness?

MS YANG:

I think in the case of non-pecuniary loss, non-pecuniary loss still goes to the purpose of compensation as opposed to vindication where damages would be awarded for – yes.

WILLIAMS J:

I see, right.

WINKELMANN CJ:

So I think Justice Glazebrook's right that on your analysis that which is already covered under the Act could arguably, those cases could in fact be entitled to a higher level of costs on the basis that it's compensatory under common law damages principles so it's not costs, it's actually public law damages. But to decide this case we don't need to go that high, do we? We can just take the appellant's position which is that this is a case of stay and it's not covered on the face of the legislation?

MS YANG:

Yes, it's not necessary to address this case but that would be the principal position that the Commission is advancing.

WINKELMANN CJ:

Yes, thank you.

MS YANG:

Your Honours, unless there were any further questions, I think they are the submissions for the Commission.

WINKELMANN CJ:

Thank you, Ms Yang.

MS YANG:

Thank you.

WINKELMANN CJ:

Mr McKillop, all the way back there, it's a long way back.

MR McKILLOP:

Thank you, your Honour, and I'm just checking firstly you can hear me?

WINKELMANN CJ:

We can.

WILLIAMS J:

You're about the clearest Mr McKillop which is…

MR McKILLOP:

I'm going to try and sustain that.

GLAZEBROOK J:

Actually oddly the further back people are the better we can hear them.

MR McKILLOP:

Yes. I could move behind the glass and really bellow. I am assuming we're adjourning at four.

WINKELMANN CJ:

Yes.

MR McKILLOP:

So, I'm going to be – I'm going to try my very best to make this –

WINKELMANN CJ:

Well, you don't have to finish in the 10 minutes. You might just like to set up, do your preliminary and we can resume in the morning. We don't want you to be rushed feeling it to be 10 minutes.

MR McKILLOP:

Sure. I'm just – I'm not sure –

WINKELMANN CJ:

But nor do you have to exceed it if you don't need to.

MR McKILLOP:

No, well I don't think I really need to. There's been a lot already said by those who come before me so I'd really just want to touch on three topics. The first looking, as I do in my submissions, at what Parliament has actually done with *Baigent* through two statutory regimes and the second point is how that – how we say that helps address the question of how to look at *Taunoa*. Does *Taunoa* stand for narrow vindication to the extent that a majority can be assembled from it or not and if it does, is it right? So, that's the second point. And then the third point will be the cost-related submissions and that's – I'm only going to be submitting about the costs of counsel in Bill of Rights Act claims. I'm not going to be submitting about the costs in criminal cases which have already been addressed.

So to turn to the first point about what Parliament has done with *Baigent*, and I put it that way because the two regimes that I have mentioned in the submissions both came along post-*Baigent*, pre-*Taunoa* and I say that none of Parliament's interventions there have purported to alter any methodology for calculating damages in these sorts of cases. Both were adopted while *Baigent* was really the leading BORA case. They reflect what *Baigent* did and effectively endorsed that.

Starting with the Human Rights Act, I've set out in the submissions, and I've really put it in a footnote, I think which is footnote 14, that the Human Rights Act as it stands is a bit of an accident of, and I'm conscious I'm talking about the legislation that another party actually effectively administers but –

WINKELMANN CJ:

But they ceded the field to you, Mr McKillop.

1550

MR McKILLOP:

That's right, so I'll grasp that. It's effectively an accident of history that we have a partially codified BORA right in the mechanics of the Human Rights Act. So as the Human Rights Act was enacted in 1993, it had a sunset clause that meant that eventually the specific non-discrimination rights would also end up applying to the Crown. And so that would cover things like employment, accommodation, the provision of services, et cetera. This was going to be a real headache because there would be the section 19 BORA duty and there would also be the specific statutory duties. What Parliament instead did was to clarify that only section 19 BORA applies to the Crown and that's why we have Part 1A in the Human Rights Act. So Parliament has grappled through that amendment process. And sorry, I say "only" you can make employment claims under Part 2 if you're a Crown employee but that's really only the substantive area.

So the mechanics of the Human Rights Act can be used to make section 19 BORA claims. And I say that this is important in this case because of the breadth of compensation that can be obtained under that regime which includes pecuniary losses. That much is clear from section 92M of the Human Rights Act.

I've also then referred in the submissions to the further sections which introduce broader public interest considerations under sections 92O and 92P which might allow for the foregoing of remedies such as this altogether or modification or something of that sort. And the other counsel have already referred to those factors in 92P as being broadly or the representative, the sort of public interest factors that also make *Baigent* damages discretionary.

WINKELMANN CJ:

So they allow a systemic focus to be brought to bear?

MR McKILLOP:

Yes, and I didn't mention this in the written submissions but they were actually used in *Spencer v Ministry of Health* [2016] 3 NZLR 513 (HC), the case that I

refer to there, and the Court accepted there that the Court should modify remedies in that case and part of the reasoning driving that was the implication for public finances if it was something of an open season on pecuniary losses under the discriminatory family carers policy from – if you were able to seek those all the way back to when the Human Rights Act came into – when Part 1A came into force.

WINKELMANN CJ:
Yes.

MR McKILLOP:
It would be an enormous strain on the public purse. So that's really all I wanted to say on the Human Rights Act.

The PVCA though – sorry I'm using an acronym. The Prisoners' and Victims' Claims Act 2005, I say also, and this grows somewhat out of *Taunoa* in the High Court level but wasn't mentioned in the Supreme Court. That Act also has something to say about *Baigent* remedies, I say. It did two things specific to the context of prisoner claims. It required prisoners to have made reasonable use of internal and external mechanisms to raise these issues other than through proceedings, and it created the Victims' Special Claims Tribunal to allow victims to make calls on any compensation awarded. But what it didn't do was to do anything to alter the method by which damages would be calculated once a court had recognised that compensation was needed and that, if an effective remedy is to be granted, it's section 14 of that Act which sets out the various factors that the Court can take into account which include matters like, as I noted in the submissions, whether mitigation of loss or damage had been attempted by the plaintiff or defendant. So, those are obviously indications that you're dealing with to talk about the narrow sense of vindication and the narrow sense of compensation as the two elements that were addressed by Justice Tipping in *Taunoa*. That's really something of an indication that you're dealing with compensation as an element of *Baigent* remedies.

So, these two regimes, the Prisoners' and Victims' Claims Act and the amended Human Rights Act, ultimately I'm saying that Parliament has indicated comfort with *Baigent* damages being compensatory, not merely narrowly vindicatory, and I'm obviously grateful that Ms Yang has dealt with the tricky issue of how *Taunoa* can be stitched together so that I don't have to.

A majority, and I'm coming onto my second point now, a majority there is hard to find. This Court obviously has the option of explaining that case, or confining it to its non-pecuniary facts perhaps, or if the Court was to find that this is a situation where the Supreme Court has ruled as a majority that it is a – we're looking really at for the narrow sense of vindication when we're looking into these damages, then we might be in the circumstance where the Court is considering whether to overturn *Taunoa*.

So I have just – I wanted to provide in the submissions, and it's in paragraph 17, just to ensure that the Court had before it some arguments that would support that if that's where the Court got to, so that it wouldn't be a point that was left unargued and I've drawn for each of those sort of – each of those one sentence points I've made in that paragraph on *Couch v Attorney-General (No 2)* [2010] NZSC 27, [2010] 3 NZLR 149, which was the last time this Court really substantively dealt with departure from one of its – or, sorry, of the prior apex court, the Privy Council, departure from that by any precedent. So, those arguments are before you.

There's one point that I want to just pick up on that the Crown raised in their submissions which is the idea of reliance. So, this isn't the – I'll just give you the citation to the paragraph which is paragraph 67.3 of the Crown subs where the Crown has noted that lower courts have relied on *Taunoa* and that that is a reason for not departing from Taunoa. I want to just submit that that's not the kind of reliance that this Court was talking about in *Couch*. That's merely the doctrine of precedent acting as it should that lower courts will apply the findings of senior courts.

1600

Reliance though was explained by Justice Tipping in *Couch (No 2)*, it's the second sentence of paragraph 105 which I've put up on the screen: “Some cases are intrinsically of a kind upon which reliance is placed by people making choices about how to order their affairs; others are not relied on in the same way.”

And so I'll just finish this point, as we’re at four, if that’s okay. Reliance in my submission, as it was used in *Couch*, was about a general ordering of affairs, not about the simple application of the document precedent. So, for example, is there a ripple effect through society that leads people to contract in a new way because an apex court has made a certain kind of interpretation of some sort of common contractual language, something of that sort. There couldn't – well it's hard to imagine that there would be reliance in this case throughout society. It would be astonishing if anyone had ordered their affairs based off rights-related compensation being very low and exclusively focused on vindication as that would suggest that really you can just – well that breaches of rights are more economically palatable so we don’t have to put aside as much money for them or something like –

WINKELMANN CJ:

I think we've got your point there, Mr McKillop.

MR McKILLOP:

Yes, that’s the whole point.

WINKELMANN CJ:

Yes. Shall we adjourn now and you can finish your third point in the morning?

MR McKILLOP:

Thank you, your Honour.

COURT ADJOURNS: 4.02 PM

COURT RESUMES ON FRIDAY 20 MARCH 2026 AT 10.00 AM

MR McKILLOP:

May it please the Court.

WINKELMANN CJ:

Mōrena Mr McKillop.

MR McKILLOP:

Good morning. We left off with me having covered two of my three points and so I'm just going to come onto that last one.

WINKELMANN CJ:

Yes.

MR McKILLOP:

Which concerns the costs available to litigants in Bill of Rights Act proceedings. I'm not going to go into my submissions in any great detail here because the points are really principled ones.

The headline proposition is a pretty simple one which is that it may be that a more appropriate starting point for effective BORA remedies would be increased costs rather than indemnity costs. And the motivation, if you like, for that submission is that there have been references to indemnity costs being an appropriate part of an effective remedy in several leading cases; *Taunoa, Attorney-General v Udompun* [2005] 3 NZLR 204 (CA), but the reality of practice has been that they simply aren't being awarded very often, and it seems to us that one explanation for this might be that it is quite difficult to reconcile this approach to indemnity costs in BORA cases specifically, with the usual approach to indemnity costs under the High Court Rules 2016 and other cost rules.

GLAZEBROOK J:

Although indemnity costs are at least sometimes awarded in what can be seen as public interest cases where you have public interest litigants and one would've thought that there is some, although in a lot of these BORA cases it's a personal interest and nevertheless because of it being a Bill of Rights issue has a wider effect.

MR McKILLOP:

Yes.

GLAZEBROOK J:

So, I understand the submission that you're making and it might be because people are concentrating more on the personal aspect of it rather than the vindication aspect, and of course that's part of the whole of this case in terms of how the damages ought to be calculated but…

MR McKILLOP:

Yes, I certainly take your Honour's point that public interest can indicate increased or indemnity costs may be appropriate and that's not just a BORA point.

The lack of a consistent practice though, in my submission, may be explained by the focus on indemnity rather than increased and in contrast to indemnity costs within the High Court Rules, within rule 14.6, there's a specific reference when thinking about increased costs where the Court is, permitted might be the wrong word because it's a general, discretionary power, but it's signposted that it's an appropriate case for increased costs when a "proceeding is of general importance to persons other than just the parties and it was reasonably necessary for the party claiming costs to bring it or participate in it in the interests of those affected;" and that would, given the vindication of rights central to *Baigent* claims, that would seem to be met typically in a BORA claim. So there is a specific provision under the "Increased costs" rules that quite neatly fit these sort of circumstances.

And the other point that I want to make that I don't think I've made really clearly in my written submissions is just the general principle that if an enactment makes a power available which would seem to be the natural home of a BORA consistent application, then that would be the place where a section 3 actor would normally be expected to implement a BORA consistent outcome. And, sorry, it's a very confusing way of saying that the rules confer a public interest justification for increased costs and the Court, as a section 3 actor, would normally be, well, like any other section 3 actor it would normally be expected to make use of that power as it's written down in the rules.

WINKELMANN CJ:
So you're submitting it's the current rules regime is a natural home for this?

MR McKILLOP:
Absolutely.

WINKELMANN CJ:
But also, we might infer a parliamentary intention that that is the place for it, or is it just that it's a natural home for it?

MR McKILLOP:
Well I'm not sure you can infer a parliamentary intention about the High Court Rules.

WINKELMANN CJ:
So it's secondary rules actually, quite so, but we might infer.

MR McKILLOP:
Well it's still a policy, it's still –

WINKELMANN CJ:
Might infer an executive intention.

MR McKILLOP:
Well it's a –

WINKELMANN CJ:

No not even that.

MR McKILLOP:

– considered, yes, even executive intention when it's the High Court Rules it's a bit of a stretch.

WINKELMANN CJ:

A problem with that too yes.

MR McKILLOP:

But it certainly is a considered policy. The cost regime is a discretion highly shaped through a considered policy of reasonable contribution that gets built on for various reasons, that indemnity costs has been thought of as essentially in the nature of a penalty for bad behaviour in the course of litigation and so quite unattractive to judges being asked to consider making indemnity costs orders simply as a matter of course in a BORA case. But there is a pathway into that through increased costs which might actually end up being used more often if that was the steer from appellate courts rather than this focus on indemnity costs that we've had previously.

So that's the submission in a nutshell and there's one more thing, a piece of overseas costs law. I'm not going to take you to it because it's not in any bundle or anything but it's that in the United States where their usual costs approach is that parties bear their own costs in all sorts of litigation, they have a special rule applying to civil rights litigation where people can have cost awards made in their favour, reasonable cost awards. I'll just tell you the reference to their United States code. The section is 42 USC section 1988 just in case the Court is interested in how one other jurisdiction deals with – sorry, and the Act that's inserted that is called the Civil Rights Attorney's Fees Award Act 1976 – just in case the Court is interested in how another jurisdiction has dealt with a similar issue.

1010

But other than that, unless I can assist the Court with anything further, those are my submissions.

WINKELMANN CJ:

Thank you, Mr McKillop. Mr Jones?

MR JONES:

Good morning, your Honours. You will hear from me first on behalf of the respondent and thereafter from Ms Laracy. Your Honours should have before you two documents from the respondent. The first is our outline of oral submissions and the second is a table of findings to be derived from *Taunoa* and others that I hope has been placed on your Honours' desks and, if not, we have more copies.

Your Honours, turning first to our outline, we have set out at paragraph 1 the four topics that we propose to address you on and which counsel will be carrying the burden of address in relation to each. What I propose to do at the outset is to simply identify the key arguments that we make in relation to each of those four topics before proceeding to development.

So, your Honours, we begin, not with the facts, but with the principles of liability at play in this case. As you will see from our short summary in our outline, we will say on behalf of the respondent that in this case the Court of Appeal followed the correct right-centred approach in considering damages, and that under this approach the protection and promotion of rights is a primary importance and not full compensation for pecuniary loss, although, of course, we do not rule out compensation for pecuniary loss in an appropriate case.

And, your Honours, we will say, on behalf of the respondent, that in this remedial jurisdiction compensation of course may be awarded. When it's awarded it may be awarded on the basis of loss and we do not rule out that full compensation may be awarded on the basis of proven loss in an appropriate case. But obviously the operative word is "may," as Justice McGrath said in *Taunoa*, redress may be in whole or in part. The crucial word for us is "may"

because we say that damages in this area of the law are an evaluative fact-sensitive exercise in which loss caused by a breach is only one factor to be considered among others when determining whether damages are the appropriate and proportionate remedy, and which the Judge will be guided by the need to vindicate the rights, vindicate in a wide sense, in a sense of protecting and upholding rights, and not constrained to fully compensate for quantifiable loss when it would not be appropriate or proportionate to do so. And one of the factors always prominent in this evaluative exercise where other remedies have already been applied, in this case by the criminal court, is whether vindication has already been achieved through the office of those remedies.

So, that is in very broad terms, our statement of the principles that we say are at play in relation to damages insofar as this appeal is concerned, and having first addressed you in relation to those principles, we will go on to invite your Honours to consider *Taunoa* and we suggest two things. First of all, that *Taunoa* is consistent with the judgment of the majority of the Court of Appeal in *Baigent's case* and, secondly, that the majority in *Taunoa* is internally consistent. And when we address you in relation to this topic, we will invite you to take a look at the table that we have provided. It doesn't purport to be a comprehensive table of all findings in relation to damages but we have set out what we say are the core areas of agreement among the majority, but obviously we haven't shied away from also identifying areas of divergence, particularly between Justice Blanchard and Justice Tipping. So, we hope that working through the table and the relevant parts of the judgment that are cited in the table, rather than flitting between different judgments on different topics, is going to be a more orderly way of addressing you on that issue.

Your Honours, after that I will say a little bit about the international law dimension and what we say are equivalent approaches adopted in other common law jurisdictions and then, as you may have seen at paragraph 8 of our outline, I will hand over to Ms Laracy, who will address you on the liability assessment that the Court of Appeal made in this case. And, as you will have appreciated, your Honours, from our written submissions, we do place

considerable weight on the stay that was granted in this case as we say an effective means of vindication in itself, particularly when coupled with the declaration. And just to be clear on the question of causation, we do say that in this case the loss that the appellant suffered was not caused by the breach, it was caused by the prosecution. The prosecution was not based upon the breach, it was not founded upon information obtained from the NOPA. Long before civil proceedings were commenced, there was found by the Commissioner to be sufficient evidence upon which to prosecute the appellant. But even if we are wrong on that and causation has been established as a matter of strict fact, we say that it is only one factor among others as part of a wider evaluative exercise in determining whether damages were the appropriate remedy.

