IN THE SUPREME COURT OF NEW ZEALAND SC 37/2012

[2012] NZSC Trans 17

BETWEEN **VINCENT ROSS SIEMER**

Appellant

AND **THE SOLICITOR-GENERAL**

Respondent

Hearing: 15 November 2012

Court: Elias CJ
McGrath J
William Young J
Chambers J
Glazebrook J

Appearances: A J Ellis and G K Edgeler for the Appellant
M F Laracy and A R van Echten for the Respondent

CIVIL APPEAL

MR ELLIS:

May it please your Honours, Ellis and Edgeler for Mr Siemer.

ELIAS CJ:

Thank you Mr Ellis, Mr Edgeler.

MS LARACY:

May it please the Court, counsel's name is Ms Laracy, I appear for the Solicitor-General with my learned junior Ms van Echten.

ELIAS CJ:

Thank you Ms Laracy, Ms van Echten. Yes, Mr Ellis.

MR ELLIS:

I have two only additional pieces of paper, two pages, to hand up which, if we could do that now please. Won't get accused of ecocide.

ELIAS CJ:

Of what?

MR ELLIS:

Ecocide.

ELIAS CJ:

Ecocide, killing trees.

MR ELLIS:

Yes. This article, as you see, came out in *The Herald* very recently, where in the second paragraph there, two of New Zealand's Chief Judges have stepped forward in defence of the judicial system after –

ELIAS CJ:

Mr Ellis, sorry, can you tell us what you've cited it for, what submission you're making?

MR ELLIS:

Yes, I'm citing it for the proposition that what we have here is a conviction for contempt for publishing an unreasoned judgment which was apparently unappealable and for which nobody is accountable and the Chief Judge here of the High Court is calling for accountability and reasons and I'm saying well, this is what this case is all about. So it's just my little opening comment.

ELIAS CJ:

I see, all right, thank you.

MR ELLIS:

So High Court Chief Judge Helen Winkelmann –

ELIAS CJ:

Well I think we've all scanned it and we've got the sense of it and we understand what you're saying.

MR ELLIS:

Right, well if you – I'll just read –

ELIAS CJ:

And that's why we're here really, isn't it, it is an accountability process, in part?

MR ELLIS:

Yes, I think so. Well, in that case, well you've scanned it, you couldn't have read it all. I'll just read one or two lines, the essence of it. Second to last paragraph on the front page, "The requirements that Judges work in public and they provide reasons for their decision, provides the best means of accountability. Their decisions can be and are subject to public comment and criticism." So what this case is about is, as you say, partly about accountability and, I suppose at simplest, what I'm saying and this is intended to be polite, so please don't take offence, she's just got to harden up, the criticism and you've just got to accept it. People criticise Judges and they move on. Mr Siemer printed this because he was unhappy about the suppression, why he couldn't have a jury trial and why don't he get convicted. So that's the framework by which we're here today.

Now I know you've read my submissions and my learned friends, so I'm not going to have to trawl through them in any great detail and you're well aware that we say *Taylor v Attorney-General* [1975] 2 NZLR 675 (CA) is outdated and I rely principally on the *Independent Publishing Company v Attorney-General of Trinidad and Tobago* [2004] UKPC 26, [2005] 1 AC 190 but, having read my learned friend's submissions, there's not a great deal that I am going to say in response to them but there is one particular aspect that I thought it was of sufficient concern to deal with upfront and that relates to my learned friend's paragraph and I apologise for my voice fading, hope it stays for the day – in paragraph 26, 27 and 28 which will require me to take you to two of the decisions that she's cites. I haven't otherwise proposed, unless questioning requires it, to take lengthy excursions into the casebook but I'm going to look at *Times v United Kingdom* (1979) 2 EHRR 245 and the *Independent*

Publishing case in brief and importantly, the *In re British Broadcasting Corporation* [2010] 1 AC 145 (HL) case at the top of the page.

So my learned friend says that, in 26, the recent decision of the Chief Justice in *Re Times Newspapers Ltd* [2008] All ER 343 (CA) is perhaps instructed in not referring to *Independent Publishing*. So the context of what she's saying in these three paragraphs is perhaps that the House of Lords don't seem to be willingly following *Independent Publishing*. I propose to show you that they are and that my learned friend –

ELIAS CJ:
But this can't be in the House of Lords if it's Lord Phillips CJ, is it? Was it in the House of Lords?

MR ELLIS:
No, I'm sorry it's in the –

WILLIAM YOUNG J:
It's Court of Appeal.

ELIAS CJ:
Court of Appeal.

MR ELLIS:
– the *British Broadcasting Corporation* was in the House of Lords, the *Times* one is in the Court of Appeal.

ELIAS CJ:
Yes.

MR ELLIS:
The House of Lords in the *British Broadcasting* case does follow it. So, I mean, we start with the proposition here that, not referring to it and at the bottom of the page, in the last sentence, "Whatever the reason, the Court of Appeal's failure to reference *Independent Publishing* is curious and most likely deliberate", and with respect, that is nothing more than idle speculation and it's wrong and we'll see why. So if we could turn to *Times Newspapers* which is in their bundle at tab 14, you'll see that the

case – there's actually two cases in the law report. The first one is the Court of Appeal criminal division case and further on, at page 354 there, under the appendix, is the Old Bailey case in first instance and, I mean, that's where we start in the appendix. The trial finished on the 10th of May 2007. So this is a criminal trial in the Old Bailey, 2007. Then we go to the beginning and turn over to page 344, the second page of the judgment –

ELIAS CJ:
344?

MR ELLIS:
344, the second page of the –

ELIAS CJ:
Yes, sorry, Court of Appeal judgment.

MR ELLIS:
Just to get the context of it and about halfway down the first paragraph there, "Various media organisations appealed against the 1981 orders contending inter alia that the section 4(2) order was not necessary to avoid a substantial risk of prejudice to the administration of justice," and two, "That the section 11 order was too wide," and the context there was that there had been an in camera hearing and inadvertently something was not *in camera* and it needed to be suppressed. So in the held part, at the top of page 345, "The publication was in connection with proceedings that might reveal the matter in the in camera order. The section 11 order appeared to cover a publication based on wholly inaccurate speculation but not making it plain that it was mere speculation as to the evidence that had been given *in camera*", and the order is not upheld.

As we go down to (g) there, we see that it's an appeal from Justice Aikens of the 10th of May, as I've already indicated to you, and this date –

ELIAS CJ:
Sorry, is the speculation that it might reveal the matter *in camera*?

MR ELLIS:
Might affect the trial.

ELIAS CJ:

Yes.

MR ELLIS:

Yes. This date, I've lost it but it's some time in July, oh yes, here we are, 10th of July. So what we've got here is, in our terms, a 379A. We've got a rapid appeal anyway, it's quite quick this appeal, from May to July. Nobody has given it a huge amount of thought, is the proposition that I put to you and I'm going to take you to the odd – oh no, I won't for a second. What my learned friend is saying is, it's curious that *Independent Publishing* isn't raised in this issue. Well if you look at (j) on page 345 – no, not (j), sorry (f), you'll see that there were three cases cited only. Whereas if we look at *Independent Publishing* at 10 of my learned friend's bundle and then if we move to page 2, 3 and 4, we see that this is a full scale attack, with numerous authorities, not one where there's just a few minor authorities. I mean, this is chalk and cheese.

ELIAS CJ:

So you're saying this is a hasty appeal and it wasn't a considered judgment, in the sense that the *Independent Publishing* case was?

MR ELLIS:

Exactly Ma'am, yes.

ELIAS CJ:

Yes, all right.

MR ELLIS:

And then if we move to paragraph 28 of my friend's submission, where she's got about 10 lines, trying to downplay the House of Lords judgment, "Even more telling is the division in the House of Lords over the issue in BBC," and we have a little quote from Lord Hope and we see the comment there that Lord Phillip makes and then however, Lord Brown endorsed *Independent Publishing*. The remaining members of the Court took no clear stance on the specific issue. Well let's look at that which is in tab 18 – no it's not tab 18 –

GLAZEBROOK J:

Tab 6, is it?

MR ELLIS:

All right, thank you. Right, so in tab 6, on the first page there we see –

McGRATH J:

So whereabouts are you, should we be looking at now?

MR ELLIS:

Tab 6, first page Sir. Sorry, I'd forgotten the number of the tab. So in the first page, just before "held". "A broadcast reply to the House of Lords for the discharge of the anonymity order, so it might broadcast a television programme suggesting that at least close consideration was warranted as possibility of a re-trial of D –

ELIAS CJ:

Sorry, where are you reading from?

MR ELLIS:

Just above "held", at the bottom of paragraph (f).

ELIAS CJ:

I see, yes, thank you.

MR ELLIS:

Just to give you the context of what we're talking about. So you've got an anonymity order and a re-trial. Then over the page, at the middle of (a), "By virtue of section 6 of the 1998 Act," that's the Human Rights Act 1998, "read in conjunction with section 37 of the 1991 Act, to make such an order if the ultimate balancing exercise required it, discharging the order would not affect against the presumption of innocence. There was no sensible risk the proposed broadcast compromised the fairness of any possible re-trial of D. The striking of the balance between the competing rights was to approached on the basis that the media should be free to exercise their own judgement, that the publication of D's identity pursued a legitimate aim in that the proposed programme would have substantially less impact if D was not identified," and it goes on to talk about proportionately. So those sorts of tests should equally have applied in the Courts below.