Ms Laracy will also address you in relation to the relevance of the statutory regime for costs in criminal cases set out in the Cost in Criminal Cases Act and we will say that where costs are governed by a legislative regime they should not be recovered by way of civil damages where the regime does not provide for their recovery.

Your Honours, finally, and time permitting, I may resume after Ms Laracy has concluded to make some very short submissions in relation to costs. So, your Honours, that's the proposed order.

Can I begin please with the broad principle which we say is at play in this case which is whether or not the Court of Appeal in this case, and indeed whether or not this Court in *Taunoa*, has adopted the correct right-centred approach. That is the phrase used by Justice McGrath in *Taunoa* and Justice Hardie Boys in *Baigent's case*, the right-centred approach in determining whether damages are to be awarded and, if so, what level of damages are appropriate.

Your Honours, it might be helpful at some point, and I see it's already up there, I know that paragraph 15, which I can now see, of our submissions being brought up on your Honours' screen, and I'll turn to that in a minute, but before

that some very broad principles that we make partly in response to the written oral submissions that have been made by the interveners.

Your Honours, the Bill of Rights Act is an Act to firm and protect and promote fundamental rights and remedies granted under the Act have been shaped by that high aim. We say that the remedial jurisdiction flows directly from those aims and, in effect, the objective of vindication in this area of the law means no more than to protect, promote and affirm. We do not obviously disregard the second part of the lower title of the Bill of Rights Act but the reference to our international obligations and, in particular, to the obligation to provide an effective remedy under Article 2(3) of the International Covenant, but we do say, contrary to what is said by my learned friends for the Human Rights Commission, that vindicatory approach to damages is not simply a synonym for effective remedy. Effective remedy, as Justice Blanchard observed in *Taunoa*, is a phrase that exists at a very high level of generality and doesn't necessarily, in itself, provide a great deal of guidance to the Court in determining what the appropriate remedy might be in a particular case.

1020

Effective remedy raises the obvious question, effective in relation to what, effective to do what? Should damages be effective in the way that they are often regarded as effective in the context of private, civil proceedings in that they will fully compensate, subject to matters of remoteness, causation, contribution, the party who has suffered a wrong or are they effective in another sense? The answer, we say, that comes through loud and clear from *Baigent's case* and *Taunoa,* is that remedies will be effective in this area insofar as they do affirm, protect and promote rights in a practical sense.

And in order to be truly effective, vindicatory remedies must generally do two things. First of all, they must protect the rights for the rights-holder, the individual victim, and they must also provide a wider, social benefit in upholding the rights and restoring the right for the benefit of the community at large. And we say that vindicatory remedies in this broad sense are remedies that do both.

So, in relation to remedies provided in the context of criminal proceedings, the exclusion of evidence will protect the right of the defendant but it would also assist in upholding the integrity of the criminal justice process for society at large.

Similarly, when it comes to compensation paid to a prisoner who has suffered a significant breach of his rights to be treated humanely, that compensation, those damages, will provide that prisoner with a measure of redress but would also significantly mark the breach and act as a disincentive to further breaches by the state.

And we appreciate that at certain points in his judgment in *Taunoa,* Justice Tipping used the term "vindicatory" compensation in a narrower sense simply to refer to the latter of those two elements, but we will suggest that it has been used more broadly in the case law, not only by him but by the other Justices of the majority and also by the Justices in *Baigent's case*, the broader meaning of the term "vindication" was intended.

So, your Honour, now could we –

WINKELMANN CJ:

So, you're at ad idem with the appellant on that, that vindicatory is used in the sense of both for the individual right-holder and for the community?

MR JONES:

Yes, to that extent we are. We don't say that vindication can necessarily be satisfied by a simple marking of the breach and neither was that the outcome in *Taunoa* and substantial damages were provided to the prisoners at various levels in that case which provided them with their own individual form of redress.

Where we differ, I think from the appellant and potentially from the interveners, is that they say, as we understand it, that there is a general presumption or prima facie rule that where it is proved that pecuniary loss arises from a breach,

has been caused by a breach, that loss must be compensated and should be compensated in full.

WILLIAMS J:
By arises you mean caused?

MR JONES:
Caused yes. We say it may be compensated, whether or not it should be compensated and the level of compensation is a matter to be determined as part of the evaluative exercise that the judge must engage in with a view to ensuring that there are rights that do provide satisfactory vindication, protection, promotion of the rights in question.

Your Honour, turning now to paragraph 15 of our submissions and briefly, we say that for the purposes of this appeal these are some essential elements of this approach which we say arise from the case law and are pertinent to your Honour's consideration of the Court of Appeal's judgment.

The first point, (i) is probably not in dispute. In fact, it's certainly not in dispute this is a public law remedy, available not as of right, but if the Court considers it appropriate and proportionate in the circumstances of the case. We say that that in itself means there cannot be a general prima facie rule that pecuniary loss must always be recovered. It is subject to wider consideration in which a number of factors, including public interest factors, may have a bearing.

Second, as we've said already and not need to reiterate, the "principal objective" we say is to vindicate. We don't say it's the sole objective. That sits alongside other complementary objectives, compensation, deterrence, denunciation.

WINKELMANN CJ:
Okay, so I thought you were using vindicate to capture compensation.

MR JONES:

Yes. I'm going to pause and just rephrase that slightly. Certainly I think conceptually the way that it's been approached is that deterrence is a distinct element to vindication but to some extent they allied. Denunciation, to the extent that that is different from vindication, it is a separate objective. But we say that broadly speaking those objectives will fall under the vindication head and probably distinct from any kind of intent to punish which has not been widely approved.

In relation to why we say that vindication can be understood in these terms, we don't need to invite your Honour to turn to the case now, but I'll give your Honours a number of references to assist when you do turn to *Baigent's case* in which various Justices in the majority treated vindication as synonymous or coterminous with such concepts as protecting and promoting rights, enforcement of rights, vindicating rights, upholding rights. So that was: President Cooke at page 676, line 27; Justice McKay, page 717 at line 50; and Justice Casey, page 691, line 34. And your Honours will recall that one of the cases –

WINKELMANN CJ:

Sorry, can you just go through those numbers again?

MR JONES:

Yes of course. So Justice Cooke sitting as President of the Court, page 676, line 27.

GLAZEBROOK J:

Sorry, can you just slow down a bit please.

MR JONES:

Page 676.

GLAZEBROOK J:

Thank you.

MR JONES:

Line 27. Justice McKay, page 717, line 50. Justice Casey, page 691, line 34. And we note that Justice Hardie Boys at page 701, line 21 referred, citing from a case of the Irish Supreme Court to remedies that enforce rights which we say is a similar equivalent and so the direction of the Court's approach, we say, is clear.

And then arising from that approach we say (iii) will often be a factor in the *Baigent* damages assessment and is in this case. The Court must consider whether vindication has already been achieved through other non-monetary relief.

So on the appellant's case the stay must be effectively disregarded because obviously if the starting point is that pecuniary loss must receive financial compensation, the stay is no remedy. But we say from the wider perspective of protecting rights, the stay is all important. It was the stay that effectively upheld Mr Parore's right to a fair trial, albeit after the prosecution had commenced. It provided him with the relief of absolute release from criminal proceedings and it also served to uphold the integrity of the criminal justice system. And if that, coupled with the declaration, is sufficient, then we say that further vindication is not required.

WINKELMANN CJ:

Mr Jones, I must ask you about the intervener's suggestion that sections 92O and 92P of the Human Rights Act provide a useful framework for matters, that it could be relevant to the remedial discretion.

MR JONES:

Well, we certainly say that, I think as Justice Tipping said in *Taunoa*, there should be broad equivalence between the two regimes, and that's to say the regime that the Courts have recognised and evolved under *Baigent's case* and the separate statutory regime, and we don't disagree with that. We don't – let's just say that the Courts in relation to an award of *Baigent* damages should be restricted to conducting the exercise in precisely the way that the Human Rights

Tribunal would do under the relevant statutory provisions but we say they are broadly relevant and there must be broad equivalence. The emphasis is on broad. The jurisdiction of the Human Rights Tribunal is distinct.

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WINKELMANN CJ:

Well, it doesn't have the powers that the Courts have and nor is the subject matter the same.

MR JONES:

Indeed. But there is certainly value in considering those statutory provisions and the light that they might shed on the Court's own remedial jurisdiction, as long as those statutory provisions are not read literally or too cleanly into the Court's exercise of its own jurisdiction.

In relation to the Court's own exercise of its jurisdiction, we say that key here is the retention of an appropriate degree of flexibility to allow Judges to provide appropriate remedies in relation to very different rights, very different factual circumstances. It is the nature of the right, as much as any other factor, that may determine the appropriate remedy as was said in *Taunoa*. As your Honour has observed, the Court have broad powers, not only in relation to criminal law but in relation to public law proceedings, that the Human Rights Tribunal lacks and that must also be considered when determining that the scope of what a vindicatory remedy will require and provide.

WINKELMANN CJ:

What about the matter that I discussed yesterday with Mr Kirkness about the systemic considerations, and he referred to a decision of Lord Justice Sedley's, I can't recall the name of the case, I don't know if he gave me it.

MR JONES:

Neither can I, I'm sorry.

WINKELMANN CJ:

I don't know if he gave it to us, which made the – where Lord Justice Sedley declined – he said he would not be minded to grant relief because to grant relief, that damages in that circumstance would lead to the regime being swamped.

MR JONES:

Yes.

WINKELMANN CJ:

And undermined effectively.

MR JONES:

Yes. Well, your Honour, that brings us to what would have been my next point which is an additional reason for flexibility and for the retention of flexibility here. Under the rights-centred approach that the respondent advocates for an effective remedy need not require any particular type of remedy and it need not require any particular outcome. There is no need necessarily for there to be full compensation. We say that a real risk might arise in relation to the floodgates concerns that we presume that Lord Justice Sedley was alluding to. If it was the case that this Court was to find that upon proof of cause of loss there must necessarily or generally be financial compensation, and it is not just Lord Justice Sedley in the United Kingdom jurisdiction that has raised those concerns. Similar concerns have been raised domestically, not least by Justice William Young in *Brown*, when he referred to the risks that might arise if damages claimed could automatically follow on from a finding made in the criminal jurisdiction that individuals' rights had been breached, and that there was an order for the Court, the Judge, in that jurisdiction to make an order such as the exclusion of evidence or the stay of a prosecution, in order to do justice in the criminal jurisdiction. Not only we would suggest is there a risk of, you know, floodgates opening because this is, as I understand it, the most common way in which Bill of Rights protections are activated is in criminal proceedings, but the other concern arising from that that Justice William Young in *Brown* raised was that it may in turn cause the Judges in criminal jurisdictions some

reluctance to rely upon the Bill of Rights in providing the necessary practical protections in the criminal context.

WILLIAMS J:

Why is that not all adequately protected by the basic application of rules of causation as Lord Bingham seemed to think it would?

MR JONES:

Well, your Honour, two points in response. First of all, when we take you to *Greenfield*, we will suggest that Lord Bingham did not simply say that causation is enough, it all rests on causation. We don't suggest that that is what the House of Lords found in that case. We say that causation is of course a relevant factor but causation may not be sufficient, and the type of case where it may not be sufficient is we say a case such as this, where we say that if your Honour is against us on causation then loss was caused by the decision of a prosecutor, that we say that decision was made in good faith and was in error. It would be wrong, we say, for damages automatically to arise when loss is caused as a result of an error made by a prosecutor in the proper exercise of his or her function. Not always but we say that there are important safeguards to prosecutorial integrity that the Canadian Courts have recently recognised in *Henry v British Columbia (Attorney General)* 2015 SCC 24, [2015] 2 SCR 214 and prior to that in *Ward v Vancouver* that mean that damages must not necessarily follow the event if causation is proved because that would mean that prosecutors exercising difficult judgment calls in relation to criminal proceedings may find that, not they personally, but their prosecuting agency and the Crown more broadly opens itself to financial liability by making the wrong call. And we say it would be wrong to hang that risk over the head of a prosecutor and we say that concerns expressed by the Canadian Supreme Court in *Henry*, by Justice William Young in this jurisdiction and by other senior judges, and perhaps Lord Justice Sedley was one of them in the United Kingdom jurisdiction, attest to the reality of that risk and the need to adopt a flexible approach that avoids that risk arising and we –

WILLIAMS J:

But isn't that hanging over the prosecutor's head in Costs in Criminal Cases and under the CPA anyway except for this gap?

MR JONES:

The difference we say is that when the Court proceeds under the Costs in Criminal Cases Act under section 5 the Court doesn't simply consider causation. It considers a number of matters that might be relevant to a costs award.

WILLIAMS J:

Sure. I don't think the appellants or the interveners take a different approach to that. They do agree that proportionality, affordability, chilling effect and so on are all going to be relevant but compensation is not treated as utterly exceptional.

MR JONES:

We don't suggest it is. I mean we suggest the reverse would be true. We suggest that the current approach under *Taunoa* is that compensation in a *Baigent* context is dependent on all those relevant factors. It doesn't hinge solely on causation. So, causation is important as it would be in a cost application under the Costs in Criminal Cases Act but other matters such as sufficiency of evidence, evidence of misconduct by a prosecutor will all be relevant factors, and if you follow the path that the appellants invite you to go on and say causation is a factor –

WILLIAMS J:

Sorry, follow the path in?

MR JONES:

That the appellants invite you to go on and say that effectively causation is the key here and in this case, as long as it can be shown that the loss to the appellant was caused by the prosecutor's decision to prosecute, okay so that was unfair, then that is sufficient to found a damages award. Our point is that

it isn't sufficient and it certainly wouldn't be sufficient for full indemnity costs under the CCCA regime.

Your Honours, Ms Laracy has handed me a helpful note in relation to the CCCA regime. One distinguishing feature of the operation of the CCC regime is that costs in that case are paid out of a Ministry of Justice fund with a special standing appropriation. They are not costs that will be sheeted to the individual prosecuting agency. And it's worth recording that in this jurisdiction there are, as your Honours are well aware, a number of prosecuting agencies. Not all of them are large and well-funded. Some of them are small and would be considerably financially impacted by substantial compensation awards.

WILLIAMS J:
Is that budget item provided for in the Act? Right.

MR JONES:
Well I know that Ms Laracy has more to say about that. So I'll allow her to address you more fully on that topic in due course.

WINKELMANN CJ:
For myself I find that a little hard to see how we would take that into account – but the internal accounting of the State.

MR JONES:
Well I'm not saying it's the most important point but we say it is of some significance here that there is not the same risk in costs under the CCCA regime that prosecutors would be exposed to in relation to *Baigent* damages, don't say –

WILLIAMS J:
Yes, big difference between that and the Ōpōtiki District Council.

MR JONES:
We don't say it's the most important point, your Honour.

WILLIAMS J:

But with great respect to the Ōpōtiki District Council.

MR JONES:

We say it's a relevant matter among others. Your Honour, on this general theme of the risks inherent in the appellant's proposed approach we have summarised at paragraph 7 I think of our – no I'm so sorry, paragraph 5, some of the concerns that we say would arise in the adoption of appellant's proposed approach. And I would just take your Honours through them briefly to the extent that we haven't already touched upon them before turning to the authorities.

WINKELMANN CJ:

Where are we at in your outline?

MR JONES:

Paragraph 5.

WINKELMANN CJ:

So you're taking us to paragraph 5 of your outline, right.

MR JONES:

Yes. Sorry I thought I said paragraph 7 at one point, but I was wrong. Paragraph 5. So first we say there is a risk of overcompensation of defendants who have already received effective remedies in criminal proceedings. When I invite your Honour to turn to the case of *Ministry of Transport v Noort*, you will see that that was a concern expressed by President Cooke in that case, a case not dissimilar to this case in some respects.

The second factor, one we've already touched on, the potential chilling, distorting impact on prosecutors and we also say public authorities, because if your Honours find that damages should be at large following causation in relation to procedural rights, there would appear to be no obvious reason why that would apply to procedural rights in a criminal jurisdiction under section 25 and not under section 27(1), breach of natural justice.

WINKELMANN CJ:

I had in mind that Justice Cooke had also mentioned concern about the impact on the standing of the Bill of Rights Act.

MR JONES:

Yes well, I think the one – his concern is that one flows from the other. If the public are concerned that those who are or may be guilty of criminal offences have not only avoided prosecution for perfectly proper reasons in order to uphold their rights, but they have then received public money and compensation, if the public considers that that is overcompensation or unjustified compensation that would undermine the standing of the Bill of Rights Act itself. And I'll take your Honours to that case in a minute.

So briefly in relation to section 27(1) there's little to say except perhaps the obvious, the same risks might also apply to a civil public authority engaged in administrative or quasi-judicial decision-making when section 27 rights are at play. If they make an error and they get it wrong and someone's right to natural justice is breached, is that person going to sue that authority for significant, potentially pecuniary loss, depending on the loss that arises, the nature of the matter in issue?

Is it the case that prosecutors or public authorities will face liability from well-heeled defendants or litigants in civil proceedings who can afford private lawyers and will suggest that their loss should be quantified to the full extent of their legal costs? That we say would present a significant burden. (iii), we suggest –

WILLIAMS J:

Is it? Let me just test that. Generally speaking, loss of right to natural justice would sound in costs anyway, wouldn't it? That would be your primary loss.

MR JONES:

It may, but I think that entirely depends on the nature of the matter at issue. One can envisage situations under the RMA in relation to property matters

which are administered by the local council, where it may be more than legal costs that are at play and it may be that the loss that results from a particular decision has considerable financial consequence, not to speculate about what they might be, that's part of the difficulty, one can't see what's over the horizon –

WINKELMANN CJ:

You might lose your job because of things that are said about you in the judgment.