Then we notice, on 147, where the lawyers for the BBC, Gavin Millar QC says at (g), "Speech on matters of public interest attract enhanced protection under article 10, see *Forgison v Ireland*", and that case from recollection, is about a journalist who was – who called the police "pigs" in some article and was prosecuted for criminal libel and the European Court said no, that's an interference with your freedom of expression. Then over the page on –

ELIAS CJ:
Sorry, which page are you at?

MR ELLIS:
Sorry Ma'am, I was on page 147.

ELIAS CJ:
Thank you.

MR ELLIS:
And I read the first couple of lines of (g).

ELIAS CJ:
Of the argument?

MR ELLIS:
Yes. Just to say – because that's an important proposition.

ELIAS CJ:
Yes.

MR ELLIS:
And over the page again in (f) and (g), "The House of Lords does not have that power nor does it have power to grant an injunction. Criminal Courts have no common law powers to purport that something said in open Court cannot be reported, see *Independent Publishing*." So Their Lordships were aware of the argument because it was put to them and if we sequentially look at the judgments on page 157 we start with Lord Phillips at (e) – no, perhaps at (d). "I have had the benefit of reading Lord Hope, Lord Brown and Lord Neuberger and I agree with their

reasoning and their conclusion." In (e) I also question whether the order was one that it's appropriate to make in the exercising of inherent power that this House must enjoy to insure its proceedings do not result in an unjustified interference with a parties article 8 right to respect for a private life.

Lord Hope, on page 158, the next page, His Lordship's judgment is the second judgment in terms of lead judgments. At 5, "My Lords I have the advantage of reasoning in draft. Lord Brown, I adopt his background and I'm in full agreement with his reasons." So Lord Hope is in agreement with Lord Brown, Lord Phillips is in agreement with Lord Brown and over on 159 there, "The circumstances that led to the making of the order are obscure. No reasons were given." It seems to be – have something in common with us and over at 13, on page 160 which is the passage that my learned friends appear to be citing, at least in the footnote in their paragraph 28, there's paragraph 13, they extract a little of but a larger reading of 13 puts it more in context, "I think that this issue has to be approached on the assumption that is at least arguable the Court have power, the House have power to make the order. Section 61 has an important part to play but it cannot confer on a Court a power that it doesn't otherwise have. It would seem therefore, that the setting aside of an order that has been made without jurisdiction cannot be said to be incompatible with any conventional right that it's preservation might protect. So the assumption must be the Court did not have power to afford it that protection."

Then down at the bottom there, "I agree therefore with Lord Pannick, that the decisive issue is where the setting aside of the order would be incompatible with these rights under article 8." So that's the decisive issue, not whether we've got the power and that is why nobody else bothers to talk about it because it's irrelevant, the decisive issue is what is articulated there.

Then still in Lord Hope, at 164, where His Lordship is referring to the article 10 right, the freedom of expression –

ELIAS CJ:
I'm sorry, a bit slower –

MR ELLIS:
You're lost?

ELIAS CJ:

No. I'm just trying to think of the distinction that's being drawn here. This is asserting an inherent jurisdiction in the House of Lords to protect the article – is it article 6? Article 8 right, in connection with its proceedings.

MR ELLIS:

Yes and there's –

ELIAS CJ:

Irrespective of the outcome of whether there had been jurisdiction to make the original order, is that right?

MR ELLIS:

There is a balancing exercise to be done between article 8 privacy and article 10 –

ELIAS CJ:

Yes.

MR ELLIS:

– freedom of express and Lord Brown makes it a little clearer when we get to it.

ELIAS CJ:

Yes, I was just trying –

MR ELLIS:

Perhaps I was jumping the gun –

ELIAS CJ:

– to work out what power the House of Lords was relying on. It's its own power to act to protect article 8 rights and then as to whether it's necessary to do, presumably you go on to the balancing.

MR ELLIS:

Yes and I think there is a statutory power as well but neither of these questions, as we'll see a little more clearly in Lord Brown's speech, are necessary to decide because the real issue is elsewhere. So where was I? So turning to 164, still in Lord Hope and the article 10 right and a little way, (f), "Any restriction of the right of

freedom of expression must be subjected to very close scrutiny but so too must any restriction on the right privacy," and my proposition of course that relates to this case is, we didn't get that, didn't get a close scrutiny.

Also, at 27, "There remains the question of proportionately." So there's a proportionately test as well as a close scrutiny test. At 29 Lord Hope agrees with the order of Lord Walker, who has also read Lord Brown and Lord Neuberger's speech, agrees and Lord Brown – I'll just deal with Lord Neuberger because they had nothing much to say on him, he's at page 177, "I've had the benefit of reading Lord Phillips, Lord Hope and Lord Brown. I agree."

Then Lord Brown, who delivers the main judgment. The first passage I want to draw your attention to is at paragraph 51 of the judgment, on page 171 and about halfway through, maybe two-thirds, "Rather more fundamentally there was the consideration of whether such duties or powers purportedly arising under the 1973 rules were lawfully imposed or conferred on the Court. Where was the authority to make such rules? On this latter question, it is important to have in mind the detailed legal analysis and clear conclusion arrived at by the judicial committee in *IPC*." So detailed legal analysis and clear conclusion and, we've seen from the three or four columns of cases, that there was a large amount of case law involved in that sanction.

Over the page, at the top of the page, on top of 172, quoting from *IPC*, the heart of *IPC*, Their Lordships, "The ratio concluded, if the Court is to have the power to make orders against the public at large, it must be conferred by legislation, it cannot be found in the common law."

Then at 53, "To my mind however, for reasons which I shall shortly come, it is not necessary to resolve any doubts about the vires or scope of the 1973 rules one way or another. Similarly, it's unnecessary to reach any concluded view upon section 11 of the Contempt of Court Act which would have allowed the makings," and that was the statutory power I was referring to earlier. We don't need to do that.

Then at 54, "The reasons why these questions seem to be in the end unimportant, is that on any view, the House was bound at this time, an anonymity order was made three weeks before the Human Rights Act came in, as it's bound today and that evolves as balance between article 8 and article 10." So you don't answer the

question about the powers because it's not relevant to – and everybody is agreeing with Lord Brown. So when my learned friend suggests to Your Honours, in paragraph 28, "The remaining members of the Court take no clear stance on the specific issue," I say that that isn't a fair reading of the judgment. A fair reading of the judgment is that Lord Brown deals with it, says it's irrelevant and everybody agrees with him. So it's not surprising that the clear legal analysis in *IPC* is plainly, in my submission, adopted. So I don't just rely upon the Privy Council, I rely upon the House of Lords as well. That was the purpose of that excursion.

CHAMBERS J:
Do you intend taking us to *IPC*?

MR ELLIS:
Not unless you need me to. I am saying the ratio is at the top of page 172, as adopted by the House of Lords.

CHAMBERS J:
Well could I take you to *IPC* because there is a question I would like to ask you concerning it.

MR ELLIS:
Yes Sir.

CHAMBERS J:
If you turn to – I happen to be looking at tab 10.

MR ELLIS:
Yes, yes I am too, as we've got it open.

CHAMBERS J:
What I would just like to ask you Mr Ellis, looking in particular at issue 1 on page 12 and then at paragraphs 21 to 23, is it possible –

MR ELLIS:
Hold on a second, I've got to find – is this Lord Bingham?

CHAMBERS J:

No, this is the Privy Council, it's Lord Brown's.

MR ELLIS:

Page 12 is Lord Brown.

CHAMBERS J:

Well there was just one judgment.

MR ELLIS:

Yes, okay.

CHAMBERS J:

Yes.

MR ELLIS:

So page 12, paragraph?

CHAMBERS J:

The heading of, "Issue 1," and then paragraphs 21 to 23. Is it possible that what the Privy Council meant was that when it comes to open Court proceedings which is what they were dealing with in *IPC*, you have to have a statutory basis for any order but when it comes to a trial within a trial, the voir dire situation, testing of evidence and other sorts of matters that happen in chambers, of course there an order can be made and must be made for the due administration of justice and in particular, fair trial rights. Do you think that's a fair reading of *IPC* and I may say, there do appear to be rather similar observations in the *Attorney-General v Leveller Magazine Ltd* [1979] AC 440; 1 All ER 745 decision, page 450 for instance, Lord Diplock. Do you accept that that is a fair reading of those decisions?

MR ELLIS:

Well subject to having a further reading, yes.

CHAMBERS J:

If it were, would it be correct to analyse what Justice Winkelmann was doing in this case as effectively a chambers matter, a trial within a trial, it just happened by reason of the way procedure works here. It was being dealt with in advance of the trial, but

it's the sort of matter that the jury would not normally have been expected to hear, had the matter happened to have arisen say right at the start of the trial?

MR ELLIS:

Well one of the issues is whether that should be occurring or not. Obviously that is a question that couldn't be put to a jury, yes but the issue is, I think, probably – probably part of my answer to that is in *R v Mentuck* 2001 SCC 76, [2001] 3 SCR 442 which is in 18, where the – in this bundle, 18. I'm just sticking to the headnote here, and this case was about – and in the headnote on page 443, and the case involves here a one year ban on the identity of undercover police officers. It's a limited time ban on that, what the case is about, and then the – I was going to come to this later but maybe I'll deal with it now – no, I will come to it later. Go over to 445 where there's a – sorry, the bottom of page 444, "Even at a serious risk of not getting a fair trial has been demonstrated, the deleterious effects on the ban as to operational methods on the rights of freedom of the press, the accused's rights to a public trial, would substantially outweigh the benefits to the administration of justice," and a little further down there, "Allowing public scrutiny of the trial process is to the advantage of the accused as it ensures the trial is conducted fairly," and because it can vindicate a person." So in answer to you, yes it is not before the jury but it should be conducted in public. It's a significant public important whether or not there's a jury or not. That shouldn't be held behind closed doors.