MR JONES:

Any number of things and that's why we say is it necessary to retain the flexibility that currently exists under the *Taunoa* approach.

(iii) the obvious point that the stability and coherence of this law, our law, is undermined if the Court departs from one of its own decisions without the strongest possible reasons. This is not a case we would suggest where the Justices in *Taunoa* made an error. It is not the case, we say, that the judgment in that case is hampering the proper development of the law and that judges in inferior courts are straining with the burdens of giving effect to the *Taunoa* principles. We say it is a judgment on an important matter upon which opinions will necessarily disagree.

WINKELMANN CJ:

Would you accept that it's not a judgment that sets out very hard and fast lines, I mean, you could read quite a lot into it or out of it if you chose to.

MR JONES:

We would absolutely agree with that. We would, we agree that it does not set out hard and fast lines, it sets out broad, general principles and this is an area of law where your Honours might feel that hard and fast lines may be inappropriate or unhelpful. All must ultimately return to the evaluative exercise that must be conducted by the individual judge, but we say that the principles enumerated in *Taunoa* provide invaluable guidance.

(iv), it would risk undermining the principles of liability established in the law of private remedies, and we have a little about this in our written submissions. We have cited from Professor Todd at paragraph 62 of our submissions, his concerns –

WINKELMANN CJ:
So, what you're responding to here is that we accept there was, sort of, a compensatory requirement for pecuniary loss to be part of any public law damages award.

MR JONES:
Yes.

WINKELMANN CJ:
This is responding to that?

MR JONES:
Yes. I mean, this is all responding to that.

WINKELMANN CJ:
Yes.

MR JONES:
At that passage Professor Todd cited, or referred to: "Lord Steyn's observation in [the] *Three Rivers* [case], that the elements to misfeasance [in public office] represented a satisfactory balance between constraining abuse and not allowing public officers to be assailed by unmeritorious actions … Courts should proceed with caution where their decision might upset that balance, notwithstanding that there is a breach of a guaranteed right."

So, we say that the elements of liability in private law, worked out carefully over many cases, address risks that are caught if considered arising in relation to the potential impact on prosecutors or other public officials at being assailed by litigation, unmeritorious or otherwise, and balance that against the need to

prevent real cases of abuse and have set the liability thresholds high in many instances.

The concern of Professor Todd is that those liability thresholds would be effectively undermined if compensation for breaches of Bill of Rights was generally available on proof of loss.

WINKELMANN CJ:

I'm not quite sure I'm understanding why that would be the case.

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MR JONES:

Well, to take the example of malicious prosecution, obviously bad faith must be proved. If it were the case that in a *Baigent* damages case the judgement call of the prosecutor led to a breach and to a loss consequent along that breach but there was no bad faith alleged or proved, that would be an easy way round the more demanding liability threshold that exists, and we say exists for good reason in relation to the tort of malicious prosecution. That doesn't mean that it must always be the case that bad faith must be proved in a BORA damages claim, but we say it should be, generally will be, a highly relevant factor when the breach in question arises from the decision of a prosecutor exercising their proper discretion.

WINKELMANN CJ:

But could that risk not be dealt with by calibrating the awards to have regard to malicious prosecution claims or the remedial response? It's just a constellation of responses so it's a different wrong, isn't it?

MR JONES:

It's a different wrong but an overlapping wrong potentially, and overlapping remedies potentially, and the question is to what extent should the courts in this public law jurisdiction be guided by the approach that's already been developed in relation to that tort. One of the observations made by the Supreme Court in the *Ward v Vancouver*, is that where the private common law has set high

liability thresholds it may be helpful for the courts in considering whether it's appropriate to make a damages award under the Canadian Charter, to look to those contours of liability existing already in the private law.

WINKELMANN CJ:

I may have got your submission wrong then. It's not actually to do with – it's to do with the liability thresholds.

MR JONES:

Yes.

WINKELMANN CJ:

And so –

MR JONES:

I'm sorry if I made it in a way that was misunderstood.

WINKELMANN CJ:

No it was me, I got it wrong. So you're saying that it deforms the law. But if the courts proceed with care and take that into account it's something they should take into account really, it can't be put it higher than that can it?

MR JONES:

No in the sense that there is the potential to deform the law, but we say that that potential is most manifest if the current careful evaluative approach that is required under the *Taunoa* principles is abandoned and instead causation of loss is the primary factor that determines whether or not damages should be awarded.

WINKELMANN CJ:

Because you couldn’t complain should a prosecutor imprison someone and compel them to make a confession, wrongly imprison them and compel them to make a confession and that leads to a prosecution.

MR JONES:

No. No you couldn't complain.

WINKELMANN CJ:

I mean you couldn't complain that there should be – even if the prosecutor makes a decision, is not implicated, you couldn't complain with there being a Bill of Rights response in that circumstance could you, even though you might not meet a threshold for malicious prosecution?

MR JONES:

No you wouldn't, but similar factors are in play than this context –

WINKELMANN CJ:

Just have to take into account?

MR JONES:

Yes, absolutely. And just to be clear we don't say that damages are never appropriate in relation to prosecutorial decisions. But we simply say that the threshold should generally be a high one and that evidence of bad faith is not always essential but will be generally highly material.

The final points are, or the penultimate point is perhaps a restatement of an earlier point that the appellant's approach would limit the flexibility required for the proper development of the law. And then final, final point in this paragraph is that the approach that they advocate for has not been fully embraced by any other common law jurisdiction and in due course we will support that proposition by asking your Honours to return to *Greenfield* and also to a recent case of the Irish Supreme Court.

Your Honours, can I invite you to turn now to the authorities, briefly to the authorities that precede *Taunoa* and then into *Taunoa* itself. Your Honours, we'd like to take some very short points from three judgments of the Court of Appeal that preceded *Taunoa*. And the first I don't need to take your Honour to the judgment itself, but just to the relevant part of our submissions at

paragraph 18 is what Justice Cooke as President of the Court of Appeal said in *Noort*. And I've touched upon the point already, in answer to your Honour's question, so we don't need to linger on the case, but we say that this early case decided towards the beginnings of this Court's remedial jurisdiction gives a flavour of the concerns that have been expressed subsequently by judges of this and lower courts in relation to the potential damaging impacts that *Baigent* awards could have in criminal proceedings. I don't need to read aloud the passage that we cite. I appreciate it is obiter and can't be taken too far. But that was a case that had some similarities with the facts of this case in the sense that there was a breach of rights and the breach was such that the conviction was overturned in the Court of Appeal, stayed in the Court of Appeal.

WINKELMANN CJ:
Although it was a traffic, a regulatory thing.

MR JONES:
Yes, it was.

WINKELMANN CJ:
It's quite different to be prosecuted for a traffic infringement than to be – was it – it was EBA so it's criminal. So criminal. It's different to be prosecuted for a breath alcohol offence than it is to be prosecuted…

MR JONES:
It's certainly different but –

WINKELMANN CJ:
Yes. Imprisonment is not at issue, yes.

MR JONES:
That is very true, that is very true, but equally, if the public saw that individuals who had been properly charged for more serious criminal offences were not only, not subject to trial, and their case is stayed for perfectly proper reasons but received public compensation, the public's concern might be all the greater.

It was potentially open to the appellants in *Noort* to make similar arguments to that which has been made by my learned friends on behalf of their client today, to say that here was a breach that caused a prosecution that shouldn't have taken place, we know that because it was stayed, should damages follow, and you will see the response to that suggestion by Justice Cooke.

WINKELMANN CJ:

This submission turns a little bit on your causation argument, doesn't it, because it might shock the conscience of – it might shock the public should there have been a case of prosecution, so that he would have been prosecuted anyway without the breach of rights. It's a different scenario if he would not have been prosecuted but for the breach of rights. So, people might think – the public might not be shocked in the second category.

MR JONES:

The public might not be shocked if it was a genuine case of miscarriage of justice, or however it's termed, where someone who should never have faced prosecution because there was not sufficient evidence, or because the prosecutor was unmotivated –

WINKELMANN CJ:

And you say that's not the case?

MR JONES:

We say it's not the case here. Similarly, in *Martin v Tauranga District Court* [1995] 2 NZLR 419 (CA), paragraph 22 of our submissions: "The Court of Appeal ordered a stay of criminal proceedings, having found undue delay" and you will see the relevant passage that we cite from Justice Cooke as President of the Court and Justice Richardson and Justice Richardson's observations are ones that echo in the subsequent case law. No suggestion in either of those cases that there had been an ineffective remedy by virtue of the fact that there had not been compensation, and the obvious contrast is with the facts of *Baigent* itself, in which the Court recognised the remedial jurisdiction to award damages precisely because there was no other effective remedy that could be

applied because there had been no prosecution, there was no question of stay or exclusion of evidence.

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My learned friends for the intervener have made the point that each of the majority Justices in *Baigent's case* all referred to the obligation under Article 2(3) to provide an effective remedy. They did but we say that the same Justices also indicated that such remedies are available in the criminal jurisdiction and that this was an alternative remedy where such remedies were not available excepting, of course, that they didn't rule out that there might be an appropriate case where compensation would be available for breach of fair trial rights, but it was not a question simply, as my learned friend I think put it for the Human Rights Commission, of considering that criminal remedies were irrelevant in that case. They were relevant to the extent that they were absent and it's their very absence that made damages necessary.

Your Honours, can I invite you now to turn to *Taunoa*, and I hope the table that we've provided is a useful way through the judgments of the majority, and I don't intend to take you, of course, to all of the passages that we have cited but just to some key ones. The starting point we say for determining whether there was a stable majority in this case is the expressions of agreement that were volunteered by the Justices themselves. We have set out how Justice Tipping and Justice McGrath expressed their general agreement with Justice Blanchard and its general principles that are at play here. Justice Henry expressed agreement with Justice Tipping and/or Justice Blanchard. Obviously there are matters upon which those two Justices departed but the high level of agreement expressed between the four Justices indicates, at least in their minds, they were not divided on fundamental issues.

Also relevant is that each of the three substantive judgments by the majority Justices cites in places extensively from *Baigent's case* and the principles enumerated in *Baigent's case* are in no way disproved or doubted in any of those judgments. I say that with one exception, Justice Tipping and I think Justice Blanchard, also indicated that they differed from President Cooke in

relation to what the appropriate quantum would have been in *Baigent's case* but that's not a question, of course, of general principle. As far as general principle is concerned, had they been in their own minds departing from *Baigent's case*, they would have expressed it.

The same Justices cited other case law that's been cited to the Court in this hearing. In particular, they cited *Anufrijeva*, judgment of the United Kingdom Court of Appeal that my learned friends for the appellants relied on, and *Greenfield*, judgment of the House of Lords that my learned friends for the interveners relied upon. And in both instances, your Honours will recall that they were cases where the United Kingdom Courts reviewed the jurisprudence of the European Court of Human Rights in relation to damages for breaches of rights under that Convention and made a number of observations to the effect that pecuniary loss may be available where causation is proved, so pecuniary compensation may be available where pecuniary loss is proved. Those judgments were very much before the Court but also in both those cases the United –

WINKELMANN CJ:

Where are you at in your chart, Mr Jones?

MR JONES:

I'm sorry, I'm not really into it yet. I'm just – I suppose I'm at point 1, expressions of agreement between the Justices on approach to remedies. Perhaps I should have added –

WINKELMANN CJ:

Okay, I thought you were well into it, I'm sorry.

MR JONES:

No, sorry, I probably should have added a section underneath that first section which is expressions of agreement by the Justices in relation to domestic and overseas authority.

WINKELMANN CJ:

So, you're saying they referred to *Greenfield*?

MR JONES:

Yes, and *Anufrijeva.*

WINKELMANN CJ:

Can you spell that?

MR JONES:

No. But it's somewhere.

WINKELMANN CJ:

Well you failed that test.

MR JONES:

I can probably bring it up in a minute.

WINKELMANN CJ:

Oh, yes, that one.

MR JONES:

Yes. But I didn't want to take you directly to *Anufrijeva* yet but simply to what the Justices in *Taunoa* took from *Anufrijeva* and *Greenfield*. So, if your Honours could turn to paragraph 245 of *Taunoa*. I'll just allow you to read it and then make two short points on it. Your Honours, in both *Anufrijeva* and *Greenfield* the respective courts had found: "that damages play a lesser role than in actions based on breaches of private law obligations and that, where an infringement of an individual's human rights has occurred, the concern will usually be to bring the infringement to an end and any question of compensation will be of secondary, if any, importance." That observation in both cases sat alongside each court's recognition that damages measured in terms of pecuniary loss may be appropriate in particular cases. So that observation was not intended to discount the prospect of damages being awarded when appropriate to do so.

Similarly we would say reliance upon that observation in *Taunoa* should not be taken as an indication that the Justices in *Taunoa* did not recognise that damages, compensation, may be appropriate and that one of the factors in determining the level of compensation may be the loss that was caused by the breach.

Now I know that my learned friends, I thinks it's perhaps more in their written submissions than in oral submissions, rely on this observation and similar observations made by Justice Blanchard to suggest that he was outlining a very restrictive approach to compensation and that might be contrasted with the more expansive approach that appeared to be expressed at certain points by Justice Tipping. But we say that both of those Justices relied upon these judgments, both supported and adopted the observation of the United Kingdom Court of Appeal and House of Lords' judgments, but both also accepted that loss may be a relevant factor in determining quantum.

So your Honour, with that in mind, can I turn now to the table and the first few points that we derive from it, I don't need to take your Honours to because I don't think that they are in dispute. The obligation is to provide an effective remedy, the three Justices were very clear about that, and I think it was Justice McGrath at paragraph 364 who expressly referred to the obligation under the International Covenant.

Similarly the Justices were in agreement that remedies under the Bill of Rights Act were public law remedies with all that that implies. The appropriate remedy in a particular case is a matter of principled judicial discretion. The remedy must be appropriate, proportionate in all circumstances, expressed slightly differently by Justice McGrath at paragraph 254 where he said the remedy must reflect a balance of interests, but we say the thrust of that observation is the same. And we say that the purpose of the remedy, as articulated by the Justices, was vindication both in a sense of firming, promoting, and protecting rights, both for the rights holder and society at large.

1110

We've cited relevant passages of the three judgments, but can I take you in particular to those of Justice McGrath, because I think the suggestion from one or more of my learned friends was that Justice McGrath adopted a narrow approach to vindication in which the purpose of vindication was simply the societal benefit that arises from the marking of a breach rather than the provision of redress. So can I take you to paragraphs 366 and 367 of Justice McGrath's judgment. And it's 367 in particular. "This rights-centred approach recognises … that 'society as well as the individual victim is injured when human rights are violated'. It looks to repair the social harm caused by the breach." But we say the next sentence is also important. "In general the chosen remedy should do this by marking the breach [social harm] and [also by] redressing it wholly or in part." And we say read in the light of the preceding and subsequent passages of Justice McGrath's judgment where he refers to injury, loss, damage arising to the victim of the breach, it is clear that the reference here to redress of the breach is there redress that must be provided to and for the victim.

GLAZEBROOK J:
Redressing provided to… Sorry?

MR JONES:
To and for the victim as opposed to –

GLAZEBROOK J:
Yes thank you…

MR JONES:
But we don't neglect the next sentence which is that it of course: "…should be proportionate … and have regard to other aspects of the public interest."

So, this is vindication in its broader sense. And just to complete the picture I'm turning to the preceding paragraph, six lines from the bottom, the sentence beginning: "The Court's principal objective…" "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."

At the conclusion of paragraph 366, Justice McGrath leaves off with the sentence that stresses the importance of ensuring the reinstatement of the rule of law and the "cessation of any continuing breach". But clearly that wasn't all because at paragraph 367 he spoke of redress. So, vindication is vindication in its fullest sense, we say.

WINKELMANN CJ:

Well, this links to something further down in your chart I think, which is the purpose of remedy is to vindicate the right in the sense of affirming… No, "damages may be required depending on nature of breach, seriousness of the breach, consequences for the victim", so are you including consequences for the victim because yesterday when we looked at the passages they didn't seem to include that.

MR JONES:

Well, when we –

WINKELMANN CJ:

Come to that, all right.

MR JONES:

Yes and I can come to it now or later.

WINKELMANN CJ:

Well, we're in the area aren't we with Justice McGrath at paragraph 370.

MR JONES:

So, paragraph 370, the reference four lines down: "… a measure of redress for intangible harm." Obviously what that measure should be will depend on the individual case.

And on this point more broadly, it is not insignificant that each of the Justices upheld damages awards in respect of the various appellants and in some cases those damages award were substantive. In determining what the appropriate award should be they of course took into account the suffering to which the appellants had been subjected. So loss, albeit is referred to here as intangible loss, non-pecuniary loss, of course factored into their judgment.

But can I at this point just cut back to the section directly above the one that your Honour has taken me to, which is vindication in the narrower sense of repairing social harm because we can see that at Justice Tipping's paragraph 317 and paragraph 318, he does use vindication in a narrower sense. And this arises, we say, in the following way, and I will talk your Honours through his judgment as we see it, and when your Honours have the opportunity to read it, you can see whether you agree with our interpretation. In the opening part of this section of his Honour's judgment, paragraphs 300 to 306, he talks about vindication in a broader sense.

Perhaps I can take your Honours to – yes, can I just take your Honours to support for this proposition that in the early part of his judgment he talked about vindication in a broad sense. Can I invite your Honours very briefly to turn to paragraph 305 and I'll allow your Honours to read it. And the point we make here is that the third of the factors that Justice Tipping regarded as necessary to be taken into account was "the seriousness of the consequences of the breach."