CHAMBERS J:

Yes, that's the second part of my question. It's just that reading all the cases that you and Ms Laracy have given us, it would seem that there is a division of view about the power to suppress material from – with regard to the open Court process, but I haven't found any decision yet which says that at least within the trial within a trial part of the process, or equivalent chambers type hearings, there doesn't seem to be any authority which says you can't suppress that for a time for the purpose of ensuring justice and fair trial considerations.

MR ELLIS:

Well I think I would share your thought processes. I haven't found that either but the Criminal Justice Act of course allows you to suppress evidence, submissions and so on but not judgments. There's a statutory power that allows you to do that, so why would you need a common law power?

WILLIAM YOUNG J:

What about a power to suppress, say a bail decision that records a Judge's view of the strength of the Crown case?

MR ELLIS:

Bail Act.

WILLIAM YOUNG J:

Is that covered by the Bail Act?

MR ELLIS:

Yes Sir. So there's no need to have a common law. I mean, Parliament has addressed the issue and yes, you should be able to suppress matters that are in chambers, as your Honour puts it but there's a limit to what you can suppress and our proposition is, you can't suppress everything and what we had here which is really the heart of the issue, isn't it, that Her Honour made this decision without giving any reasons, got up Mr Siemer's nose. He may have, in the sense of a lawyer, might have done something different. He might have over reacted but he's a journalist and he thought no, this isn't right; this should be out in the public arena. Mr Burns, sometime later, decided that the order was overboard too and applied to have it amended and then what we get, at least from my client's perspective and I think it's a valid one from an independent observer's perspective, what seems to be visages on him, possibly because he's Mr Siemer, is some sort of judicial vengeance, to say you can't do this and we'll make sure you don't do it, without a proper analysis of the rights of freedom of expression.

CHAMBERS J:

Since you've raised section 138, could I just ask you one question that I have on that too please?

MR ELLIS:

Yes Sir.

CHAMBERS J:

And it's this, given the apparently wide powers under that section, the subsection (2), "Forbid publication of evidence –

MR ELLIS:

Could you –

CHAMBERS J:

I'm sorry, tab 1 of your authorities, 138.

MR ELLIS:

Yes, got it, thank you.

CHAMBERS J:

"To suppress, in the interests of justice, all of the evidence, all of the submissions, the names of witnesses", et cetera. What is the rationale, do you say, for why judgments themselves were not included in that list because it does seem odd that you can suppress everything else about the trial effectively but not the judgment?

MR ELLIS:

Well because one assumes, or presumes, that Parliament is aware of the right of open justice and freedom of expression and if the judgment doesn't contain those matters but it contains a sort of general principle, like should we have a jury trial, then it wouldn't be intending to suppress that.

CHAMBERS J:

So you do accept that section 138(2) would permit a ban on publication of a judgment, insofar as it might record evidence or submissions made?

MR ELLIS:

Well that appears to be the plain meaning of the section.

CHAMBERS J:

Yes, thank you.

ELIAS CJ:

Yes because it applies to accounts and the account of the evidence in the judgment must be able, pursuant to section 138, to be suppressed.

MR ELLIS:

I'm not quite sure that I understood that. "It applies to accounts –

ELIAS CJ:

Well the question that was put to you was, there's no mention of judgments but if there is an issue with the content of a judgment, referring to evidence or submissions, the publication of which pre-trial might compromise, it's broad enough that's – you've accepted that it applies?

MR ELLIS:

Yes, you redact it, as my junior says here, you redact it but in the – sorry, did somebody –

WILLIAM YOUNG J:

Well I was going to just say, it's a reference to the evidence adduced, does it naturally cover a reference to evidence which is intended to adduced?

MR ELLIS:

Well that would seem highly arguably, wouldn't it? I mean, we haven't addressed that issue but in most circumstances it would seem likely but –

ELIAS CJ:

The evidence must be before the Court in some way, even if it's an affidavit referring to evidence to be adduced that's being suppressed, wouldn't it?

MR ELLIS:

Well some sorts of application and – a search warrant or somebody's evidence that you're trying to have removed or, you know, some, yes, there's got to be some cause or connection –

ELIAS CJ:

Yes.

MR ELLIS:

– with the evidence that's coming in but in this case we've got which is probably important to get in at this point, the only evidence there is that this may affect a fair trial is contained in the blue book which is technically volume 2 of your case on appeal but it's actually the index to the case in the Court of Appeal. It's got a blue

cover. You've got that? If you look at page 21 which is an annexure to one of Mr Siemer's affidavits and it's an affidavit from Jamie Beattie Lockett and – who is one of the accused in the case and you probably know more about them than I do because they weren't convicted. They must have been one of the ones, as a result of your decision, that the case didn't proceed on.

So at paragraph 5, what I can and do say is that, "I cannot conceive how Mr Siemer's publication of the judgment denying the trial by jury could jeopardise my right to a fair trial in this prosecution. Quite to the contrary, Mr Siemer shine the light of day into these proceedings which have been for the most part languishing in secret for the last four years. I consider his reporting to not only be accurate but directly helpful to the defence obtaining a fair trial and the overall interests of justice." Now that's uncontested. That is the only –

ELIAS CJ:
But that's his opinion. You really need to convince us that there is nothing – well, if it's relevant, you need to convince us that there's nothing in the judgment that warranted suppression in the interests of fair trial. His opinion isn't enough. You need to convince us, don't you?

MR ELLIS:
Well, well I need to start by saying that's the only evidence, uncontested evidence, and it's –

CHAMBERS J:
I don't think that's quite right Mr Ellis, is it, because we have evidence from somewhere that when Mr Burns applied to have the order relaxed to some extent, some of the defendants objected to that, didn't they? I can't remember where I've read that –

MR ELLIS:
Yes, yes, they did.

WILLIAM YOUNG J:
At page 70 there's a not very satisfactory document at page 70 of the volume.

MR ELLIS:

Yes that's, I think the ones who were present objected, the ones who –

McGRATH J:

I think it's at page 71 of the pink folder. I think it's an email.

MR ELLIS:

I don't think the rest –

McGRATH J:

And again it's, I think it's the following pages.

MR ELLIS:

Yes –

CHAMBERS J:

There may have been a division of view, I was just drawing to your attention, but I don't think it's quite correct to say there's no evidence contrary to Mr Lockett's.

McGRATH J:

There may be somewhere.

MR ELLIS:

Well yes, I understand. I don't want to overstate the position but I think I can stand firm and say there is no evidence to the contrary they objected. I'm not sure that we know why they objected and whether anybody was saying it was because they wouldn't get a fair trial. It may have been for strategic reasons at the time.

McGRATH J:

Well the Judge was satisfied, wasn't she, looking at paragraph 5 on page 70, that a prudent course was to continue to suppress the content of the judgment, this is following the précis, accept if it's not in effect.

MR ELLIS:

Well that's the –

McGRATH J:
That's the outcome of that.

MR ELLIS:
Yes, the outcome of the application to –

McGRATH J:
Yes. So she came back and considered the matter in light of counsel for the accused, who opposed the Crown's application to lift suppression orders, or at least limit suppression orders and she decided that she would leave them in place, apart from allowing the result to be published?

MR ELLIS:
Yes but again, she doesn't consider what I would say Sir, is an imperative. She's got to consider *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA). What are my reasons –

McGRATH J:
Yes, I fully understand, that's not a –

MR ELLIS:
– and the –

McGRATH J:
– closed the matter but it's just the – that's the reference really to the Judge's view of the submissions put to her by counsel for the defence, when the Crown wanted to substantially lift suppression orders.

MR ELLIS:
Well at paragraph 4 of 70, "All counsel for the accused who attended this morning's conference," so that accords with what I was trying to remember, the people who were there, did object, opposed the Crown's suggestion that the suppression orders be limited but we don't know why. So to suggest that it's for some reason that they wouldn't get a fair trial, to Justice Chambers, I mean, I don't think one can extend the logic to that and I'm conscious of the fact the Chief Justice says I've got to persuade you –

ELIAS CJ:

Well no, I'm probably putting it inadequately but I would have thought that on your argument, it was largely irrelevant whether all parties wanted suppression. Your argument takes the higher ground, that unless objective – or at least, it seems to me, that unless objectively the interests of justice outweigh the wider public interest in obtaining this information and in open justice, then the evidence, or the judgment should not have been suppressed. So there's an objective assessment. I'm not quite sure why we are looking at what the opinions of the parties were?

MR ELLIS:

Well because, in my submission – yes, I think your Honour is wrong because it's for the respondents to show that this needs to be – we're raising the Bill of Rights really –

ELIAS CJ:

Yes, I said I had probably expressed it inadequately in saying that it was for you to persuade us but your position is that these relative, or this competing interests, need to be objectively accessed by the Court. It's not a question of simply looking at what opinions those participants in the process have, is it?