Well, at first instance, the consequences would appear to be the consequences for the rights holder, though that isn't made explicit I appreciate. But having said that, we say that at the later point of his judgment, that part of his judgment that begins at 306 with a general review of recent overseas authority and goes all the way through to paragraph 324 I believe, he embarks upon a discussion of vindication in a narrower sense drawing upon a judgment of the Privy Council in the case of *Attorney-General of Trinidad and Tobago v Ramanoop* [2006] 1 AC 328; [2005] 2 WLR 1324 (PC) in which the Board discussed two alternative measures of compensation, one being – let me rephrase that,

two alternative measures of damages, the one being purely compensatory and the other being vindicatory, and in that context, vindicatory damages were those damages that might needed to be added upon existing compensatory damages to reflect the societal harm of a breach of constitutional rights. And drawing upon that authority, Justice Tipping separated out the two aims of a damages award under the Bill of Rights into a vindicatory purpose and a compensatory purpose and he found that both must be reflected in the ultimate remedial package. And at that part of his judgment he does talk about vindication in the narrower sense of vindicating the fundamental rights of society as opposed to compensating the victim who suffered the loss. But that's a difference, we say, of phraseology rather than of substance because, as we say, and we hope your Honours will see from the paragraphs that we have highlighted, Justice Blanchard and Justice McGrath also found that an effective vindicatory remedy must mark the breach for society and also provide a matter of redress for the victim.

WINKELMANN CJ:

I think you could feel free to move through this at some speed because we are familiar with *Taunoa*.

MR JONES:

I'm really responding to the arguments advanced by my learned friends that there was a significant division between the Justices on this point.

WINKELMANN CJ:

And your point is there isn't really?

MR JONES:

Indeed. Well, can I then move to the next page of our table, and again I think a point that won't be in dispute, all Justices were in agreement that certain rights will be generally effectively addressed by other remedies, which does not exclude the possibility of damages for breach of fair trial rights of course. We make the point again about the need for an element of damages to be made reference to, they're redressed and the harm caused to the victim, and then we

do come to individual comments by the three Justices, which take their approach to damages and potentially diverging directions, though we say the divergence is again more apparent than real.

A well-known passage that I think was cited yesterday of Justice Blanchard at paragraph 265 to the effect that damages in this area will best be regarded as moderate must, we say, be seen alongside what he also said at paragraph 260, which I will invite your Honours to turn to now. And what we take from this passage is that the general requirement for damages to be moderate does not impede or hamper the development of different approaches to damages in relation to different rights. "The level will have to be worked out" as he says "on a right-by-right and breach-by-breach basis."

So, we say it is clear from his judgment and from the judgments and the ultimate disposal that was ordered by the Justices that damages should generally be moderate, but that is not to set a bar on different approaches to damages that might be appropriate in relation to other rights and other situations. And we say that what he said at this part of his judgment is fundamentally consistent with Justice Tipping's wider more expansive discussion of compensation at paragraph 322 and 324, and the particular phrase that we have alighted on at paragraph 322 is Justice Tipping's finding that: "… all loss … is potentially capable of playing a part in the remedial process" or loss including pecuniary loss, but we say potentially capable of playing a part is very different from saying that damages should turn on causation and that compensation should be provided in full. It is a factor to be considered a part of the overall remedial package. And his Honour's observation about the need for general consistency with the damages awarded under the Human Rights Act has already been made.

And your Honours, we say, if proof were required as to the essential unity of the Justices on the approach to damages, that proof comes in their disposals of the case. Justices Blanchard and McGrath agreed with Chief Justice Elias in relation to the appropriate awards for three of the appellants. Justice Tipping and Justice Henry were in broad agreement but they reduced the awards to a

greater extent in relation to two of those opponents and that is not consistent with the suggestion that Justice Tipping's approach to compensation was fundamentally different, more expansive, more willing to place emphasis on the remedial element than the approach of Justices McGrath and Blanchard because the award ultimately approved – that would have been approved by Justice Tipping is lower than that that was ultimately approved by the Court in its majority on this point.

Your Honours, can I now turn from the domestic authorities to briefly touch upon the international case law and the relevant authorities and common law jurisdictions.

WINKELMANN CJ:

That's your point 7 in your outline, is it?

MR JONES:

Yes, and I may in fact first invite your Honours to turn to that part of our written submissions where we address the approach of the Human Rights Committee, which is at paragraph 53 to 56. But before getting to what the Committee has or has not said in relation to compensation in this area, the starting point must be the words of Article 14 itself. Article 14 as your Honours know, I don't need to perhaps bring it up, in relation to compensation, save in relation to Article 14(6) which is compensation in relation to miscarriages of justice as defined by that provision.

WINKELMANN CJ:

And we have a saving on that?

MR JONES:

I'm so sorry Ma'am?

WINKELMANN CJ:

A reservation, we have a reservation.

MR JONES:

We have entered a reservation on that yes. So no general obligation to provide compensation for other breaches of Article 14. We note of course that in its *General Comment 31* the Human Rights Committee has said, not expressly in relation to Article 14 but in relation to all rights under the Convention, effective remedies "generally entails appropriate compensation", though in that same paragraph the Committee seemed to suggest that redress could also be provided by other means. But it is not pronounced specifically on the right to compensation under Article 14, leaving aside Article 14(6).

And in the individual complaints that it has received in relation to Article 14, some of which we've cited in our written submissions, it has on occasion if upholding a complaint, said that the complainant is entitled to compensation and on occasion not, and there is no particular pattern to be observed as to when it does suggest compensation might be appropriate and when it doesn't. In addition to its *General Comment 31*, it has also issued a *General Comment 32* expressly in relation to Article 14 and is again silent about compensation save in respect of Article 14(6).

So this is very different, we say, from the situation that arose in *Thompson* where the complainant had been refused compensation in this jurisdiction as a result of a breach of her right not to be subject to arbitrary detention and complained to the Human Rights Committee and the Human Rights Committee had said that compensation was required. And I raise *Thompson* because it was relied upon by my learned friend for the interveners yesterday. *Thompson* concerned the right to compensation, the express right to compensation under Article 9(5), the equivalent under Article 9 to Article 14(6). It is that part of Article 9(5) which provides for an express obligation to compensate. It has no bearing on the facts of this case.

And just finally in relation to what can be gleaned from the jurisprudence of the Human Rights Committee. It is enormously important to bear in mind, we say, that when complaints are made to the Human Rights Committee, they have been made on the basis that there has been a substantial denial of justice in

the member state. Had they been provided with a remedy in the member state they would not have satisfied the exhaustion of remedies criteria that is necessary for a complaint to be accepted by the Human Rights Committee.

So complainants arrive at the Human Rights Committee with a substantial complaint, not simply a complaint that there's been a failure to provide damages.

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So we are not aware of any case in which a complaint has been made and accepted by the Human Rights Committee where a complainant has received substantive justice in the criminal proceedings of the member state, by way of stay, or exclusion of evidence or an appeal, and makes the complaint simply in relation to damages. In other words the other components of an effective remedy have been provided but damages have not been. That is the type of circumstance where the Committee might be supposed to express a view on whether compensation was required in addition to existing effective remedies provided within the criminal process, but that case has not arisen.

WINKELMANN CJ:

Right.

MR JONES:

So that was my point in relation to the Human Rights Committee. I see the time.

WINKELMANN CJ:

Have you finished item 7 or?

MR JONES:

Almost.

WINKELMANN CJ:

Okay and then we're handing over to Ms Laracy?

MR JONES:
Yes.

WINKELMANN CJ:
So the Crown should be finished by lunch?

MS LARACY:
Endeavour to.

MR JONES:
I think our collective view is yes, we will endeavour to. Obviously, it always depends on the intensity of questioning so we can't give an undertaking but certainly we are confident.

COURT ADJOURNS: 11.31 AM

COURT RESUMES: 11.49 AM

MR JONES:
Your Honours, three short points for me before I hand over to Ms Laracy. One on general principles of international law and then one in relation to *Greenfield* and then the Irish case of *O'Callaghan v Ireland* [2021] IESC 68, [2023] 2 IR 135.

I'll start with general principles of international law. Of course, the Human Rights Commission has highlighted to your Honours the principle of restitutio in integrum, adequate reparation, loss recovered in full as it operates in the international arena and that principle has been affirmed by various international instruments and judgments of the International Court of Justice. The obvious point to make in response is that this is a high level principle and not an unbending rule.

WILLIAMS J:
Not a?

MR JONES:

Unbending rule. The cases cited by my learned friends in support of the proposition are utterly factually distinct from the matters in issue before your Honours today. We say that neither the *Chorzów Factory* case which concerns an interstate dispute, nor the opinion on the construction of the Palestinian Wall, sheds any light on the extent to which and how that principle should be integrated into this Court's jurisdiction for providing damages for breaches of fair rights. More on point we say are those cases of other common law jurisdictions that have sought to do, as this Court has sought to do in *Taunoa*, and give effect to the principle of an effective remedy within its own particular domestic common law systems.

And on that point, can I ask your Honours return to *Greenfield* and what else can be valuably extracted from it. As your Honours will recall from yesterday *Greenfield* is the judgment of the House of Lords in which Lord Bingham reviewed the relevant authorities for European Court of Human Rights in relation to damages for breaches of Article 6 right to a fair trial and applied them within the domestic setting. An important point of context is obviously the relevant provisions of the United Kingdom Human Rights Act 1998 which direct the approach that the domestic courts must take, and the relevant section of that Act is set out at page 677F of Lord Bingham's judgment, section 8, and we refer you, in particular, to section 8(1), no award of damages is to be made unless taking into account all the circumstances of the case including any other relief or remedy granted.

WINKELMANN CJ:

Sorry, what page is that?

MR JONES:

So, sorry, page 677. It should be up on the ClickShare. I think it is. And it's paragraph F where section 8 of the United Kingdom Human Rights Act begins and in particular we invite your Honours to consider paragraph 8(3) where statute requires a very similar approach to that which has been recognised by the Courts in this jurisdiction. It is always necessary when considering the

appropriateness of damages to consider whether other available relief has satisfactorily addressed the breach or in the words of that jurisdiction provided "just satisfaction".

WINKELMANN CJ:

So that's just a provision of the Human Rights Act?

MR JONES:

Yes.

WINKELMANN CJ:

And you're suggesting that's a useful model for us?

MR JONES:

Well it is –

WINKELMANN CJ:

There's nothing wrong with citing a sensible model.

MR JONES:

It is, we would say, very similar to the approach adopted already in *Baigent's case* and *Taunoa*, the necessity of always looking to the availability of other relief and considering whether that alternative form of relief has provided effective redress before considering damages. And in that jurisdiction again the test is similar, just and appropriate, and in relation to subsection (3), final sentence, damages may only be awarded if "necessary to afford just satisfaction to the person…".

Paragraph 7 at page 678 Lord Bingham commences his review of the European Court's approach to damages for breaches of Article 6. Paragraph 8, the finding of a violation has been treated as just satisfaction in and of itself. Paragraph 9, Lord Bingham cites with approval from *Anufrijeva* to the effect that "… the focus of the Convention is [more] on the protection of human rights and not [on] the award of compensation." And having cited paragraph 52 and paragraph 53 of

Anufrijeva makes the following observation at the bottom of page 679: "Where article 6 is found to have been breached, the outcome will often be that a decision is quashed and a retrial ordered, which will vindicate the victim's Convention right." We say if appeal and retrial is effective vindication, then a stay which brings the proceedings to complete cessation is even more obviously beneficial to the accused.

At paragraph 10, Lord Bingham acknowledges the acknowledgement of the European Court of the principle of restitutio in integrum and thereafter he commences the review of authorities to which your Honour has already been referred. Different types of damages that have been assessed and sometimes compensated to differing extents by the European Court.

Paragraph 11 deals with pecuniary loss and we place emphasis on the final sentence of paragraph 11: "It is enough to say that the court has looked for a causal connection" between the breach and the financial loss but the next part of the sentence is no less important "and has on the whole been slow to award such compensation" the implication being that, even if causal loss is established, it does not necessarily follow that compensation will follow.

Paragraph 16 at page 682 –

WILLIAMS J:
I guess there's a question about the connection between the first part of that sentence and the second.

MR JONES:
Yes, that is the way that we read it and we suggest that that is a fair –

WILLIAMS J:
Because the cases that are referred to, at least the European Court of Human Rights cases, that are referred to in the judgment all look really hard at causation –

MR JONES:

Yes.

WILLIAMS J:

– as the primary filter but do say, as Lord Bingham notes, they are prepared to award damages on the basis of we cannot say that the result would have been the same for example so there's a probability assessment there.

MR JONES:

But as we read it, and I'll invite your Honour to turn to paragraph 60 now on this point.

WILLIAMS J:

Six-zero?

MR JONES:

Paragraph 16, so sorry. I'm so sorry on this point it's not 16, it's 14. These are the cases where the Court awarded in certain cases compensation for loss of a chance, but we don't read Lord Bingham as saying that this is the invariable practice of the Court. We do say it's also necessary to take into account the final lines of that large paragraph: "… only where it is satisfied that the loss or damage complained of was actually caused by the violation it has found, and it has repeatedly stressed that it will not speculate on what the outcome of the proceedings would have been but for the violation," and then the crucial point is important, "it has on occasion been willing in appropriate cases to make an award…". We don't read that as loss necessarily follows on from the causation, sorry, damages follows on from the causation. We read it as –

WILLIAMS J:

That's the loss of – I think he's really saying that exceptionally loss of chance cases –

MR JONES:

Exceptionally, yes, loss of a chance.

WILLIAMS J:

– have got through otherwise it's actual causation.

MR JONES:

Yes. He goes on to observe at paragraph 15 that there are certain cases in which causation might have been shown where the Court has not awarded compensation. So bottom of page 681: “In the absence of a clear causal connection, the court’s standard response has been to treat the finding of violation without more as just satisfaction. It has done so even in such cases ... where an award might well have been made.” Not easy to interpret that but we read it as that where there may have been causation it may have been found but it doesn’t necessarily follow that damages follow.

WILLIAMS J:

Do you know if this is a reference to non-pecuniary or pecuniary, or both? I think it's non-pecuniary, isn't it?

MR JONES:

It might be. It, as I say, is not easy to interpret the ambit of paragraph 15 because it's framed in general terms. Bottom of paragraph 16, Lord Bingham reviews “a second head of general or non-pecuniary damage ... “physical and mental suffering”. We take the point from nine lines from the bottom: “To gain an award under this head it is not necessary for the applicant to show that but for the violation the outcome of the proceedings would, or would probably, or even might, have been different, and in cases of delay the outcome may not be significant at all. But the court has been very sparing in making awards”. And then finally paragraph 17: even where awards have been made “... the sums awarded have been noteworthy for their modesty.” Even for the loss of procedural opportunity.

So that does not suggest to us that where loss of opportunity is shown, damages will be calculated to the full extent of the loss.

Your Honours, finally and more briefly can I invite your Honours to consider the recent judgment of the Supreme Court of Ireland, *O'Callaghan v Ireland*. This was a case in which the Supreme Court ordered damages following a significant delay before appeal in which the appellant was in custody for the entirety of that time. There were damages made as a breach of the appellant's constitutional rights, as opposed to his rights under the European Convention but the Court looked to the approach of the European Court of Human Rights for guidance. And in this area of damages for delay at paragraph 58 and 60 summarise the approach taken by the European Court. And the point we take, first of all at paragraph 58, in *Kudla v Poland*, the centre of the paragraph, the European Court "… the ECtHR had provided guidance on the exact form which that remedy should take. Such remedy must be effective in law, as well as in practice. It must be capable of preventing any continuation of delays with the litigation, or, alternatively, it must be capable of providing adequate redress …", not necessarily both. And that's the point we take from there, and the same point is made at paragraph 60.

WINKELMANN CJ:

Can you just go back to that sorry, I was just finding it hard to comprehend that. I mean one assumes that they would wish to prevent the continuation delay?

MR JONES:

Yes. But the suggestion that we take from that, and I think it's clearer in paragraph 60, is that if an effective remedy may prevent continuation, but it doesn't necessarily require that there will also be redress for the delay that took place before it ceased. It's an either, or.

WINKELMANN CJ:

Doesn't seem right though. I mean one would always want to stop the delay, wouldn't one? Anyway.

MR JONES:

Yes. And maybe this goes back to the primary purpose of right remedies being to prevent rights breaches rather than to compensate for loss. And then the

same point is made at paragraph 60, a review of the judgment of the European Court in *McFarlane v Ireland* (2011) 52 EHRR 20 and I invite your Honours to page 165 where the paragraph continues, where the Court summarises the majority of the European Court in *McFarlane*, six lines from the bottom. the sentence beginning: "The majority concluded that a state could choose between a remedy that could expedite proceedings or providing for a remedy in damages."

So, we say this is evidence of the approval of the European Court to the principle of flexibility of remedies. Vindication can be provided by bringing the breach to an end, or if it continues by damages, it's not necessary, we would say in the view of the European Court, that the remedy should both bring the breach to an end and also provide damages for the time that the applicant was awaiting his trial before the breach concluded.

This is clear support, we would suggest, for the proposition that the European Court, and we would say this Court, does not necessarily have to provide an effective remedy in financial terms. It can be provided in other ways.