MR ELLIS:

I sort of want to reserve my position but I think – the thought that first occurs for me is it's a bit like a refusal application. The subjective views of the person complaining need to be taken into account but the better decision is the objective one, with the higher weight would be placed to the – I don't think you can ignore the subjective views because it must inform the objective view and there hasn't been a close scrutiny, or there hasn't really – in my submission, I don't think there's really been any scrutiny, of any meaningful sense, to say why this would have caused damage to the trial and that's really the problem.

WILLIAM YOUNG J:

Mr Ellis, just to pick up something I said before. There's a better version of the minute of the Chief Judge at page 101 of the pink volume which does record that Mr Bioletti was present for Mr Lockett but anyway, I mean, for myself I'm rather in the Chief Justice's camp, that it's not what –

MR ELLIS:

I think that's a different – that's the telephone conference on the 21st of December –

ELIAS CJ:

Well, it's the same one.

WILLIAM YOUNG J:

It's the same one, I think.

CHAMBERS J:

It's the same one.

MR ELLIS:

Is it?

GLAZEBROOK J:

And if you actually look at it, on paragraph 3 on page 101, Mr Burns had actually identified those parts of the judgment which should be edited to preserve the fair trial rights of the defendant. Now presumably when they were arguing therefore for a wider suppression, that was because they took the view that the, that those parts of the judgment that he was suggesting be edited to preserve their fair trial rights did not go far enough?

MR ELLIS:

I'm not at all sure that anybody turned their mind to the question of whether the one that was concerning Mr Siemer, the jury trial suppression point, was one of those.

GLAZEBROOK J:

Well no but the results was actually released. That was the whole point, wasn't it, that the result in terms of the jury trial or not was actually released after that?

MR ELLIS:

Yes but the reasons weren't.

GLAZEBROOK J:

But the reasons weren't agreed.

MR ELLIS:

And, well I think we had this argument in one of the Courts below of course. You shouldn't be having this sort of argument at a telephone conference. The public should be – there should be an open Court.

GLAZEBROOK J:

Well that would slightly defeat the purpose, wouldn't it? If there were matters being referred to that were going to compromise fair trial rights it would be odd, wouldn't it, to have an argument on evidence that somebody's arguing to be excluded in open Court and have the evidence referred to in open Court, wouldn't it?

MR ELLIS:

No Ma'am, it wouldn't. It would be –

GLAZEBROOK J:

In terms of, I'm not sure that it really is of any moment, but –

MR ELLIS:

Well I think it's a great moment because it's the heart of what we're talking about, can you do things in secret, effectively. If you hold it in open Court you've got power to suppress under section 138. The principle of open justice is not adhered to if you're having this in private and when there are matters of public importance we should start with the proposition that we're in public and there's good reason to be otherwise. But I mean we're not even in chambers, are we, where the press might be present, because we're on the telephone. So it's more secret than it might otherwise be or more private than it might otherwise be if you were in chambers.

GLAZEBROOK J:

Can I perhaps just take you back? You – I just want to make sure I understand your argument. When you were asked about the common law power to suppress evidence et cetera if it was heard in chambers you agreed with Justice Chambers that in fact there seemed to have been that power at common law.

MR ELLIS:

Well I don't know that I did say there was a common law but I assumed there was under the Criminal Justice Act.

GLAZEBROOK J:

Well yes but it's dated over to the Criminal Justice Act that's why I asked you the question. The cases in the United Kingdom seem to suggest, as Justice Chambers put to you, that there was a power to suppress at common law evidence in matters of that kind that might compromise a fair trial.

MR ELLIS:

Yes.

GLAZEBROOK J:

So you accept that there was that power at common law?

MR ELLIS:

I accept there was a power at common law, yes.

GLAZEBROOK J:

Now as I understand it your argument is that that power was superseded by the statutory power or duplicated by the statutory power?

MR ELLIS:

Superseded.

GLAZEBROOK J:

All right.

CHAMBERS J:

What about Mr Ellis, the possibility of re-categorising the power, forget about inherent power or inherent jurisdiction for a moment, as a preventative remedy under the Bill of Rights Act to ensure no breach of fair trial rights?

MR ELLIS:

Hmm. Yes. I think – just bear with me while my thought processes adapt that. In a recent case that I was arguing before Justice Arnold and, I can't remember who the other two were, the decision hasn't come out. I was trying to say that in section 38 of the CP(MIP) Act, there's no power in the statute to give a – order a report on a mentally ill or intellectually disabled person as I think may have been your decision in *McCartney* and it raised the issue of whether there was a power and I said well, if

there isn't a power there, there's a Bill of Rights power and then I got asked well, does that mean you can imprison somebody under the Bill of Rights which I, you know, intake of breath which I'm sort of thinking with what use I am and my response to that which I think is the same here, is providing there's a minimal impairment to the right yes, then that is possible. If that's a minimal impairment of a freedom of expression right, then a preventative remedy, as you put it, or preventative mechanism, I prefer to call it, would be in order.

CHAMBERS J:

Yes, I'm not sure whether "minimal" is right because, as you yourself have submitted to us today, when you've two conflicting rights under the Bill of Rights, one has to do a proportionate response, doesn't one and it would depend on the facts of the case as to which right had to take precedence and presumably, the fact that the possible remedy you were thinking of to preserve fair trial rights was going to be of short duration, might be an important factor for instance?

MR ELLIS:

Yes, I – there's several propositions there really. The first one I think is, with respect, minimal impairment rights must be the starting point in any rights issue. Now whether that is somehow altered when you've got a clash of rights – I'm having difficulty understanding how it can be but, as human rights lawyers, we all try and avoid one right beats another one, as Judges do but we have well accepted European culture as prudence but freedom of expression is an enhanced right, it's very important in a free and democratic society.

We don't have the same sort of privacy rights in our domestic law, do we, that the Europeans have but nevertheless, that's assuming it's just a balance of one right over another. I would still say you've got to reconcile them whichever way you're going to do it, with a minimum infringement of somebody else's rights. I can't see how that principle doesn't apply Sir.

McGRATH J:

There's a statutory provision that justified limitation provision in the Bill of Rights and minimum impairments is a concept within what might be a justified limitation where rights clash, fair trial clashing with freedom of expression.

MR ELLIS:
Yes, I'd agree with that, yes.

McGRATH J:
Yes and really I suppose, the way the Courts in New Zealand have approached that is looking to overall find a balance that protects, as far as possible, both values as much as can be.

MR ELLIS:
Yes, I think that's correct, that has been the approach of the Courts, except under the case we're appealing. I mean, we say there's been an undue attention to protecting, however we want to call it but let's call it, in colloquial terms, the rights of the judiciary rather than –

ELIAS CJ:
The exercise of judicial authority, you say?

MR ELLIS:
Yes.

ELIAS CJ:
Yes.

MR ELLIS:
Yes and that one's been overplayed with scant attention to the freedom of expression. It's not, in simple terms, it's not a fair go.

ELIAS CJ:
Can I just ask you – sorry, is that finished?

McGRATH J:
No, thank you.

ELIAS CJ:
Just picking up really on what Justice Chambers said, it does occur to me that the only reason to look at this in terms of remedy under the Bill of Rights Act, is if section 138 doesn't provide an effective remedy because if you are exercising authority

under the statutory provision, the Courts are of course bound by the Bill of Rights Act, so the determination there must give effect to the Bill of Rights values. So I'm not sure in substance, it matters very much whether this is described as a Bill of Rights remedy. That might be necessary only if there is no other effective remedy, that it would be necessary to shape one.

MR ELLIS:

Well I'm not sure we're quite on the same wavelength because I was – and I'm not sure if I'm being overly sensitive or not but I was trying to avoid falling into a trap that the only remedy – you've got to deal with this after you've been convicted and sentenced and this is your remedy, whereas I wanted to convert it into a Bill of Rights mechanism, rather than necessarily a remedy, or power –

ELIAS CJ:

Well it has to be Bill of Rights compliant, whatever.

MR ELLIS:

Yes but it's not just a remedy. Depending on how we mean – I wasn't quite sure on how remedy was being used and I –

ELIAS CJ:

I see, I see, yes, I see –

MR ELLIS:

– was trying to be cautious –

ELIAS CJ:

– yes, I was picking up on what Justice Chambers said but I suppose, the question I have for you is, on your argument, it's not necessary to fashion a Bill of Rights remedy because section 138 provides the authority and it must be exercised in a manner that's Bill of Rights compliant.

MR ELLIS:

Yes, I think that's correct and I suppose, if we had no – maybe going out on a limb here. Let's imagine we didn't have the Criminal Justice Act statutory provisions and then I'm still arguing that the common law has been removed, well there's a Bill of Rights power to have a fair trial and one might be able to suppress minimally to

ensure that you have a fair trial under the Bill of Rights but given that we've got the Criminal Justice Act, it will only arise if the provisions of the Criminal Justice Act don't apply, in some rare circumstance that Parliament hasn't covered the field but it appears to have.

ELIAS CJ:
Yes, thank you.

WILLIAM YOUNG J:
Can I just, while we're talking 138, ask you this. Have you addressed at all the power to suppress aspects of a civil case? Now I think there is, one of the earlier cases, one of the House of Lords cases is on this, isn't it?

MR ELLIS:
Yes but we – that's – well we –

WILLIAM YOUNG J:
Is it *Scott v Scott* [1913] AC 417, I think, isn't it?