I don't need to take your Honour to the paragraphs of the judgment of the Court where it reaches its own determination as to whether or not damages are required, but I'll give you the relevant paragraphs. Paragraph 73, paragraph 183 and paragraph 166. And we say that what these paragraphs show is that the Court did not find that damages necessarily flow from a constitutional breach, but it was a question of taking into account a number of factors to assess the severity of the breach in which, in this case, of particular importance was the fact that the appellant had been in custody during the relevant period of time, the implication being that had he suffered this significant day without being in custody, damages may not have been required notwithstanding the extent of the delay. Again, we say that this is evidence of the Supreme Court of a cognate common law jurisdiction applying a flexible principled approach to damages which is precisely the type of approach that we say was recognised in *Taunoa* and that we invite you to uphold.

Unless your Honours have any further questions for me I'll hand over to Ms Laracy.

WINKELMANN CJ:

Thank you Mr Jones.

MS LARACY:

May it please the Court, is that clear enough?

WINKELMANN CJ:

Yes, thank you Ms Laracy.

MS LARACY:

The succinct submission for the Crown is that the appellant received a big remedy for what the Court of Appeal accurately, in our submission, described as a lower-level breach of the right in section 25(a). As a result the remedies he has received, the stay and the declaration are sufficient and no more remedy was needed.

My learned friend, Mr Jones, has set out the topics that I intend to cover. I don't intend to necessarily cover them in that order but I will cover all of those matters in our outline.

But what I'd like to do first, and it will only be brief, but is ask the Court to consider the *Safi* decision and this is very important because *Safi* in my submission –

WILLIAMS J:

Which decision?

WINKELMANN CJ:

Safi.

WILLIAMS J:

Safi, right sorry I –

MS LARACY:

Safi, sorry – is essentially a keystone of this case and I say that because not only because was it followed in the District Court, and that was considered right in the High Court when the stay was considered, but it goes right to the heart of the appellant's argument here as to recklessness or bad faith and to their argument for causation as a result, namely the position that is advanced is that the case was for all intents and purposes identical and, therefore, the Court's treatment of *Safi* provided a reliable model as to what would happen if a prosecution occurred in this case, in my submission is that –

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WINKELMANN CJ:

Sorry, what are you saying the appellant builds on *Safi*? I'm not quite following you.

MS LARACY:

The appellant builds on *Safi* without any analysis of the matter which is why I need to take the Court there for the proposition that it is to all intents and purposes identical and, therefore, the Court's outcome in that case, namely a stay, should have been anticipated here and that the risk that we have discussed yesterday, the legal risk was known because the cases are so identical, the prosecutor should have realised –

WINKELMANN CJ:

So, it's for its proposition that the prosecutor was reckless?

MS LARACY:

It goes to that question of recklessness. And the question of recklessness –

GLAZEBROOK J:

Even though the charges were actually filed before that case came out.

WINKELMANN CJ:

No they weren't.. Oh, yes, they were.

MS LARACY:

No, they were filed after *Safi* came out in this case.

GLAZEBROOK J:

Well, the decision to prosecute had been made before *Safi* sorry.

MS LARACY:

What had been given prior to *Safi* coming out was an approval on the basis that there was sufficient evidence to prosecute but not a decision made to prosecute, but that is correct.

GLAZEBROOK J:

Yes.

MS LARACY:

So, *Safi*'s very important. So, *Safi* involved complex financial offending, very large-scale argument concerned overseas sales being the source of income and, therefore, GST and the Commissioner's claim was essentially that the income that had been received came from a taxable business in New Zealand and the defence for Mr Safi was that, no it didn't it came from activity that had happened overseas in Afghanistan, that's the context.

In terms of when the NOPA was issued in that case, was provided, what had happened is that the Commissioner had done a default assessment and had required Mr Safi to provide the material to challenge the default assessment if he wished to. And what had been sought and provided was a very large volume of documentary evidence of a factual nature, it was an extended process and charges were laid.

In fact at paragraph 24 of Judge Collins' judgment there is a summary of some of the most important features of that case. And what he has there is that the charges had in fact been laid first and then the NOPA had issued. That was obviously a significant factor in terms of the Commissioner should have been aware that criminal fair trial rights were plainly an issue in that case.

The other features of the case which are found throughout but are referenced at paragraph 22, and I summarise, is that from the Judge's perspective the Commissioner, it seems, delayed or took advantage of delays in the trial process including a trial adjournment at the prosecutor's request to go and investigate, including overseas in Afghanistan, material that had been obtained by the Commissioner in the NOPA and this was to counter the factual material and head off, in a very substantive way, a defence. They took time to do that in a way that the District Court Judge suggests, but does not say, was not wholly candid. And he says he regrets he wasn't more alive to what was happening in the case.

He notes that the Commissioner used the NOPA information and the time that the delay, the adjournment allowed, to work with police in order to get civil restraining orders also based on the NOPA.

The Judge importantly says that this is a type 1 stay case in terms of *Wilson v R* [2015] NZSC 189. Now, that's a stay that is entered on the basis that there cannot be an unfair trial, so it is the same type of stay as we say is engaged in this case.

He says, importantly, that exclusion in that case is not an option and the reason for that is very important. He said but for the defendant not advancing notice of the detail of his defence in the NOPA and the time that that gave the Commissioner to investigate, the Commissioner would've had no ability to come to that evidence when it came to the trial.

Looking at the matter from the time it was before the Judge he said so if I exclude that evidence now the Commissioner will have nothing at trial to counter that evidence and an acquittal is, therefore, almost certain. And in the face of that: "The trial would be a farce."

So, the material was highly relevant to what was in issue and without it the Judge was satisfied there was simply no point having a trial because the Crown would not be able to counter it.

MILLER J:

Where does he say that?

MS LARACY:

That paragraph about it being a farce I think is… Perhaps my learned friend can find it. So, that was the context of *Safi.*

GLAZEBROOK J:

Sorry, have you given us the paragraph number?

MS LARACY:

Sorry, my learned friend is looking for the word "farce" in the judgment, I haven't got a note of it.

WINKELMANN CJ:

Is it paragraph 54?

MS LARACY:

Paragraph 54, sorry.

MILLER J:

Right, it's paragraph 54, yes.

MS LARACY:

And in terms of the legal risk that is mentioned there, paragraph 44 is relevant. The Judge makes the point that counsel for the Commissioner in the *Skinner* decision was saying to the Supreme Court that Inland Revenue: "… was well aware of the risk of fair trial right by triggering the civil process before the [criminal process had concluded.]" And this was the Judge making that clear because the submission that was being made to the Judge, which he did not accept to be accurate, was that the Commissioner's preferred position was to deal with the proceedings in the reverse order, whereas in fact counsel for the Crown in *Skinner* had said that the Commissioner's preferred position was:

"… to conclude the criminal prosecution first and deal with the civil litigation second." So, that's the context of *Safi.* After *Safi* –

WINKELMANN CJ:

So the Court was satisfied that this Commissioner would've been aware after *Skinner* of the risks of proceeding in the way that they did in *Safi*?

MS LARACY:

That's right. *Skinner* obviously wasn't about this issue but that risk –

WINKELMANN CJ:

Was discussed.

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MS LARACY:

– in the context of the judgment had been identified. That's right. But the significance of *Safi* is that it's for the Court to make of it what it will in terms of how that compares with facts of this case, but there is nothing in the judgment or in any of the subsequent judgments that have considered *Safi* to suggest that it means that in every case where a default assessment and a NOPA process have occurred prior to the criminal process being engaged, that there will necessarily be a need for a stay nor will there necessarily be a fair trial. Of course the implications of that civil compulsion process, as Justice Miller identified yesterday, need to be considered in each case. And that's what happened in this scenario. Inland Revenue referred at a certain point after the *Safi* decision had come out, a number of prosecutions, or contemplated prosecutions or investigations that they had on foot to Crown Law, this is in the evidence, for advice to be given and decisions to be made, and presumably to the extent distinctions could be made within cases, decisions could then be made as to what the implications of *Safi* were for individual cases and that is what happened.

Now, in our submissions we have, in a fairly muted way, said we do not accept that *Safi* and the facts of this case are identical. I don't propose to take up the

Court's time by going over that any more, but my submission is that legally and factually they are highly distinguishable and that a reasonable legal decision may well decide that the facts of the appellant's case are materially different, both in terms of what was disclosed, the volume of material, the way it was used, the circumstances in which it was disclosed, to the question of whether that would necessarily lead to an unfair trial and whether it would necessarily lead to a stay.

WINKELMANN CJ:

But we've got that. We have a stay and it's not before us as to whether a stay was correct.

MS LARACY:

That's right, but it does, in my submission, go to the reasonableness of the circumstances as the decision-maker understood them to be in terms of recklessness.

WINKELMANN CJ:

The recklessness issue, yes.

ELLEN FRANCE J:

Could I just check, you rely on the fact in *Safi* that the Court said there would be no case for the Commissioner if the evidence was excluded?

MS LARACY:

There was still a case for the Commissioner but there would be no ability in the Judge's view to rebut the defence that would be put up. The only evidence of the alternative source of this – well there would be sufficient evidence of the alternative source of this income to mean that the Crown hadn't proven beyond reasonable doubt that the business had been occurring in New Zealand as the Commissioner alleged. So, the Commissioner wouldn't be in a position to rebut the defence if the –

ELLEN FRANCE J:

And in the present case that was Justice Wylie's view, in terms of at least some of the charges, that the Commissioner's case would necessarily fail?

MS LARACY:

Yes and I do want to –

MILLER J:

Section 58 ones I think.

ELLEN FRANCE J:

Yes, yes.

MS LARACY:

I do want to spend a little bit of time on that.

GLAZEBROOK J:

Can I also just check, I think you also rely on *Safi* on the fact that it was incredibly extensive, factual material that would otherwise not have been available to the Commissioner I think.

MS LARACY:

Yes.

GLAZEBROOK J:

Is that the –

MS LARACY:

Yes. Yes.

WINKELMANN CJ:

But in *Safi* there were no damages awarded were there? There was a stay, I mean –

MS LARACY:

No, it was just a stay. It was an application for a stay for an unfair trial and the Judge goes on to say that the Commissioner's civil remedies are still there, in terms of the public interest in a stay it's required but the Commissioner still has all the opportunity, or the police have all the opportunity to pursue the assets which were substantial.

WINKELMANN CJ:

As did the Commissioner here didn't they but just they got something wrong?

MS LARACY:

Yes.

And we have accepted the Court of Appeal's characterisation that the decision to go about the matter in this way was ill-advised but we don't put it any higher than that.

WINKELMANN CJ:

Well you resist putting it higher than that?

MS LARACY:

My submission is that the facts simply do not support it being put any higher than that, your Honour. And it's worthwhile thinking about how this has been, perhaps I'll come onto that later, but the way in which the situation has been remedied is not to say that it's never reasonable to commence the civil process first and to do a default assessment and to seek a NOPA. Instead, the policy now clarifies that when the default assessment is issued it is clear in the policy that the person does not have to provide the response within the four-month period where criminal proceedings have either commenced or are contemplated and it's that addition of "or are contemplated" which brings the protection back further than had been identified in *Skinner* and that was perhaps further than to an earlier period of time than was the Commissioner's practice.

The other aspect of the policy that has, of course, changed is the way that is given operation and that is by using the provision, allowing for exceptional circumstances to allow the NOPA to be provided after the criminal proceedings have been concluded. But the important change, in my submission, is in the policy, is that it recognises that fair trial rights might have to be proceeded at the point of an investigation when information is being sought.

WINKELMANN CJ:

And in fact Justice Wylie didn't find that commencing the process was the breach. He found it was the failure to advise of the option of not proceeding with the process.

MS LARACY:

That's right. So, in terms of being ill-advised it would have been very wise for the Commissioner, in the ideal world, to have had a policy that required clarity of people's rights, Mr Parore's rights, at that point. Greater clarity. We're asking you to provide this material pursuant to our default assessment but we need to be clear that the possibility of criminal proceedings are being considered or are being investigated and as a result of that you do not need to do this. The current policy, of course, goes on to recognise that it may be the taxpayers choice to go on and provide that material voluntarily and there are good public policy reasons for encouraging that as long as it's done voluntarily because it may head off a prosecution.

And that route was explored in this case. Some of the back and forth prior to the final decision being made was because the possibility of resolution through that civil process, based on combination of the evidence the Commissioner already had and the points raised by the appellant in his NOPA meant that there was a basis for resolution discussions, they didn't end up resolving the matter but had they done that then a prosecution could not have followed. There would've been a civil resolution of the tax owed, there might've been what's called a shortfall penalty and then that would've been the end of the process.

And the final thing I'll say on this –

MILLER J:

Would it only be the end of the process if shortfall penalties were imposed?

MS LARACY:

Yes, you can't bring a prosecution after a shortfall penalty.

MILLER J:

So, in principle you could resolve the civil matter and then still prosecute for intentional – provided you didn't levy shortfall penalties?

MS LARACY:

Yes, that's right. If a shortfall penalty is imposed under the statute, you can't prosecute. If it's something short of that you could, but of course then the very risk identified in *Skinner* and in *Safi* is engaged and that's because any penalty is a penalty, so double jeopardy is engaged.

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The final brief point, perhaps, is to say that the policy in place now also reflects a development, perhaps, a development of clarity in the Solicitor-General's Prosecution Guidelines and the guidelines that all prosecuting agencies need to put in place to show how their own prosecutions will work and that is this. The Solicitor-General guidelines properly reflected by IRs now say that there's a hierarchy of responses to potential criminal offending and it may be that nothing needs to happen or it may be that something short of prosecution is appropriate and prosecuting agencies are encouraged to set out that hierarchy and where appropriate seek to resolve matters according to the less serious penalty process and in the IR Prosecution Guideline, which is not before us but which is a public document, it clearly shows that in the hierarchy of approaches there's educative, there's giving an informal warning, there's resolving the matter through the civil and shortfall penalty process. And the last one is prosecution. So, there are good, public, policy reasons to encourage the civil first, as long as rights are clearly protected. And in my submission that's

relevant to how this breach here should be characterised. It's one of a lack of clarity at a particular point in time.

WINKELMANN CJ:

Sorry, whose breach?

MS LARACY:

The breach that occurred here which was the action of seeking a NOPA at a point where criminal proceedings were, in fact, contemplated. That is the breach, in my submission, that is the act that led to this being unfair. I've characterised that as fundamentally being a problem at a particular point in time, not so much with that sequencing of activities, but with the lack of clarity about the appellant's rights. Had he been clearly told, you can provide this information, we may or may not prosecute but you don't have to provide it –

GLAZEBROOK J:

And that had been said in the earlier letter but was not repeated at the time, the default assessment was the –

WINKELMANN CJ:

I don't think it was said.

MS LARACY:

No, that's not quite right but what had been said in the earlier letter was fair notice had been given that IR was contemplating, was looking at this through a criminal lens and it had said, in response to that, it wasn't the default assessment, it was prior to that.

GLAZEBROOK J:

No, that's what I said, in the earlier letter it had said, you can provide a response but it will be used against you if you do.

MS LARACY:

That's right.

GLAZEBROOK J:

But that advice was not repeated at the default assessment stage, and in fact it was actually said that the person was obliged to respond if they wanted to challenge.

MS LARACY:

That's right. So, the advice in the former letter might be read as just relating to, just a statement of general criminal law rights, you don't have to say anything in response to this letter that might incriminate you, you don't have to respond, as opposed to being directed to what really was in issue here which was a demand for information through the default assessment process.

If I can then come to causation. In my submission it's critical when considering causation to ask the right question and we know from *Greenfield* that there are different formulations of how causation in this context is expressed. But we say the appellant needs to prove – or the question is, has the appellant proven that the breach of fair trial rights, namely premature disclosure of the defence, has the appellant proven that the breach of fair trial rights was the cause of his loss, namely the unnecessary legal expenses. There are different ways of looking at this but the right question is at the heart of understanding the causation problem.

So, if the question is, did the breach cause the prosecution, the answer must be no, for reasons I will come on to just to show the Court briefly what the Commissioner already had available to him.

If the question is, did the breach cause the money to be spent that otherwise would not be, the answer must be, no. Again, for the same reason. The money was spent because there was a prosecution and we say that prosecution was a reasonable one. But his question is, did the prosecution cause the expenditure? And in my submission that's reductive and it's too simplistic and –

WINKELMANN CJ:

Well it assumes that the breach caused the prosecution.

MS LARACY:

It does assume the breach caused the prosecution and the way the appellant deals with that is by saying, the prosecution in this case was so flawed from the outset because of a compelled disclosure that it should never have been brought in the first place, and then he is –

WINKELMANN CJ:

So, it's circular reasoning?

MS LARACY:

Yes, but then has to add to it and the Commissioner knew that, recognised that risk and did it anyway, therefore, all the costs were caused by the wrongful prosecution.

So, in response there was independently obtained evidence in the Commissioner's hands prior to the default assessment which led to the NOPA and in our chronology that's the 15 January 2018 point in time, Inland Revenue assessed sufficient evidence to charge the same offences and sufficient, of course, means in terms of prosecution decision, an assessment that there is sufficient admissible evidence on each element of the charge to prove that element beyond reasonable doubt and to prove the charge beyond reasonable doubt if that evidence is accepted by a properly directed judge or jury. So, it's not just is there some evidence, it's an assessment that the case can, at that point, be proven beyond reasonable doubt. So, that's 15 January.

And the default assessments which were issued on 23 January 2018, to which the NOPA responded, were based on the material that the Commissioner had which had influenced that internal assessment a week earlier.

And if I could just be as quick as I can, just take the Court through what the evidence is that is needed to charge and what the Commissioner had.

So, the elements of the offence is that there has to be an omission and that's the actus reus that has the effect of evading tax, and to prove mens rea the

Crown must prove the accused had knowledge of the obligation to make an assessment or to pay tax and had the intention to evade the assessment or the payment of tax, and the authority for that is *R v G* [2013] NZCA 146.