MR ELLIS:
I don't think we have addressed that because whilst we disagree between the parties as to – and we seem to not be quite sure what we're doing here in terms of is this a civil case or a criminal case and it is part of my – part of the plank of the law is so inaccessible and uncertain you don't know because we started off as a civil case, we became a criminal case, we imagine we're a criminal case in this Court but we haven't addressed in substance –

ELIAS CJ:
But that's the consequential proceedings, isn't it –

MR ELLIS:
Exactly, yes, we have –

ELIAS CJ:
– Justice Young is asking you about –

MR ELLIS:
Understand that. We haven't addressed what –

ELIAS CJ:
Yes.

MR ELLIS:
– if this was a suppression order in a civil case in the first place. No, we haven't addressed that because – well, nobody was in disagreement that what was being suppressed was in a criminal case. So we haven't turned our mind to that because it appeared to be unnecessary. If you want me to, for some broader policy reasons, I'll give it a stab.

WILLIAM YOUNG J:
Well it's just that there are – it is very common in civil cases that deal with issues that are embarrassing, perhaps of a sexual nature, for the names of the parties or the witnesses to be suppressed.

MR ELLIS:
Yes.

WILLIAM YOUNG J:
Now as far as I'm aware, there's no statutory authority for that.

MR ELLIS:
A case, whose name I can't remember but it's in the law reports, maybe the procedure reports, one of my cases in Christchurch, where the plaintiff wanted to sue for malicious prosecution for some sexual offence that he'd been accused of which was dropped but he wouldn't proceed until –

WILLIAM YOUNG J:
Without an undertaking of confidentiality from the Court, effectively.

MR ELLIS:
Yes and that's I don't – I'm sorry, I can't remember what it is, it's apparently the leading case in civil name suppression but I can't remember for my life what's it called but somebody in a Christchurch case and I think you're right, there is no

statutory, there's no – it's just a common law basis but without re-reading the case I can't remember but –

WILLIAM YOUNG J:
But at the broadest stretch, your argument would say that those orders, to the extent that they cover what happens in open Court anyway, are ultra vires?

MR ELLIS:
I don't understand that.

WILLIAM YOUNG J:
Well that your argument would be I guess, that leaving aside the, you know, the statutory focus on section 138 which I accept is an essential part of your argument in this case but you would say that absent of statutory power, there is no power to suppress, other than perhaps in relation to what occurs at a trial within a trial?

MR ELLIS:
Well other than the discussion that we've just had about the Bill of Rights because the Bill of Rights requires you to have a fair civil trial as well as a fair criminal trial and presumably, that is the quintessence question of Judges asking themselves, how do I get this trial fair and I think President Richardson in some article in the *Canterbury Law Review* said, you know, Judges are remiss, I think would be a fair word, not bringing the Bill of Rights into civil cases but it's got more use and why shouldn't you bring it in and it's something the covenant says, everybody is equal at a trial and it includes civil and criminal. So I don't see why the Bill of Rights doesn't as well. I know 25A, it doesn't have a mirror reflection for civil but 27 is available, isn't it.

WILLIAM YOUNG J:
Natural justice.

MR ELLIS:
Yes.

ELIAS CJ:
I haven't understood – well, perhaps you can answer. You do seem to be accepting that there is inherent power to make suppression orders for proper purpose. You say

there is no power to suppress a judgment. I mean, leaving aside the section 138 and the statutory process.

MR ELLIS:
Inherent power. Now I say there's a – leaving aside the statutory but – by leaving aside the statutory process we mean the Criminal Justice Act.

ELIAS CJ:
Yes.

MR ELLIS:
I'm saying the Bill of Rights which is a statute, has a power that can be utilised and hasn't been thought of in this context. So I was quite attracted to the proposition is it a –

ELIAS CJ:
But that would still be inherent or ancillary or necessary in the interests of justice, the sort of justifications that underlie the inherent jurisdiction generally.

MR ELLIS:
Well, I think that's – no, no, I don't wear that because we've got to be able to have that power in the Courts that don't have inherent jurisdiction as well, don't we?

ELIAS CJ:
Well they do, they're ancillary.

MR ELLIS:
Oh, I see, well it's ancillary –

McGRATH J:
They all have inherent power, it's inherent in their statutory powers.

ELIAS CJ:
If it's necessary to achieve their functions.

MR ELLIS:
Well we're getting into labelling, aren't we here?

ELIAS CJ:

Yes.

MR ELLIS:

I mean, I'm trying –

ELIAS CJ:

It's easy to do it, yes.

MR ELLIS:

Concerned with the principle. The principle is a statutory power because the Criminal Justice Act in criminal cases has covered the field and there's some additional powers under the Bill of Rights that nobody has thought about but there's no common law power left in the terms of what *IPC* says and what, I think my Indian Judge Katju, he says, you know, this is just imperial – better not say that word, imperial dog law I think he calls it. You know, we should grow up and, you know, not follow the British system and if it doesn't hurt the Judge let's, you know, move on, we're big boys or girls.

McGRATH J:

I really thought that, in relation to the statute, the point you were really putting to us was that the statute, to use your words a few minutes ago, covers the grounds and it abrogates any inherent powers that might otherwise lie inherent to the statutory provisions giving the Court power to conduct proceedings. It abrogated because there's a statutory provision that covers the grounds.

MR ELLIS:

I would adopt that as a proposition, yes.

McGRATH J:

Yes and so it's a question of interpretation of the statutory provision and you say it doesn't apply to the judgment in this case?

ELIAS CJ:

The whole judgment?

MR ELLIS:

The whole – no, I say it doesn't apply to the judgment and we didn't really get into an analysis of whether, if there's any bits of evidence in it they could be suppressed but –

ELIAS CJ:

I had understood you to be accepting that, for proper reason, there could be redaction of the judgment?

MR ELLIS:

Yes.

ELIAS CJ:

Yes.

CHAMBERS J:

What about Mr Ellis, and I'm not saying it's this case, but what about the fact that a particular application had been made by a defendant pre-trial? The fact of making that application, in itself, might interfere with that defendant's fair trial rights. In those situations, could the judgment be suppressed under section 138, or under inherent power, or pursuant to the Bill of Rights, until the trial was complete?

MR ELLIS:

One, it can only be suppressed under the Criminal Justice Act if it fits within the statutory provisions which, unless I'm wrong, it doesn't appear to fit in there but it depends what the application is about.

CHAMBERS J:

It might be an application to try to suppress great swathes of evidence –

ELIAS CJ:

Or a confession, say.

CHAMBERS J:

Yes and the defendant might not want it known that he or she had even applied to have anything suppressed. That may just – and that frequently suits the defence. In those situations – well, let's put to one side 138 for a moment. Do you accept that

either, under inherent power or pursuant to the Bill of Rights, that the Judge could suppress the entire judgment in order to ensure fair trial rights of that defendant?

MR ELLIS:

Hmm. Well, as you say, it would be fact specific and I certainly don't accept there's an inherent power to do it. Whether there's a Bill of Rights power would require a proper scrutiny and the balancing exercise but it would seem, if you're talking about – I know you say put aside the Criminal Justice Act but it's the evidence, isn't it, the confession, well that's going to be the main bit of the evidence, there is a statutory power so why put a –

CHAMBERS J:

Yes but I'm really referring to the whole fact that the application itself had been made which – we can all think of situations where defendants would not want that to be known.

ELIAS CJ:

Well in the case of a confession, where if the evidence is ruled admissibility at trial, the defendant will want to contend that it isn't confessional, or put up some explanation. So the fact of trying to exclude may be highly prejudicial.

CHAMBERS J:

Yes, yes.

MR ELLIS:

Well and I suppose, you know, following your logic, that if it was – there's just an application to suppress the confession because, let us say, it was obtained by unfair means or inhuman treatment or something and that is the only application before the Court well – so the only things that can be in the judgment must relate to that. So we're then saying well, can you suppress the whole judgment. Well it coincides, in those circumstances, with only being about a confession. So certainly putting my Bill of Rights hat on, I wouldn't have any problems.

CHAMBERS J:

Mhm. Well otherwise it would be – if that weren't the case, it would be completely counterproductive of the whole pre-trial mechanism because defendants, to protect themselves, would simply have to take all objections at trial and have voir dires the

whole time, in order to protect that nothing got out about what they were applying about and the like.

MR ELLIS:

And I suppose the balancing exercise Sir, would – bearing in mind it's fact specific, I mean, the case we're currently dealing with is one of some significant public importance, in the sense there's lot of – I don't know how many there were, was it 13 or 17, how ever many it was and that caught the public imagination. One person's confession is not going to retract – well it might do, I suppose if it was a Weatherspoon or something, might attract the public attention but the balancing exercise would hopefully sort that out.

ELIAS CJ:

I was just wondering whether it might lead to Judges simply announcing rulings with reasons to follow but I suppose that wouldn't be proper because it would prevent pre-trial appeals which are envisaged.

MR ELLIS:

Yes, that would subvert *Lewis v Wilson and Horton*, wouldn't it, if you didn't give your reasons promptly and, I mean, well I can only ever recollect it happening once when I applied for a habeas corpus which was Justice Cartwright, so it must have been a long time ago and we hadn't got the reasons when we were in the Court of Appeal but there was a sort of synopsis of reasons that she gave. So even if you hadn't given the reasons, presumably the system would ensure you got some sort of synopsis so you could get on with it because I think if you appealed, it would precipitate the reasons, wouldn't it, so I don't think it would be abused.

All right, well we seem to be getting on very well here, so perhaps while we're –

ELIAS CJ:

Can you tell us, while you're paused and we've stopped interrupting you, how you intend to present the rest of the argument, where you want to take us?

MR ELLIS:

Well we seem to have covered a significant amount of the major part of it, so there's – interchange is very helpful because it covers a lot of what I was going to – immediately, I was going to look at, as we've been dwelling on the respondent's

casebook, I was going to go back to *Mentuck* to tell you where I was – what I needed to finish in that case and then – it probably won't take us to half past 11 but then I was going to have rethink in the break as to significant bits I don't need to cover because we've already dealt with it. So I don't want to just blindly go on so –

ELIAS CJ:
Yes, thank you Mr Ellis, that's helpful.

MR ELLIS:
So at tab 18 of my friend's bundle, the undercover police officers. So this is a decision of the Supreme Court of Canada, to which they refer to – can't quite remember where they refer to it but they may be able to tell me. Well, I'm sure they'll find it. The headnote – sorry, 68. Oh no, it's the 89 one that I was referring to. Yes, it is in 68 too but the – so the question here is whether confidentiality orders are justified in principle and a justified limitation and I think –

GLAZEBROOK J:
I'm sorry, whereabouts are you?

MR ELLIS:
I'm in paragraph 80 – the heading to paragraph 88 of the respondent's submissions, posing the question whether confidentiality orders are justified in principle and this case is cited by my friend and I suppose I first want to say that I don't agree with the conceptualisation of the question, or it doesn't go far enough. I mean, what we really ought to be asking is, what is the justified limitation as to why you can be committed for contempt, not whether there's a justified limitation on the freedom of expression. There might be but if there is, what's the consequence of that, can you be locked up for breaching this? The justified limitation has to go a little bit beyond that and what it needs to do is what I think is suggested in the *Mentuck* case at page 444.

"The first branch of the analysis requires consideration of the necessity of the ban in relation to its object of protecting the proper administration of justice. The risking question must be well grounded in the evidence and must pose a serious threat to the proper administration of justice," and I pause there and go back to our earlier discussions where I say, there is no meaningful evidence that there's – well grounded in the evidence, that there's a serious threat to the administration of justice –

ELIAS CJ:

Is that a submission based on the substantive decision of Justice Winkelmann that there's nothing in it, is that what you're saying? There is nothing in it which –

MR ELLIS:

There's nothing in it that –

ELIAS CJ:

– affects the administration of justice?

MR ELLIS:

Or there's no – and there's no encapsulation of anything in the High Court or Court of Appeal on this case, that identifies a serious threat to the administration of justice. It's certainly not well grounded in the evidence.

ELIAS CJ:

Well does it have to be well grounded in the evidence, or does it have to be apparent in the judgment?

MR ELLIS:

Well according to the Supreme Court of Canada, it's got to be well grounded in the evidence and your proposition, it's sort of self-evident in the judgment. Well even if that is the test, it isn't self-evident in the judgment.

CHAMBERS J:

Can you just give me a bit of background about this case because I'm sorry, I haven't read this one about –

ELIAS CJ:

Mentuck.

MR ELLIS:

Oh, this case, yes –

CHAMBERS J:

– in the voluminous one, in *Mentuck*.

MR ELLIS:
Yes.

CHAMBERS J:
What was the reason why a one year ban on the officers in question was thought to be necessary?

MR ELLIS:
Well I'm not too sure that I can specifically answer that. I can put it another way, that it wasn't – the logic was it wasn't possible to have a permanent ban, that would be breaching the freedom of expression and I imagine, seeing that –

CHAMBERS J:
Were they involved in other undercover work, were they?

WILLIAM YOUNG J:
Yes, they were.

CHAMBERS J:
I see.

WILLIAM YOUNG J:
This is the, sort of the sting operation, where the undercover officers pretend to be criminals and encourage the suspect to confess to them, to show that the suspect is a serious criminal too.

CHAMBERS J:
Right.

WILLIAM YOUNG J:
And it would appear from page 474, that some of the officers involved were still in the field –

CHAMBERS J:
Still working on other cases. Yes, I follow and presumably, their work in those other cases would have come to fruition within a year, was that the point?

WILLIAM YOUNG J:
I think it is.

CHAMBERS J:
Yes, thank you. Yes, sorry Mr Ellis, you can continue now.

MR ELLIS:
Yes, thank you. Thank you Justice Young. The paragraph 55 on 474, is what I'm just about to come to, that's the paragraph at the bottom of 444, "Even if the serious risk has been demonstrated," that's the passage in the fuller judgment.

Anyway, where was I, one, the two, "The proper administration of justice should not be interpreted so widely as to keep secret a vast amount of enforcement information, the disclosure of which would be compatible with a public interest," and three, "The minimal impairment branch of the *Oakes* test, are there reasonable alternatives available but he must also restrict the order as far as possible without sacrificing the prevention of risk. Under the second branch, the ethicacy of police operations, the right of freedom of expression and the right of a public trial must be weighed." So there's a really serious rights analysis to be made, not an assumption that okay, you've done it, you must be guilty.

"Even if a serious risk has been demonstrated, the right to freedom of expression and the accused's rights to a public trial," on top of the next page, "would substantially outweigh the benefits to the administration of justice. The benefits the ban promises are speculative and marginal improvement," and I wonder –

ELIAS CJ:
Where are you?

MR ELLIS:
I'm on the top of page 445 Ma'am, so I was reading the last bit down there and then turned over.

ELIAS CJ:
Thank you.

MR ELLIS:

And I ask myself well, even if there was any evidence as to what would happen, I mean, what would happen – I mean, what would happen if the public knows, well they did know, that there was ban on a jury, well I don't think anybody is seriously suggesting – well I'm not and I don't think even any of the appellants suggesting they didn't get a fair trial because of that because Mr Siemer published this, I don't think anybody has made – I think there's an appeal to your Court, I seem to recollect but I doubt –

WILLIAM YOUNG J:

I think they are complaining about other publicity.

MR ELLIS:

Yes, I doubt that it's Mr Siemer, I mean, I don't know but thank you. So where is this, I mean, it's all a bit speculative, is it best speculative what the harm would be done and I really seriously think that there's any harm done and allowing – well, I've read the paragraph about allowing public scrutiny, is to the advantage of the accused because it ensures the trial is conducted fairly. What all –

McGRATH J:

But all this is of course postulated on the open justice principle as it applies to the media being able fully to report the actual trial, rather than pre-trial processes.

MR ELLIS:

Well yes, I think that's probably correct but that may be so but one needs to stand back and say, in principle, is it any different and my answer to that unasked question would be no, it isn't any different. There are some things that are just so important that they need to be conducted in public otherwise open justice means nothing –

ELIAS CJ:

Well it depends, doesn't it, on the impact upon the ability to have a fair trial? It doesn't matter at what – it's not a classification response that is appropriate. It's not whether it's pre-trial, or post-trial, or at trial, it's whether there is some rational reason against the trial to be held for suppression.

MR ELLIS:

Yes, yes, that seems to be a fair way of putting it.

ELIAS CJ:
And – sorry.

McGRATH J:
No, after you.

ELIAS CJ:
No, that's all right.

McGRATH J:
I would certainly be interested in seeing something that's applied, the open justice principle, the two pre-trial matters because that's what it seems to me as the distinction, particularly when you start talking about matters being of advantage to the accused and the rest of it and how important it is, as this decision goes on to say, that open justice is practiced in case there is an acquittal that is highly unpopular, those sort of things and these were the matters that were actually addressed of course in the *Rogers* case.

MR ELLIS:
What was that about?

McGRATH J:
Rogers v Television New Zealand [2007] NZSC 91.

MR ELLIS:
Oh yes, yes. Well yes, I'm sure you would like to see something about – and that may challenge me to find something but I'll think about it over the break.

ELIAS CJ:
It may be that in a number of jurisdictions there isn't the elaborate pre-trial processes that we have in New Zealand of course which is why it hasn't arisen in other jurisdictions?

MR ELLIS:
That may well be a good reason but, I mean, I think because we've got elaborate pre-trial procedures, we've got less protection for freedom of expression, doesn't

seem in principle right. Unless there's good reason for suppressing something, it shouldn't be suppressed pre-trial, at trial, or at the appellant level –

ELIAS CJ:

It may be that a temporal analysis is not appropriate. I just notice that – I mean, there are temporal aspects very often, as in this case, this *Mentuck* case, I see at pages 475 and 476, there's the reasoning as to why it should only be for one year –

MR ELLIS:

A limited time, yes.

ELIAS CJ:

– and why it was appropriate for one year which is not dissimilar because this is to protect the officers. In our case, it's to protect the fair trial right. So whether it's pre-trial or not may be less significant than the purpose that's being fulfilled in the ban.

MR ELLIS:

Yes, I think the purpose is the better way of approaching it.

ELIAS CJ:

Is that a convenient time to take the adjournment?

MR ELLIS:

Yes.

COURT ADJOURNS: 11.34 AM
COURT RESUMES: 11.50 AM

MR ELLIS:

Right, to give you a road map Ma'am.

ELIAS CJ:

Thank you.

MR ELLIS:

What I propose to do is briefly, I just want to recap on section 138 then at some stage Mr Edgeler I'd like to address page 17 of our submissions and nothing else. I want to

do probably very little. It seems to me that the exchange that we've had so far, that everybody understands where we're coming from and asks intelligent, probing questions and I'll do better to say little and answer questions. So I imagine, subject to any questions you ask, I'll finish at half past 12 or thereabouts.