WINKELMANN CJ:

They had the knowledge of the obligation to pay tax. What was the last one?

MS LARACY:

And had the intention to evade the assessment or the payment. So, legally it's quite simple. An omission, knowledge of a duty and an intention to evade.

The facts are that Mr Parore was working as a real estate agent under a contract for services with Barfoot & Thompson throughout this entire period. Factually, again, it's quite simple. He had one person who paid him and that was Barfoot & Thompson. He was required to register for GST and he was paid GST on the commission he earned from sales and he was paid that commission by Barfoot & Thompson. And this arrangement meant that he had to return the GST to the Commissioner.

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Now, the reason that the Commissioner had independently sourced information in this case is that Mr Parore was paid on commission and Barfoot & Thompson issued what's called buyer created invoices. So, instead of Mr Parore invoicing Barfoot & Thompson for his services and identifying the GST component, Barfoot & Thompson would do that and they would send those to him. So that material from Barfoot & Thompson which set out what his income was for this work and what the GST component was was available to the Commissioner. That materially was properly held by the Commissioner and there's no question about that.

The other source of material that was available to the Commissioner prior to the default assessment was Mr Parore's bank statements which generally reflected the amounts that had been deposited into his account by Barfoot & Thompson. If I can just note for the Court that the Commissioner's letter notifying Mr Parore

of the default assessment says that they were based on the buyer created invoices and that's the letter of 23 January 2018, again before the material provided by the NOPA.

In terms of mens rea, he knew he was required to file GST returns and there's obviously, in every case, there's a matter of inference but while working in the same role in the past he had returned GST and then at 31 March 2011 he had stopped filing GST returns and paying. Second, in support of his application for permission to be self-employed while an undischarged bankrupt, he swore an affidavit that's before this Court at 301.0217 in which he stated that his financial advisor would file his tax returns, this is when he was bankrupt, and he provided a letter to the Official Assignee from an accounting firm in which the accountant stated he had agreed to assist Mr Parore to file tax returns and pay taxes while he continued to work while bankrupt. And there is evidence of avoidance too but I don't want to get into the detail of this, but what the Commissioner could point to was not responding to CIR filing and paying for certain periods and then not, and again I could take the Court to some of the clearer evidence of that if that's important.

The other final point on this is that when Mr Parore was ultimately charged with 13 counts of evasion, so between the October 2011 date and October 2017, the periods – the charges related to the periods for the same, related to the returns that had been filed and the quantum that had broadly been assessed by the Commissioner, albeit adjusted in light of the NOPA. So, what actually went to trial was the same case, in terms of what needed to be proved by the Commissioner, as had been identified earlier. Now –

WINKELMANN CJ:

But reduced by what was in the NOPA – by the reclassification, isn't it?

MS LARACY:

The sum in some of the charges was changed based on the NOPA, and perhaps the important point to note there is that the actual sum in it, the charge

of tax evasion, is not an element that needs to be proved beyond reasonable doubt. So, that's a particular – that does not have to be proven in that way.

GLAZEBROOK J:

You don't rely on the notation from the permission of the Official Assignee to continue in business because that clearly and expressly set out GST obligations rather than the vaguer tax returns in the affidavit.

MS LARACY:

Yes, sorry, I just omitted to mention that. That's right, and of course Mr Parore did not respond to the Official Assignee on that and so –

GLAZEBROOK J:

But he would have been notified that the permission was only granted on the basis that GST returns would be filed.

MS LARACY:

That's right.

GLAZEBROOK J:

And the amount of GST put aside in a separate bank account and whatever else the conditions were?

MS LARACY:

Exactly, and is it section –

GLAZEBROOK J:

Which goes to intent one assumes?

MS LARACY:

That's right, and section 149 of the Tax Administration Act is to the effect that if the person – the person can get the OA's consent to carry on their business but if they haven't got – of the Insolvency Act 2006, sorry, but if they haven't got the OA's consent, then the OA is not responsible in any way for their business and there was no –

WINKELMANN CJ:

So, may I just clarify, you had the affidavit before the NOPA process – before the notice of default assessment was served because you're saying this was part of what the Commissioner took into account, as I understand your submission, or am I wrong about that?

MS LARACY:

No, you're right about my submission. The affidavit was – what's the date of the affidavit – 27 something 2011.

WINKELMANN CJ:

Yes, but isn't it an affidavit – it wasn't served on the Commissioner, was it?

ELLEN FRANCE J:

27 October.

MS LARACY:

No, this was from – so this was available to the Official Assignee and the Commissioner received material from the Official Assignee.

WINKELMANN CJ:

Before they made the preliminary decision?

MS LARACY:

Yes.

WINKELMANN CJ:

Right, thank you.

ELLEN FRANCE J:

So, am I right that's 27 October 2011?

MS LARACY:

Yes, 27 October 2011. So, there was a considerable body of material, we say, that was available and that went to the propriety of the decision to prosecute

and to the much earlier assessment that in principle this was a case where it was appropriate to give approval to prosecute.

Perhaps the final thing I need to say on causation is just reverting to my original point that the question that is asked is very important in this context and Justice Gwyn at paragraph 112 of the High Court judgment observes that costs "would never have incurred but for the decision to lay charges" and my response to that is that it's a simplistic and, with respect, inaccurate statement of the position. It's highly reductive in the sense that it misses so many steps in the analysis that are important to the causation question and, in fact, it's the wrong question. Was the loss caused by the breach is the right question.

WILLIAMS J:
What's the paragraph number again please?

MS LARACY:
That was paragraph 112.

GLAZEBROOK J:
Well, I suppose, you'd have to say the breach was filing charges, which is what the appellant would say, filing charges in a context where a fair trial isn't possible because there's been a NOPA required?

MS LARACY:
Yes.

GLAZEBROOK J:
And that seems to be the argument and you answered that by saying well that isn't, that wasn't necessarily absolutely clear from either *Safi* or *Skinner* and as a matter of principle isn't clear either, is that…
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MS LARACY:

That's exactly right. Which probably takes me onto foresight, knowledge and recklessness. We've commented on this briefly in our submission. Footnote 118 refers to a decision of the New Zealand Court of Appeal in terms of the meaning, the general meaning of recklessness. It's a recent decision in a case of *Whangārei District Council v Daisley* [2024] NZCA 161, [2024] 2 NZLR 660 and in *Daisley* the Court, very much reflecting this Court's own view in a case of *Cameron v R* [2017] NZSC 89, [2018] 1 NZLR 161, said that: "In New Zealand law the term [recklessness] ordinarily means that the defendant took a risk in circumstances in which they knew there was a real possibility of harm and it was unreasonable, in the circumstances known to the defendant, to take that risk." And then at paragraph 117 of *Daisley* says: "Because the decision to run the risk must have been unreasonable in the circumstances as the defendant understood them to be, subjective recklessness admits the possibility of lawful justification." But the important thing there is that recklessness must be subjective. They must actually see the risk themselves. It must not just be any generic risk but a real possibility of harm that the – or a real possibility that the conduct was unreasonable and, in assessing reasonableness, the Court needs to take account of the circumstances as the defendant or, in this case, the prosecution decision-maker understood them to be. And I don't intend to take the Court back through the differences between *Safi* –

WINKELMANN CJ:

No, we've gone through that, haven't we?

MS LARACY:

But that's where my argument is implicitly going. So, the submission is that it is referenced in certain places in this case that the Commissioner might have made an inadvertent decision – I just want to cover that point off – might have inadvertently failed to identify the risk. That's definitely not the case. The Commissioner recognised a risk in breach of Mr – a risk that prosecuting could be contrary to Mr Parore's rights, for that reason kept the decision after *Safi* to prosecute under review and we can see that in the timeline. After *Safi*,

IR spent some time considering internally the implications of that decision, then the Commissioner took internal legal advice, gathered related cases from IR and sought external legal advice.

WINKELMANN CJ:

So, what are we to make of that, Ms Laracy, because if it's going to be relied upon, shouldn't the Crown have disclosed it?

MS LARACY:

No, the fact of taking legal advice is not inconsistent with acting.

WINKELMANN CJ:

Well, you're implicitly asking us to assume that they acted on that legal advice though, aren't you?

MS LARACY:

No, I'm not asking you – what I rely on this for, your Honour, is for the fact that this was a careful process and that goes to recklessness. It is inconceivable, in my submission, that the Court could find that the Commissioner was reckless when these are the facts of the process that were undertaken.

WINKELMANN CJ:

Unless the legal advice was "don't do it."

MS LARACY:

And, in my submission, it would be, and there is case law I can come on to about that, but the important thing is that the Crown has a right, like any other litigant of course, to rely on the fundamental right to maintain legal privilege and privilege is only waived under a statutory provision, which now broadly reflects the common law, when any significant part of the privileged communication is put in issue and that has not happened in this proceeding.

WINKELMANN CJ:

Well, I mean you'd –

ELLEN FRANCE J:

Well, you might have had an argument about what Mr Tully said because he does say *Safi* is distinguishable is the gist presumably of the advice.

MS LARACY:

I don't understand him to be saying that that Crown Law advice, which I haven't seen, I'm not in a position to comment on what it was.

WILLIAMS J:

That was prior to the Crown Law advice, wasn't it, that paragraph?

WINKELMANN CJ:

No, it wasn't. No.

WILLIAMS J:

I thought that was a point –

MS LARACY:

No, I think it's referring to the process of the decision to prosecute and the decision to prosecute he is saying was made after processes of advice were gone into.

WILLIAMS J:

I thought you'd made that point when you intervened in response to Mr Conder –

MS LARACY:

That he wasn't only –

WILLIAMS J:

Anyway, don't worry.

MS LARACY:

Sorry, my intervention was just to say that understanding from Mr Tully's brief of evidence was that that paragraph that was quoted was that the decision –

was about the decision to prosecute which was IR's subsequent decision having gone through this advice process.

WINKELMANN CJ:

I must say that I also have a prior issue as to whether when you narrated, obviously for the purposes of showing that the officers acted in a non-reckless manner, it's an implicit representation that they received advice that it was all right to proceed.

MS LARACY:

Well, our law has been reasonably settled as *McGechan on Procedure* and *Adams* and *Cross on Evidence* confirm in relevant commentary, which I can provide the Court with, that the mere relevance of privileged communication to an issue in a case provides no basis for waiver, even if parties asserted reliance on a privileged communication is generally insufficient. Waiver occurs where a party both asserts reliance upon the privileged communication and also seeks to inject the substance of the communication into the evidence. The leading authority on that which is –

GLAZEBROOK J:

Isn't whether it's privileged or not absolutely irrelevant? If you're relying on it to say they're not reckless, then the assumption has to be that the advice was "whatever you do, don't do this" but other than "whatever you, do don't do this" because if that was the advice then it was reckless to carry on.

MS LARACY:

It would depend what the question was. If the question was here are a number –

GLAZEBROOK J:

Well, it might but we have no idea because we have no idea –

MS LARACY:

Exactly.

GLAZEBROOK J:

– because we have no idea what was said so how can we rely on the fact legal advice was sought to say that the decision wasn't reckless.

MS LARACY:

It must be relevant that IR went through a stepped internal legal advice process and also took – and also had someone cast an external objective view on their legal reasoning.

WINKELMANN CJ:

Well, there you are really implying that they had legal advice that said it was okay to do it. Don't we just have to put the legal advice to one side and we don't know what it contained. If it contained a statement "don't do it," then there would be evidence that they're reckless. If it contained a statement, you know, "you're okay," it's evidence they didn't. But we don't know so we just need to put it to one side.

MS LARACY:

Well, I – to a degree I agree with your Honour but it obviously depends on another thing we don't know. What was the scope of the question that was asked? If it was here's a bundle of cases that we have on hand, a bundle of investigations post-Safi, is there a basis in law for us to look at the detail of the facts of these cases and make distinctions between them based on their facts as to whether to prosecute, whether to continue, whether to pull prosecutions, or should *Safi* be read as an absolute rule that, in every case where a NOPA has issued, the criminal proceeding can't go ahead. If that was the question –

MILLER J:

Well, we can make that assessment for ourselves and you've really asked us to do that.

MS LARACY:

Thank you.

MILLER J:

We don't need to refer to the content of the advice that the Commissioner took. That adds only one thing, namely that the Commissioner did follow a process and it is a fair response we don't know what that advice said.

MS LARACY:

That's right.

WINKELMANN CJ:

So, we can't take much from it?

MS LARACY:

No. All I ask the Court to take from it is that the allegation has been made that there was wrongdoing here by the prosecutor. The allegation has been made that the prosecution was brought in bad faith. The allegation has been made that it is reckless. My response to that in part is to say the Court can take account of the fact that there was a careful stepped legal advice process. Now, whether – what the content to that was, none of us know, but surely that is relevant.

WINKELMANN CJ:

So, Ms Laracy, we're coming onto 1 o'clock and we won't be able to sit late tonight so I'm just anxious about timing. How much longer do you think you'll be?

MS LARACY:

Probably – well I had anticipated taking in total about probably two to two and a half hours. I can truncate what I have to say but probably at least another 45 minutes.

WINKELMANN CJ:

All right, we'll come back at two and then that should give us enough time because we just can't sit past four.

MS LARACY:

No, no, definitely I don't think that will be required, your Honour.

WINKELMANN CJ:

Because we then have to have reply from the appellants.

MS LARACY:

Yes, yes.

WINKELMANN CJ:

And you'll be short, Mr Conder?

MR CONDER:

Yes, your Honour. I can indicate that I think reply will be less than 15 minutes. I intend to be very quick.

WINKELMANN CJ:

Less than?

MR CONDER:

Less than 15 minutes and I intend to move quite quickly.

WINKELMANN CJ:

Thank you. Right, we'll adjourn.

COURT ADJOURNS: 1.00 PM

COURT RESUMES: 2.00 PM

WINKELMANN CJ:

Ms Laracy.

MS LARACY:

I started off by suggesting that this was a big remedy in response to a lower-level breach that goes to the Crown's proposition that a stay was

sufficient. What I propose to do, in fairly short order, is cover paragraphs 8.1, 8.2 and 8.4 of the outline in one go, they can be combined, and then address the Court very briefly on Costs in Criminal Cases Act.

So, why do we say that a stay was sufficient here? There are, of course, multiple factors that go into that consideration. The first is that the Court of Appeal was correct that there was no evidence of bad faith. I've made submissions also on recklessness, we say that there's no evidence the Commissioner foresaw or, indeed, even should have which is not the test, but even should –

WILLIAMS J:
Even what, sorry?

GLAZEBROOK J:
Sorry, perhaps start again, because I missed the whole of the…

WILLIAMS J:
I coughed.

WINKELMANN CJ:
Because of Justice Williams' coughing.

MS LARACY:
That's all right, there's no evidence of recklessness –

GLAZEBROOK J:
Well I think maybe you're not really coming through the microphone properly.

MS LARACY:
There's no evidence of recklessness, in my submission, no evidence that the Commissioner foresaw or even should have, which is not the test, but even should have foreseen an unfair trial in this particular case. I also say that this is not an egregious case that is of the type that shocks the conscience of

right-minded members of the community such that a category 2 stay could ever have been in question.

Nor do I suggest this is a category 1 stay in *Wilson* that has shocking elements to it so that it blurs the boundaries. This –

WINKELMANN CJ:
So what category stay do you say it is Ms Laracy?

MS LARACY:
Sorry?

WINKELMANN CJ:
What category stay do you say it is?

MS LARACY:
This is a category 1 stay and a category 1 stay is a stay that is entered in response to considerations where the Court is satisfied there would be an unfair trial and *Wilson* is the leading authority on that. *Wilson* emphasises, of course, that even in the context of, well, the context of either type of stay when it's being considered, the Court must look at whether lesser remedies are available and the stay is a residual remedy. It's been described as a drastic remedy in the Canadian cases and that is referred to by this Court in *Wilson.* It's not an ordinary criminal remedy and it's a stronger one, of course, than an appeal on the grounds of miscarriage for an unfair trial because there's always a risk there of a retrial. It's definitely a stronger remedy than an exclusion of evidence.

Second, I submit that on the evidence and looked at objectively, it is reasonable to have prosecuted here, as I say not plainly from the outset an irremediably unfair trial, and objectively speaking, and a matter for the Court to determine, *Safi* is highly distinguishable. My submission is that this is, in almost all respects, a very long way from the facts and concerns of the Court in the *Safi* decision.

Third, perhaps useful to note that in this case the unfairness that was found by the Court related to the premature disclosure of the defence, which I'll go on to discuss. Now, that related to seven of the 13 charges. The other six related to charges that did not concern the time period when Mr Parore was bankrupt and the defence only relates to the period when he was bankrupt. In this case all of the charges were stayed. There doesn't seem to have been any consideration given to anyone of that, but I suggest it's a factor the Court can consider.

Next, I say that, in terms of the sufficiency of a stay as a remedy, a category 1 stay responds to the particular breach, namely the conduct that has caused the unfair trial and it's a personal remedy in the sense that it responds to protect that individual's rights to fair trial. And the way it does that is by stopping the trial and ensuring there can be no possibility of ongoing jeopardy, no conviction, no prosecution, no retrial. Theoretically there could be a retrial, of course, but in reality a stay just leaves the matter forever in that stayed position but meets all of the long title objectives protecting, affirming and promoting the individual's rights and it's not just a remedy which is important for society. It does have that societal impact as well because, of course, it's been recognised society has no interest in an unfair trial. But fundamentally, a stay in category 1 for an unfair trial is a personal remedy as much as anything.