ELIAS CJ:
Yes, thank you.

MR ELLIS:
If there's more questions then 1 o'clock. I was going to do a little bit on human rights defenders and legal agitators, the human rights decisions, the covenant and the *Worm v Austria* (1997) 25 EHRR 454 case in that late addendum that I did. I'm not going to address the main part which you've already dealt with.

ELIAS CJ:
We'd rather hear Mr Edgeler after you've concluded.

MR ELLIS:
After I've finished?

ELIAS CJ:
Yes, thank you.

MR ELLIS:
Yes, right. So just returning to the Criminal Justice Act in tab 1 of my bundle. Just to reinforce and recap on the proposition that underlies everything. So section 138(1) says, "Subject to the provisions of subsection (2) and (3), and of any other enactment, every sitting of any Court dealing with any proceedings in respect of an offence shall be open to the public," and in (3) the power conferred by paragraph (c) of subsection (2), performance and so on, shall not accept that the interests of security or defence be exercised to exclude any accredited news media reporter. So part of what's happened is that, part of that complaint was, well Judge Winkelmann was holding telephone conferences unlawfully because they're not in public and the media are excluded. So we have page 121, the telephone conference, well everything must be in public. It isn't. And then it's compounded by suppressing everything. Well this isn't a, what was it, a Conroy or Conway, whatever that famous defence –

CHAMBERS J:

Can we just – this is helpful looking at subsection (1) which I haven't concentrated on before. It can't mean what it literally says for this reason. Suppose in the *R v Bain* [2009] NZSC 59, (2009) 19 PRNZ 524 case the question about the, what the Crown alleged the 111 call might have said and the evidence relating to that and the argument about that, that couldn't possibly have been at a hearing open to the public because it was of such an explosive nature that tittle tattle would have got around as to what was said and almost inevitably have interfered with a fair trial of Mr Bain, given ultimately the decision of this Court on that evidence. So it must be referring, mustn't it, in 138(1), to the actual hearing of evidence and those aspects which are not trial within a trial or the pre-trial equivalent of trial within a trial. Do you agree with that?

MR ELLIS:

No and no. I say it means precisely what it says and it's a good place to be, isn't it. Parliament didn't mean precisely what it said. I'm enjoying this, sorry.

CHAMBERS J:

No, no, that's not – in interpreting what that – they can't have intended it to cover by the word "sitting of a Court" those matters which we'll call trial within a trial.

ELIAS CJ:

But there is the power to exclude –

CHAMBERS J:

Well only – there are powers to make orders forbidding publication but there would be some things that, however you made those orders, if the general public were able to hear those matters –

WILLIAM YOUNG J:

You could exclude under section 138(2)(c).

CHAMBERS J:

I see. Okay.

WILLIAM YOUNG J:
And it might be the answer.

ELIAS CJ:
And indeed –

MR ELLIS:
It's evidence, isn't it? I mean the example you gave me is great. It engenders, oh yes, this wouldn't be fair, but it doesn't read the rest of the section, does it, subsection (2) we're talking about, we're forbidding publication of evidence and in (c) we're excluding people.

CHAMBERS J:
Okay, I think the (2)(c) is the answer I think.

ELIAS CJ:
Indeed we heard the *Bain* appeal. I accept that the, at first instance it might have been different, but we heard the *Bain* appeal in this Court in public. We made suppression orders pending trial but we heard it in public.

CHAMBERS J:
The answer is (2)(c) which I haven't...

MR ELLIS:
In principle Justice Chambers, I don't know if I'm miscategorising what you say and tell me if you think I am but I think what you're saying is we shouldn't trust the public and that that is part of freedom of expression in a democratic society but –

CHAMBERS J:
No, my concern was fair trial rights but I can see that the answer is provided by 138(2)(c) in the extreme case.

WILLIAM YOUNG J:
You do have to really read evidence adduced, or to be adduced, or proposed as including proposed to be adduced.

MR ELLIS:

Yes.

WILLIAM YOUNG J:
If it's read literally then it becomes a bit awkward because there couldn't be, wouldn't be power to refer to evidence which is proposed to be called but which is not able to be called because a Judge says it's inadmissible.

ELIAS CJ:
But that evidence surely, will be before the Court –

WILLIAM YOUNG J:
But not adduced.

ELIAS CJ:
– by way of supporting – well –

WILLIAM YOUNG J:
Well not necessarily.

ELIAS CJ:
– but it's the affidavit that is evidence adduced.

WILLIAM YOUNG J:
It maybe about a signed brief-of-evidence, it maybe a witness statement. It maybe simply –

ELIAS CJ:
Received.

WILLIAM YOUNG J:
– the confession. No, what I'm suggesting is that you have to read the word "adduced" in a slightly broader way than it would be customarily read as, which would be the evidence adduced is the evidence given formally in Court one way or another.

MR ELLIS:

Yes, I agree with that and I thought we'd, when the Chief Justice, before the break – and we had the discussion about the confession and we said well, that would be, well it's not evidence yet but it's going to be adduced and I thought we'd agreed that the proposition, I don't think – we may have spelt it out but the way you put it, is where we were before and it must include adduced, yes. No, you don't look happy?

ELIAS CJ:

Well, it doesn't matter, it's just how it's packaged up really. I'm disagreeing up here because I think that the Court making a determination will have accepted evidence and it's that evidence which is adduced. It's adduced for the purposes of the pre-trial ruling the Court is being asked to make and it maybe, come in, in the form of a witness statement, but it's still evidence that the Judge is relying on which I think is evidence adduced in that pre-trial hearing. Well at least I think it's arguable. We don't have to decide it, I wouldn't have thought, here.

MR ELLIS:

No and we seem to be on the same wavelength in respect of that. So that's what I wanted to say. So the principle here is everything is in public and nobody really came to grips with the telephone conference that –

GLAZEBROOK J:

Can I just check. The telephone conference didn't actually make an order it just refused to – well it did vary the order in that it allowed the result but the actual hearing in public was undertaken earlier so what was the point here?

MR ELLIS:

I think –

GLAZEBROOK J:

If the order had been made after a public hearing –

MR ELLIS:

Yes and then –

GLAZEBROOK J:

And then was varied after the telephone conference.

MR ELLIS:

We started off being “charged” with what was, this is my memory it seems, of what was in the public hearing but then it got amended to include what had happened at the telephone conference and we said, “No, this isn’t a public hearing,” so it became relevant.

GLAZEBROOK J:

I’m just not sure what the relevance is, sorry.

MR ELLIS:

Well the relevance is that the order was made on the telephone and not in public so that makes it even worse –

GLAZEBROOK J:

So the amendment of the order was a renewing of the order, is that what the argument is?

MR ELLIS:

Partially, yes, but the – in principle it’s saying you can't do this in private. The whole thing, it’s a jurisdictional question, isn’t it. You’ve, the –

GLAZEBROOK J:

The order was probably made effectively in private anyway and that it was added to a judgment after a public hearing.

MR ELLIS:

Yes, I’m –

GLAZEBROOK J:

So I’m not sure what, because you wouldn’t normally, because if you’re writing a written judgment afterwards you wouldn’t normally be, especially now we’ve got rid of the, apart from in this Court, the pronouncing of judgments in open Court, because you just release the judgment with the order on it.

MR ELLIS:

Yes that’s an interesting point that I don’t think you canvassed. We certainly said the way the, what did we call it, a template was stuck on top –

WILLIAM YOUNG J:
A banner.

GLAZEBROOK J:
I understand that –

MR ELLIS:
What's it called?

WILLIAM YOUNG J:
A banner.

MR ELLIS:
Banner, all right, the way the banner was stuck on was wrong and then there was an affidavit from somebody which we couldn't refute but the – sorry, I've forgotten what I was going to say now. No it's escaped me momentarily.

ELIAS CJ:
Do we know whether there was argument on whether there should be suppression of a judgment?

MR ELLIS:
Yes, that's what I was going to say. There was no evidence as to whether the, at least I don't think there was, whether the Judge said in open Court this is going to be suppressed and there was no argument on that. So –

ELIAS CJ:
We don't know whether there was argument on it, is that what you're saying, or are you saying there was no argument on it?

MR ELLIS:
I – well I'm saying there was none. There certainly isn't any evidence of any. Nobody – I imagine it might have been taken as read because there were suppression orders prior, I think, but it certainly wasn't addressed and – so that –

ELIAS CJ:

Sorry, I'm interested in that because I wonder whether there is a practice of putting suppression orders on all – if there had been argument one would have expected, I think, something in the judgment, but that's not something on which there's any evidence before the Court as to whether this is just a habitual practice.

MR ELLIS:

Well –

ELIAS CJ:

In pre-trials.

MR ELLIS:

Yes, I mean that was what we were complaining about. It was effectively a rubber stamp put on ex post facto without anybody being heard on it.

ELIAS CJ:

But we don't have any information to allow us to draw that inference.

MR ELLIS:

Well we have the judgment which doesn't record that there was argument on this.

ELIAS CJ:

Yes.

MR ELLIS:

And as you rightly point out if there was you would expect it to be in the judgment and, no we don't have any evidence, and I did ask a few people and they were ambivalent about, couldn't remember, there's been so many hearings and whatever, but we certainly don't have any evidence one way or the other but, in my submission, it would be a safe inference to say there wasn't any.

ELIAS CJ:

Well certainly the circumstance that the Crown then sought a variation seems to indicate that the form of the order took them a little by surprise but that is pretty speculative really, yes.