Finally, I just note, without going into them in any detail, when thinking about that finding by the Court of Appeal that this was a lower-level breach, it is reasonable to consider cases that are at the middle or higher end, and very often those sorts of cases involved information that has been compelled in circumstances that are themselves far more egregious, some sort of oppression or deception. Sometimes they involve, in the most extreme cases, threats and there's discussion in the *Wilson* case, particularly in the context of category 2 stays about prosecutorial threats and oppression by way of example. The more serious cases involve breaches of liberty which wasn't at stake here.

And then getting down into the detail of this case, the final packet of considerations it's important to just spend a little bit of time on is this important

question of what actually was disclosed in the NOPA and what did that mean for the fairness of the prosecution?

No material of evidential value necessary to advance the prosecution was obtained from the NOPA. As I have analysed it there might be seen to be four categories of information obtained. The first is by filing the NOPA and there was an implicit admission that GST was owed. In relation to the non-bankrupt period GST was owed by the taxpayer, and in relation to the bankrupt period, of course the express argument that the Official Assignee was responsible was still an admission that GST was owed, albeit not by the taxpayer, he was saying. In my submission that simply is of no evidential or strategic value to the Crown. It wasn't evidence that could be advanced in the prosecution. So, that particular claim that the NOPA was an implicit admission GST was owed is neither here nor there.

Second, there's a concern that, or an allegation, that the Official Assignee was then briefed by the Commissioner in order, as it's put, to head off this defence that the –

WINKELMANN CJ:

So, doesn't the NOPA then disclose a defence?

MS LARACY:

Yes, and I will come on to that your Honour. And of course that's the important – but that's what the –

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WINKELMANN CJ:

Well doesn't that come logically before briefing the Official Assignee?

MS LARACY:

It's just that there's some detail to the defence that I wish to take the Court through, whereas I can deal with these other points very briefly.

So, the argument is that the Official Assignee was briefed and this had the effect of providing evidence which would head off the defence. A couple of points to be made on this. It's a very high-level brief that the Official Assignee provided and it does not, in my submission, head off the defence. The Official –

GLAZEBROOK J:

It does not –

WINKELMANN CJ:

Are you inviting us to revisit the finding by –

MS LARACY:

No, if I could just show you the –

WINKELMANN CJ:

– Justice Wylie, because it's just, you know –

MS LARACY:

If I could take you to it, it's paragraphs 9 and 10 of the Official Assignee's brief. And the Court of Appeal commented on this –

WINKELMANN CJ:

So, if you're not asking us to revisit it I'm struggling personally to understand its relevance.

MS LARACY:

Well, the Court of Appeal commented at paragraph 88, that a brief, even if it had covered this material, was of limited evidence. It said evidence to state the obligations of an undisclosed bankrupt are not helpful. These are matters for submission.

So, at worst it could've been excluded but the point is it took Mr Parore's defence nowhere and paragraphs 9 and 10 are now up and the Court can have

a look at it. That was the extent of the statement about the undischarged bankrupt's relationship with the OA and the obligations.

The OA had to be briefed in any event, because the OA was an important part of the factual case for the Commissioner to say at what point the OA had taken over the bankrupt person's affairs and other matters.

WINKELMANN CJ:
But the defence entailed, didn't it, that he understood that the OA was taking care of it.

MS LARACY:
That's right, well that's what is asserted. I can come onto that.

The third thing is framing of charge periods and the GST involved, that's of no evidential value whatsoever, GST is not an element of the charge as I've already covered how the charges were framed, whether they were failure to pay GST over two months or six-month periods is neither here nor there. The charges reflected what had originally been understood to be the position by the Commissioner back in the very first letter written to Mr Parore.

So, that takes us to the important matter which is said to have been prejudicial and on which the Court of Appeal said this case really relied in terms of the finding of an unfair trial, and that was that there was premature disclosure of Mr Parore's defence.

I will go on to explain a little bit about that defence to the Court, but my submission is that there was no real advantage to the Commissioner from this, no significant prejudice could have arisen and the reason for this is that it was purely a legal interpretation argument when properly looked at and the Court of Appeal makes this point at paragraph 90 in its judgment.

WINKELMANN CJ:
So, you just rely on paragraph 90 of the Court of Appeal's judgment?

MS LARACY:

I do. The legal defence –

GLAZEBROOK J:

That wasn't Justice Wylie's view though was it, because one can say that even if it wasn't a proper legal offence the issue would be whether there was an honest belief that it was, which would then arguably negate intention.

MS LARACY:

The difficulty with that is that there was no evidence of that. Mr Parore's trial had happened –

GLAZEBROOK J:

But it doesn't matter because it never got that far so…

MS LARACY:

The evidence was heard and he had hadn't given evidence. So, he would've had to have given evidence of –

GLAZEBROOK J:

No, I know, I understand that but all I'm saying is, if you're looking at what affect it would have, it has those two possible affects and that was one of the reasons the Justice Wylie upheld the stay.

MS LARACY:

Yes, in my –

GLAZEBROOK J:

So, it's not just a legal defence he said because it has these other implications.

MS LARACY:

It does, if there's any evidence that – if it could've ever turned on the evidence then it does have those implications.

GLAZEBROOK J:

Well, but you're now challenging his decision aren't you, having not challenged it, i.e. having not appealed it?

MS LARACY:

I'm not going to – we don't challenge the decision. The stay was imposed. Three courts have thought that was appropriate. We don't take issue with that but what I can do is show the Court what was in the evidence or not in the evidence.

WINKELMANN CJ:

I mean, fine, but if you could do it, you know, these arguments are advanced before Justice Wylie and his judgment actually deals with them.

ELLEN FRANCE J:

Yes, although it is, as I understood, it was relevant to your argument about what it spoke of the breach, I suppose.

MS LARACY:

The seriousness of the breach, that's right.

WINKELMANN CJ:

You seem to be advancing an argument, however, that there was no breach.

MS LARACY:

No, I'm – the Crown has made that –

WINKELMANN CJ:

Well, sorry, that a stay was an over-reaction to a breach but the stay was what was assessed by the Judge as being the appropriate remedy for the breach. I misspoke.

MS LARACY:

The submission I have made is to the effect that the stay was sufficient. I would go further, but I haven't, and suggest it was a very generous response.

WINKELMANN CJ:

Well, I think you are suggesting it.

MS LARACY:

I'm happy to be left with it –

GLAZEBROOK J:

Well, you're also saying I think –

MS LARACY:

I don't need to though.

GLAZEBROOK J:

Sorry, I think you're also saying that it wasn't a response that was necessarily inevitable and therefore necessarily anticipated by the Commissioner and, therefore, the – I mean I'm not sure that it follows from that, but therefore the argument would be that they shouldn't have instituted the proceedings because the inevitable response was going to be a stay, and I think this goes to saying well it wasn't inevitable, it might have been imposed but –

MS LARACY:

That's right, and it goes to what is required which is an analysis of the extent of prejudice.

WINKELMANN CJ:

The difficulty with that argument though is that, it assumes that it's okay to go ahead unless you're going to have a stay against you, but not if there's an exclusion. I'm not actually understanding what point we're at in your – I think I've lost the thread about which point we're at.

MS LARACY:

I'm up to my final point which was considerable prejudice has been alleged by the appellant in this case based on what was disclosed in the NOPA to the point

where it is said that, in terms of the order of seriousness, this is much the same as *Safi*.

ELLEN FRANCE J:

It is also said against you, which I understood this argument to be partly responding to, the this is the sort of prosecution that should never have got off the ground in the first place –

MS LARACY:

Exactly.

ELLEN FRANCE J:

– and it does seem to me, whatever we make of it, that the arguments can be addressed in relation to that point.

MS LARACY:

That's a helpful lens, your Honour. So, had a prosecutor looking at this case and understanding the prejudice that was asserted by the appellant prior to trial, had they been told well, for instance, you've gone ahead and briefed the OA to head off my defence, I've given the Court the material to suggest that (a) that didn't happen, if it did, it would be reasonable for the prosecutor to assume that they could go to a pre-trial application on that and ask for that evidence – well, argue about whether that evidence needed to be excluded. It wasn't a reason to not prosecute. And my submission is that, in relation to each of those four categories of information I've described, implicit in admission that GST was owed, the claim that the OA was briefed improperly, the claim that the framing of the charge periods and the GST involved and the premature disclosure of the defence, are all one way or another matters that it can objectively be said it was reasonable for a prosecution to think these are matters that I can deal with. It's not that there's no risk, but these are matters I can deal with by way of asking the Court, if necessary, to exclude evidence by changing the particulars and –

WINKELMANN CJ:

But they wouldn't be making that assessment upfront, Ms Laracy. You're not suggesting it would be proper for a prosecutor to carry on and say that they can carry on with their conduct because the evidence will just be excluded at worst?

MS LARACY:

No, but if there's a valid argument for exclusion, it must be appropriate for the Crown to test that and it's certainly – and the more important point is that, if there was any risk, it would have been reasonable for the prosecutor to think that exclusion and amending the charges might be the way the Court will deal with it rather than a stay. So, it does go to the foreseeability of a stay and the foreseeability that this was so irremediably unfair that a prosecution couldn't go ahead. My submission is that it's just not of that order.

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So, the important prejudice, of course, in this case is the premature disclosure of the defence and, in short, that is I am an incapacitated person as defined in the Insolvency Act – GST Act and therefore the Official Assignee is responsible for my GST. Now, it's common ground that Mr Parore was self-employed as a real estate agent under his contract with Barfoot & Thompson while he was bankrupt. It's not in dispute that he applied to the Official Assignee for permission to be self-employed, and we've seen the documents on that, and they did not sign those documents and that those documents included that his accountant would prepare and file his GST returns. Now, Mr Parore's accountant argued in his NOPA that Mr Parore as a bankrupt was an incapacitated person. That term is – because of his bankruptcy. Now, that term is defined in section 58(1) of the GST Act and perhaps it would be useful, can we bring that up, do we have that, and we say that is correct, he was an incapacitated person.

Therefore, so the argument goes, under section 58(1)(a) they say the Assignee was deemed to be carrying on Mr Parore's taxable activity while he was incapacitated and therefore the Assignee is personally liable for GST Mr Parore owed as his specified agent. Now, the problem with that we say is wrong plainly

as a matter of law because it does not take account of the definition of specified agent in section 58(1): “Specified agent means a person carrying on any taxable activity in a capacity as personal representative, liquidator, or receiver [or administrator] of an incapacitated person, or otherwise as agent … or in the stead of an incapacitated person” and the Official Assignee acting under the Insolvency Act 2006 was not carrying on the taxable activity of Mr Parore which was acting as a real estate agent. There is simply no basis whatsoever. It's fanciful if it were ever suggested that the Official Assignee was carrying on his real estate activity.

There is one provision in the Insolvency Act which allows an Assignee to carry on a bankrupt’s business and it's clearly not applicable here and that’s under schedule 1, clause 1 of the Act: “The Assignee has the power to … carry on the bankrupt’s business, if it is necessary or advantageous in order to dispose of it.”

MILLER J:

So, now you're making a point that the defence had to fail but do you really need to?

MS LARACY:

No. Well, they could have raised this and then the Crown would have asked for an adjournment in order to make submissions on it.

WINKELMANN CJ:

Justice Wylie dealt with whether that was relevant to his decision to exercise a stay and he said he didn’t think it was proper for him to go ahead and decide that would have failed.

MS LARACY:

It certainly goes to the question of was a stay a more than sufficient remedy in this case having regard to the extent of a –

WINKELMANN CJ:

Yes, I think we've got the point. There's difficulty with – there would have been difficulties with a defence if he'd gone to trial.

MS LARACY:

So, the conclusion on this is that here Mr Parore was carrying on his own taxable activity while an undischarged bankrupt without the assignee's consent in contravention of section 149(1)(a) of the Insolvency Act. So, there was no consent for him to be carrying on that activity and there's certainly no evidence, no possibility on any analysis that the OA was himself carrying on that activity of an undischarged bankrupt.

So, that brings me to Costs in Criminal Cases Act and all I was proposing to – there may be questions that the Court has on this, but all I was proposing to say is just to note that, as we have in our hand up at paragraph 10, that there is a case before the permanent court at the moment, it's reserved, which is looking at this question of whether the Costs in Criminal Cases Act can be read in a way that allows costs after a stay has been imposed. That decision has name suppression in the case. I can give the Court the reference if you're interested but that question is there.

In my submission it doesn't make any difference in this case for the simple reason that we would say, as a matter of law, that if that route were available, of course, the appellant quite reasonably wouldn't have known it, if the CCCA route were available, then that would be the appropriate route to go down in terms of seeking costs for legal expenditure. Understandably, they haven't pursued that but in law that would be the answer, I suggest, and if it's not available, then we've made the submission that there is a real risk that compensation for legal fees in this context of a stay after a criminal prosecution is gap-filling. And the reason I say that is, as this Court, most of the Bench would have, might have sat on the *Apanui* case recently, where one of the points made by the Crown is that at common law no costs were awardable for either the defendant or the Crown or the prosecutor so jurisdictions have dealt with that problem by creating statutes. It has been said that our Costs in

Criminal Cases Act is a code. The provision under the Criminal Procedure Act for costs is different. It has an entirely different rationale. That's a rationale of sanctioning, we say, sanctioning for procedural failure, it's not, whereas the CCCA is compensatory.

WINKELMANN CJ:

So, what do you say the point that's said against you that the approach that the Court of Appeal, particularly President Cooke, took in *Baigent's* case was that the Bill of Rights, an interpretation consistent with the Bill of Rights and the obligation of the Courts to interpret legislation in a way which affirms, promotes et cetera, the particular right would enable them to read legislation so as to not exclude the remedial response. In that case it was the Crown Proceedings Act.

MS LARACY:

Yes, we've obviously relied on *Cuthbertson*, so far as it goes, which seems to be an Australian case that stands for the proposition that unless there's express provision that the confines of cost regimes in the criminal jurisdiction don't allow remedies for costs to be given for a civil process that relates to the criminal proceeding, but I did take your Honour's point yesterday in saying that isn't it much the same as getting around –

WINKELMANN CJ:

Not getting around.

MS LARACY:

Well, the immunities in the Crown Proceedings Act.

WINKELMANN CJ:

Yes. I mean obviously it's distinguishable but that's a different context but it's really what was said in *Baigent* about the interpretive – about reading that in a rights-consistent way as to not to exclude the remedial response.

MS LARACY:

I think beyond – a number of points, but beyond repeating that some weight would need to be given to the fact that it would appear the CCCA is a code and Parliament has been – has carefully worked out what should be remedied and on what basis in that context, including notably, looking at the issue of a stay in that the Law Commission has done a report on this and has recommended that it be revisited, this issue of whether stays are covered, and in 25 years Parliament has chosen not to act on that for what that's worth. So, there's something in that Parliament has a – arguably has a preference for costs to be solely dealt with within the criminal jurisdiction but if –

WINKELMANN CJ:

By statute.

MS LARACY:

– in a particular case the criminal law remedies were plainly insufficient for the rationales that public law remedies are meant to cover, I don't think I would be saying to the Court it couldn't happen as a matter of law. I think that would put it too high. I think it would come down to the facts of the particular case. So, in this case, if the Court is to fill a gap, I think which for instance on these facts have to think very carefully about should it really be filling, not only this gap on the facts of this case, but should it be filling a gap that only arises in relation to prosecutorial misconduct leading to a stay not otherwise covered by the CCCA. So, it's filling a very narrow gap. The Court might say well that's a manageable gap to fill but, on the other hand, it does look like filling in the blanks for a specific case where Parliament –

WINKELMANN CJ:

Well, your submission is that, even if there is such an approach available under *Baigent*, this is not the case for it?

MS LARACY:

This is not the case for it.

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WINKELMANN CJ:

And that's because?

MS LARACY:

And perhaps the more general and perhaps compelling point is that, leaving aside the oddity of the situation we've got here, where this claim is being advanced because – well I suggest because the CCCA doesn't provide a remedy, leaving that aside, in other cases, of course, such as *Morrison* and the *Henry* decision in Canada, the Courts have said you need to look at the remedies that have been provided first and the sufficiency of those before you go to the compensatory one. So, even if, in principle in the right case, the costs regime, the criminal costs regime shouldn't be the full extent of what is available in terms of remedying the public law harm, the Court would still have to look at the combination of the stay, the declaration, whatever costs might have been awarded in a criminal case before asking what else significantly is left unremedied.

WINKELMANN CJ:

So, your submission is that in the area – to the extent we interpret the CCCA as covering, we should regard it as presumptively the kind of response that might be needed, but you don't rule out the – were costs to be seen to be inappropriate remedial response so if – that's legislative response and we should see that as Parliament's response to that need but you don't rule out an exceptional case.

MS LARACY:

I feel ill-equipped to make an argument on principle that in no case where – no conceivable case where the CCCA had provided a remedy could you never have a compensatory award under the public law damages regime. But I say it would be the residual remedy, it would be after the other remedies have been given, and standing back to look at in the round have all necessary harms and rationales been fulfilled here as a package, it would be remedial, it would be a very rare case. I appreciate that's not the test, it's descriptive, but it would be exceptional and the general principle that the alternative is to say Parliament

has completely covered the ground here, its code, criminal proceedings are totally separate from, with respect to money payable for costs, totally separate from every other area of the law, and all I can say is I don't advance that submission. I'm not equipped to do that. And I can see the logic in your Honour's point that, just as with *Baigent* covering, sitting alongside, due to a different rationale, Crown immunities, that were perhaps hitherto seem to be complete, it could be that in the right case public law compensation would also, could also sit alongside a CCCA remedy or fill the gap where there is none but this is not that case.

If I could just check my position on that with my learned friend. So, the alternative way is to say well we're not seeking to fill the gap in that way but, if we were to award public law compensation here, what does the CCCA approach tell us about how that might be assessed in this context, and that's where the criminal context and the principles are quite different from the civil and the Court might think that needs to be given some weight. So, as you're aware, costs are highly discretionary in the criminal area. They don't follow the event. So a successful appellant from that – well a successful defendant is not entitled to costs and shouldn't count on them simply because they're successful, more has to be shown, and the factors are set out in section 5 of the Act with respect to costs for the defendant. Fundamental principles behind those factors are that charges are pursued by the prosecutor in the public interest not for private gain. I can give the Court authority for these propositions but they're pretty well established. As such a prosecutor should be treated more, the word is used, tenderly for costs purposes. An acquittal or a dismissal or a withdrawal is a prerequisite for a costs application but not in itself sufficient for costs to be ordered. The simplest reference for that is section 5(4). On the other hand against that section 5(5): "No defendant shall be refused costs … by reason only of the fact that the proceedings were properly brought and continued." It shows the breadth of that evaluative discretion.

The Court of Appeal's decision in *R v Lyttle* [2022] NZCA 52, and there are two other costs decisions that go with it, that probably remains the most fulsome

analysis of the principles so I won't, unless it is helpful, I won't take the Court through those.

In the case of the Court of Appeal in *Turkington v Manawatū-Whanganui Regional Council* [2025] NZCA 252, last year 2025, the Court noted that: "When there is no bad faith or unreasonable conduct, it is less likely that a costs award will be appropriate." Other reasons will be required. Another factor to bear in mind with the Costs in Criminal Cases is regime and the case law under it is that what's very unsatisfactory is that the scale which is meant to govern costs in the Regulations is, as Courts have repeated many times, woefully out of date. From memory, I don't think it's been updated since the Act came into force. It might have been but it's just, it's risible. And as a result, the quantum for Costs in Criminal Cases has developed as a matter of case law and precedent in comparison with other cases but it's also got a reasonable degree of variability with it. That said, costs quantum tend not to be great and indemnity costs are extremely rare.

Another principle, this is from – one authority is *R v Mather HC Christchurch T33/97; T34/97, 26 July 1999*, a decision of the High Court in 1999 of Justice Chisholm, indemnity costs can be sought but they are rare and restricted to exceptional cases involving bad faith, gross misconduct or where the prosecution should never have been brought.

The considerations in section 5(2) for whether to award costs have also been confirmed as being relevant to quantum. That's a case I don't have the reference for but it's in *Registrar of Companies v Feeney* HC Auckland CRI-2011-404-14, 21 June 2011. And the final principle that I think is useful in the time available, the amount of costs actually invoiced is not determinative of the level of costs unless indemnity costs are warranted. The amount charged can turn on a number of different factors and it's not a fair or rational approach for the unsuccessful parties' cost burden to depend on such vagaries. That's also the *Feeney* decision, *Registrar of Companies v Feeney*.

Perhaps this is more useful, sorry, one last principle. In assessing quantum the Courts can consider the Crown's costs or scale costs as if it were a civil proceeding and the costs awarded in comparable cases. Again that's *Registrar of Companies v Feeney* at 32 to 34.

And perhaps just to round off that final point about who pays, the sum ordered should not be such that it would provide a disincentive to the Crown to prosecute in appropriate cases in the future. We say that's a principle that applies as a matter of what the Canadians would call good governance or public interest. While in the usual case, unless otherwise ordered, a costs order against the Crown is paid by the Ministry of Justice in cases, and that's under section 7 of the Act, and there's a special appropriation for that, where an explicit finding is made of bad faith or negligence, the Court can direct that the prosecutor, or some other relevant person, pay. The relevance of that is to avoid the chilling effect and to recognise that prosecutorial decisions are often finely balanced and the system in the end bears the cost of trusting prosecutors to exercise independent prosecutorial discretion, as they must, and sometimes that doesn't work out very well for everyone, and there should on occasion be some compensation or award for that, but it shouldn't feel like a punishment or be a burden on agencies that prosecute in the public interest.

Unless there are any questions for me, the only other thing I was going to say was that in terms of costs for this proceeding, my learned friends, Mr Conder and Mr Jones, have said that I could just deal with paragraph 12 which is to say that, if the Court agrees, parties have agreed that costs of the proceedings in the lower courts might must efficiently be dealt with by memoranda, filing memoranda, and the Crown would be able to file a memo in say 14 days setting out its position with the appellant to reply 14 days later unless there's some agreement which they would advise the Court of.

WINKELMANN CJ:

That's after judgment or what are you – I'm sorry, I'm not following.

MS LARACY:

Sorry, paragraph 12, sorry costs of the proceedings in this case in the lower courts, instead of us making any submissions on that, the parties have agreed that –

WINKELMANN CJ:

You mean in the High Court?

MS LARACY:

In the High Court, sorry, yes.

WINKELMANN CJ:

"He did not seek them in the High Court, where costs were agreed." Right.

MR CONDER:

If I may interrupt my friend –

WINKELMANN CJ:

I'm not quite following the submission. Yes.

MR CONDER:

There's an issue that's arisen as a result of this paragraph 12 of the oral outline that there is some confusion, perhaps is the best word for it, between the parties as to exactly what the status is of the High Court costs award presently and its involvement in this appeal. There was a consent judgment. It was appealed by the Attorney to the Court of Appeal who didn't expressly refer to it, and so there's some complexity in this issue that we thought is better addressed in writing than us attempting to unstitch that particular issue this afternoon.

WINKELMANN CJ:

All right. Okay, so and Ms Laracy has suggested a timetable?

MR CONDER:

And that's agreed, your Honour.

WINKELMANN CJ:

And the timetable is?

MR CONDER:

Fourteen days from today for the Attorney-General's position to be put forward, 14 days thereafter for us to put forward the position.

WINKELMANN CJ:

Right, well I've noted that, thanks.

MR CONDER:

It's our hope that it can be dealt with all in the round.

ELLEN FRANCE J:

Sorry, was it the subject of the appeal to the Court of Appeal?

MR CONDER:

The Attorney-General appealed the consent judgment to the Court of Appeal. It's not expressly referred to in their judgment and so it becomes a question of whether the Court of Appeal's reference to having overturned the High Court judgment –

ELLEN FRANCE J:

Applies to –

MR CONDER:

– should be read as judgments, or referring only to the liability judgment, not the costs judgment.

WINKELMANN CJ:

Did you ask them for clarification, apply for a recall?

MR CONDER:

No, I think at that stage, and at this point, I'm frankly giving evidence from the Bar, but at that stage both we and the Attorney-General formed the view that it

was intended that it applied to both. I was not aware until this morning that the Attorney-General had a different view. That's why it hasn't been addressed prior to now.

ELLEN FRANCE J:

It's just it seems to me if it is, if it was before the Court of Appeal, it's a bit odd for us then to be –

WINKELMANN CJ:

It would normally be dealt with by application for recall and ask them to deal with it.

ELLEN FRANCE J:

Re-call, mmm.

MR CONDER:

Yes, I acknowledge that, had this issue been identified earlier, that would have been the appropriate way to resolve that issue.

WINKELMANN CJ:

All right, okay. I don't know where the ledgers go. Anyway, we'll see what your submissions say. Now Ms Laracy?

MS LARACY:

Those were my submissions, unless there's any questions.

WINKELMANN CJ:

Thank you, Ms Laracy, and Mr Jones had something else to say?

MS LARACY:

No.

WINKELMANN CJ:

He has nothing left to say?

MS LARACY:

No, we are finished, thank you.

WINKELMANN CJ:

Thank you, Ms Laracy. And Mr Jones, you had something else to say? He has nothing left to say?

MS LARACY:

No we're finished.

WINKELMANN CJ:

Okay, thank you, Ms Laracy. Mr Conder, your brief reply.

MR CONDER:

Thank you, your Honour, yes. A brief reply but I am going to refer to couple of documents, so I'll just organise that. Where I wanted to begin your Honours is with the comment my friend Mr Jones made in his submissions summarising what I understand to be the position for the Attorney-General. Mr Jones said the compensation is only one factor to be considered among many. Where I would begin is by saying even on that assessment it appears the Court of Appeal has erred in that when listing factors to be considered it has overlooked at paragraph 84 of its decision entirely the question of compensation. We submit that that is really the issue that this appeal is about.

My friend also talked about the fact that courts appear to be hesitant to grant awards where there are breaches of section 27(1) as a reason why fair trial rights should also be treated with some hesitation. I would respond to that simply by pointing to three examples where compensation for breaches of section 27(1) have been granted in *Upton v Green (No 2)* (1996) 3 HRNZ 179, in *Binstead* and *X v Chief Executive, Oranga Tamariki*, each of those has a flavour to it that it is compensating for ongoing harm.

WINKELMANN CJ:

Sorry what was this, *Upton v Green*?

MR CONDER:

Upton v Green, the decision in *Binstead* and its *X and Y v Chief Executive, Oranga Tamariki*. Each of those decisions involves a decision-making process that misfired. In *Upton v Green* it was effectively a sentencing hearing. In *Binstead* and in the *Oranga Tamariki* case they are administrative processes that misfired. In one case a person was deprived of the opportunity to conduct courses on behalf of a ministry, in the other it was two employees of a ministry who went through a disciplinary process that treated them quite unfairly. In each of those cases compensation which reflected to some extent the inability or the loss of what they would have otherwise received was granted to them.

WILLIAMS J:

In a BORA context?

MR CONDER:

Yes, your Honour. Those are all expressly referencing the section 27 right to natural justice.

Turning then to, or what appears to be one of the most critical issues in this case, the question of causation, I first note that we don't fully agree with the Crown position on buyer created invoices. I don't intend to go through that in detail, but I would simply point to the cross-examination in the bundle at page 201.0052 as where that discussion takes place, and I'd suggest there's somewhat more complexity than was put forward by the Attorney.

WINKELMANN CJ:

Can you just give us that number again?

MR CONDER:

Page 201.0052. That's the page reference for where in the cross-examination.

WINKELMANN CJ:

And this is cross-examination of Mr Tully?

MR CONDER:

Of Mr Tully in this proceeding.

WINKELMANN CJ:

On which issue?

MR CONDER:

On the issue of buyer created invoices and the legitimacy and the processing of those buyer created invoices. There's some complexity in that issue, I'm not suggesting that it's overwhelmingly in our favour, I'm simply saying it's a more complicated situation than has been put forward.

GLAZEBROOK J:

So where does that get you?

1450

MR CONDER:

It doesn't take us particularly far, your Honour. I am simply saying that the situation with buyer created invoices is not a straightforward situation where there were invoices that created liability. That was obvious. There is some complexity in those invoices that is more complex than the Attorney's case here would suggest. It would have been a more difficult trial issue in my submission. That's as far as it goes, it doesn't go particularly far.

More significantly, for my friend's submissions, they've place significant weight on the fact that a decision to prosecute or something approaching a decision to prosecute had been taken in January of 2018 before the NOPA was issued. There are two things that I'll say about that. The first is that the evidence of Mr Tully is somewhat more ambiguous about whether that decision had been taken. The two points I would take you to are at page 201.0062. At that stage Mr Tully described what had happened on the 21st of January 2018 as being "just a memorandum", no final decision had actually been made. And similarly –

WINKELMANN CJ:

I think that's consistent with what Ms Laracy said, because she didn't say a decision to prosecute had been made, but a decision that there was sufficient evidence to prosecute.

MR CONDER:

Yes, I accept that. I'm simply clarifying exactly how it was put in the evidence. Similar point at page 201.0064.

The second point that arises from that is the Crown has tried to distinguish *Safi* by saying that that's a much worse situation where charges had already been laid before the NOPA was sent. In my submission the further that we go towards having the criminal process already start, and here the position for the Attorney-General is that evidential sufficiency had already been fulfilled, the more improper becomes the issuing of default assessments. There's a tension between those two, in my submission. My friend also –

WINKELMANN CJ:

So that's a tension in the different aspects of their causation?

MR CONDER:

Yes, effectively. They're saying on the one hand the breach is not so serious because it didn't follow criminal charges.

WINKELMANN CJ:

Obvious. Tension between their obviousness and their causation arguments.

MR CONDER:

Yes, I think that's correct.

WINKELMANN CJ:

Recklessness or causation.

MR CONDER:

Yes, that's correct. That's the tension that I'm drawing. I would then also say that the submission placed weight on the fact that the prosecution in *Safi* would have become a farce in Judge Clarkson's words. Those were also the words of Justice Wylie in the High Court stay decision at paragraph 77. I would also point in particular to paragraphs 66, 69 and 70 as setting out what we say is a correct assessment of the degree of harm and the degree of violation that arose from the breach. At that point I would also –

MILLER J:

When you say a farce, you mean the defence had to succeed in relation to the charges where the section 58 defence applied. It's not a farce, it's just that the outcome is perhaps inevitable in law which is not at all the same thing.

MR CONDER:

I accept that what is being described there is somewhat different your Honour, it's the farce that would take place if it were sent back rather than the farce that it would always be. But I suppose the use of that language is suggesting a concern that this process was reaching towards that level.

The more significant submission is that paragraphs 66, 69 and 70 in our submission capture accurately degree of harm that has been caused here. I would also resist –

GLAZEBROOK J:

I'm sorry I've just lost the paragraph number.

MR CONDER:

Sorry that was paragraphs 66, 69 and 70.

GLAZEBROOK J:

Thank you.

MR CONDER:

We went to them during my principal submissions, I don't propose to return to them but those are the points that we most strongly rely on.

GLAZEBROOK J:

No that's fine, just missed the paragraph numbers.

MR CONDER:

My friend also made the submission which I understood to be that conviction on these charges was effectively inevitable, it was an overwhelming prosecution case. Again we would simply say given that a number of the charges were at one stage dismissed under section 147 and then reinstated, it doesn't appear to be an overwhelming prosecution case. This Court can probably not go too far into the question of what the outcome of that trial might have been.

MILLER J:

But what can be said is based on the bare record including his knowledge of the obligation to account for GST, an inference would be available to the fact-finder that he chose not to account. It's kind of hard to avoid that isn't it?

MR CONDER:

I suppose I can't resist that in the specific, but the submission that I'm making is that it is difficult in the context of this proceeding for the Court to form firm views on what the likely outcome of the criminal proceeding would have been or should have been in an appropriate manner, and related to that I would also say simply because Mr Parore, at the end of the trial that did take place, elected not to call evidence, it cannot be presumed what Mr Parore may have done had the breach not occurred, had things in the proceeding gone in a different direction. The Court should be, in my submission, very hesitant about drawing hypothetical conclusions around how that proceeding would have gone without the breach.

GLAZEBROOK J:

Well it's a bit akin to the submission that now isn't being made by the Crown that Mr Parore was lucky and has had a windfall.

MR CONDER:

Yes. It is your Honour; in a more fundamental sense I suppose I'm also standing on the presumption of innocence and saying he hasn't been convicted and we ought not treat him as though he were.

I would note that we don't agree with the Attorney's position on the wavier point but that was discussed extensively with my friend, and I don't feel the need to go through that at all.

Finally, two points turning to the case law, first of all I simply want to draw the Court's attention, the Attorney-General has relied heavily on this language of a rights-centred response. The earliest reference that I can find to that comes from the decision of *Baigent*, and this is at pages 702 and 703 of the reported decision. There what is described as a rights-centred response is one that has, in the word of Justice Hardie Boys the primary focus has been on providing an appropriate remedy to a person whose rights have been infringed." It would seem in my submission that a rights-centred response is indeed a response where compensation is a significant factor.

The final point that I want to turn to then is responding to the table that has been provided summarising what's described as the majority view in *Taunoa*. There are four points here that I would particularly point to. The fourth row, the appropriate remedy in a particular case is a matter of judicial discretion, in my submission that should be read in view of what the quote of Justice Tipping a little bit later on in the judgment says –

WINKELMANN CJ:

Which one is it? Fourth block.

MR CONDER:

So this is the fourth.

WINKELMANN CJ:

Oh yes, okay.

MR CONDER:

Which relates to judicial discretion. When going into detail on the question of what that judicial discretion meant, Justice Tipping at paragraph 318 says: "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 Act." In our submission discretion does not mean that these things can simply be set aside. That's consistent with the approach taken there.

I would point then to the comment at line 8 of the table, damages may be required depending on the nature of the breach, seriousness of the breach and consequence for the victim, other remedies and other relevant matters. It's notable that there Justice Tipping is using the language of vindication but of course the Attorney-General is correct in the previous row to point out that when Justice Tipping talks about vindication, he appears to be speaking about it in that narrower sense and those two rows need to be taken together.

Turning to the second page, the tenth row, "In determining quantum there should generally be an element of redress for the victims for the harm caused", and I would take this together with the comments of Justice Tipping that are extracted two rows further down. In our submission what really should be the focus of the Court in assessing Justice Tipping's view of how this operates is his own words in paragraph 322. There his Honour says that: "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." He goes on to say: "... compensation for all loss or damage, direct or indirect, is

potentially capable of playing a part in the remedial package." In our submission this is consistent with what he's saying throughout his judgment that compensation is an important factor and should generally be provided.

That is all I had intended to say in reply, your Honours.

WINKELMANN CJ:

Thank you, Mr Conder. Thank you, counsel, for your submissions. Thank all counsel for their submissions. I thank the interveners for their helpful contribution. We will reserve our decision, and we will now retire.

COURT ADJOURNS: 3.00 PM