MR ELLIS:

Well yes but given that at the end of the day this is a criminal offence. I mean my client should be given the benefit of the doubt not the other way round, shouldn't it.

WILLIAM YOUNG J:

I think it's a pretty likely assumption that it went on was a matter of course.

MR ELLIS:

Yes, I think that's right.

WILLIAM YOUNG J:

Because a standard banner order –

MR ELLIS:

And we had an –

WILLIAM YOUNG J:

– would ordinarily be put on a judgment of this sort.

MR ELLIS:

Well we had an argument that we couldn't develop for some technical reason that basically it wasn't actually the Judge's order at all. It was applied by the administrator or typist on there. Of course it's difficult to get any evidence about that. We had an affidavit from, I don't remember who it was, somebody telling us what happened, but that certainly was – and nobody suggested there was arguments and I think that's quite right. It was applied as a matter of course and there's an affidavit in, I don't remember which, it must have been in the High Court file from – it was an affidavit from the associate saying this is how we usually do it and I did it in that fashion. It was a matter of course and I don't think we've got that before you. But still if we could move to page 7 of my submission.

GLAZEBROOK J:

Is the argument that if it wasn't an open Court then it's not an order?

MR ELLIS:

My recollection of how we argued it in the High Court was that is was a nullity if this didn't happen. Yes, it was of no force –

GLAZEBROOK J:
So is that still the argument now, is it?

MR ELLIS:
Yes, certainly Ma'am, yes. It's of no force and effect because it was an invalid order.

ELIAS CJ:
Sorry, because not heard?

MR ELLIS:
Because the order wasn't made in accordance in law, made unlawfully.

GLAZEBROOK J:
As I understood it, the argument seems to be because the amendment of the order was a renewal of the order and that wasn't made in open Court, that there's the breach, is that –

ELIAS CJ:
I shouldn't – taken to accept that I think it's a renewal of the order.

GLAZEBROOK J:
No, no.

ELIAS CJ:
Yes.

GLAZEBROOK J:
Me neither, I was just getting the argument rather than the – and then the previous argument would be presumably that there was – what in relation to the banner that it was merely a –

WILLIAM YOUNG J:
This was a point with –

GLAZEBROOK J:
No I understand that.

MR ELLIS:

I don't think we were asked for it.

WILLIAM YOUNG J:

No, sorry, it didn't get to – in fact it failed in the lower Courts.

MR ELLIS:

Well it sort of petered out because we couldn't, you can't examine the Judge as to what happened, we just didn't pursue it.

WILLIAM YOUNG J:

The argument was that because it wasn't, it was simply on the top of the judgment in banner form, and wasn't formally made a subject of an order, it wasn't a Court order.

GLAZEBROOK J:

Sorry, I wasn't really asking what the, what that argument was because I knew about that, what I meant was that if the amendment of the order is not a renewal of the order then is there any argument about the original order?

MR ELLIS:

I'm sorry?

GLAZEBROOK J:

Apart from the arguments that we know about, sorry.

MR ELLIS:

Yes, well that's true. He wasn't charged with breaching the original order because it got amended to – well he was, it got amended to the – the charge was amended to the amended order so it wasn't an issue. But the argument, Justice Young's proposition, I do remember it now, they were arguing that there was no argument, yes I distinctly remember this, there was no argument before the trial Court on suppression and all that happened was as a matter of routine this banner was stamped on top of it and this was not an order. This was not a suppression order in fact, as well as in law.

ELIAS CJ:

But that's not before us.

MR ELLIS:

No, no, but I was just remembering.

ELIAS CJ:

I'm just wondering though how far you take – how far this argument goes. Whether it means that judgments can't be issued through the registry. Whether it means that if someone seeks variation of a judgment, as was the case here, it can't be done by memoranda and dealt with by Judge issuing a varied order –

MR ELLIS:

Yes, well my recollection and I'll answer that, my recollection is that the judgment says and I'm sure we can find it, it gets to the end and it says, (a) and (b) this is what I do. There was no order suppressing. So all that happened was it became rubber stamped and that was unlawful, that was the argument. Now can you do it ex post facto while you're doing your judgment? Well, one would have thought natural justice has got to have a say here, we haven't heard anybody –

ELIAS CJ:

Now I'm just asking you about, leaving aside those sort of arguments –

MR ELLIS:

Right, I misunderstood you Ma'am.

ELIAS CJ:

I'm asking you about how far you're taking your section 138(1) argument.

MR ELLIS:

I see. How far am I taking it.

ELIAS CJ:

You say that the judgment shouldn't have been varied through a telephone conference but suppose one of the parties had simply written in and saying there's something wrong –

MR ELLIS:
Oh, I see.

ELIAS CJ:
– put in a memorandum, there's something wrong in here, correct, you need to adjust it and the Judge did, is that something that does not comply with section 138(1)?

MR ELLIS:
Well I haven't thought of that but I suppose there must be some sort of de minimis proposition.

ELIAS CJ:
Well is there a provision in the Criminal Justice Act that allows –

MR ELLIS:
Corrections?

ELIAS CJ:
Yes and judgments to be released through the registry because – no, there's not.

MR ELLIS:
I had a feeling there was, well there's some sections in the Judicature Act about that for the Court of Appeal, probably the High Court.

ELIAS CJ:
Yes.

MR ELLIS:
We were in, we're in the High Court, I don't know what applies in the District Court, but it's in the Judicature Act.

ELIAS CJ:
That's all right Mr Ellis, it's just a slightly irritating loose thread.

GLAZEBROOK J:
It does just say every sitting of the Court in proceedings so if the Court isn't sitting –

ELIAS CJ:

Yes.

GLAZEBROOK J:

– but presumably not for major decisions. If the Court doesn't sit, to give judgment now.

ELIAS CJ:

There's no definitions of Court sitting...

MR ELLIS:

Apparently, I'm indebted to my learned friend, who says paragraph 4(b) and (c) deal with renewal of orders maybe renewed...

ELIAS CJ:

Maybe reviewed by the Court at any time.

MR ELLIS:

But I guess by the Court implies, it does to me, momentarily that you're doing this in public not private.

ELIAS CJ:

Is there a definition of "Court" in the Criminal Justice Act? Anyway, perhaps go on.

CHAMBERS J:

I think however, in this case the argument you face from the Solicitor-General, I may be wrong, is that this wasn't made under section 138.

MR ELLIS:

Quite right.

CHAMBERS J:

So I don't – has the Solicitor-General at any stage argued well, it might not have been but it could have been under 138?

MR ELLIS:

No.

CHAMBERS J:

No.

GLAZEBROOK J:

But your argument is wider than that isn't it Mr Ellis because your argument says that effectively it had to be made in open Court in accordance with section 138(1) and it couldn't be made anyway because it didn't come within section 138 and there is no common law power, or certainly not one that survived the operation of section 138?

MR ELLIS:

That's correct. All right.

CHAMBERS J:

Page 7 of your submissions.

MR ELLIS:

Yes, thank you. I suppose I was somewhat disappointed that nobody ever said anything about this because it's a novel sort of proposition and basically it requires a heightened scrutiny for somebody who's a human rights defender. It's probably not immediately apparent to most of us that Mr Siemer would have fallen into that category but if one had that point of view, because of your prior dealings with it, just put that aside because this – and the question is, as it says in there, "It isn't whether you're right or wrong, it's just are you a human rights defender. The critical test is whether or not the person is defending a human right," at paragraph 33. "Whether or not they're legally correct isn't relevant. The key issue is whether they are." And they must be accepted according to the rights they're defending, and he thought he was defending some sort of open justice proposition and he might be irritating but we seem to have all forgotten that you've got the right to shock, horrify and offend when you're exercising your freedom of expression and there's no point in defending anybody who you agree with, and he may have offended people but so what. That's what a democratic society is about.

ELIAS CJ:

Sorry is this – this is sliding into a different point which is not the power of the Court to make the order, you're now dealing with the contempt proceedings, aren't you?

MR ELLIS:

Well it's how do you scrutinise what has happened and the heightened scrutiny, that's what I'm saying.

ELIAS CJ:

Is this directed not at whether there was power to make some order but directed at it should not have been exercised in this manner?

MR ELLIS:

Yes, yes.

ELIAS CJ:

I'm sorry.

MR ELLIS:

I'm saying the heightened scrutiny that's already addressed therein, must apply to somebody who's exercising a role as a human rights defender and at the top of page 8 extracting there from what the Special Rapporteur on Freedom of Opinion and Expression said, well you can discuss Government policies and political debate and isn't that really what Mr Siemer was doing? He was getting involved in political debate with a small p. He was criticising the suppression of what was going on in his very public trial.

ELIAS CJ:

Does this really go, though, any further than saying the human right to freedom of expression was implicated and the decision of the Judge to suppress should have –

MR ELLIS:

Addressed this.

ELIAS CJ:

Yes.

MR ELLIS:

Yes, no it doesn't go any further than that. And then likewise with legal agitators – it maybe annoying, in fact I'm sure it is annoying, what Mr Siemer does, but as Justice McHugh says, well people who are legal agitators, and I think one can categorise

Mr Siemer in the same light, we need these people in society and that's how the common law moves on.

ELIAS CJ:
Well I don't think you need to convince us of that.

MR ELLIS:
Well –

ELIAS CJ:
That is how the common law moves on. People come up with different ways of looking at things.

MR ELLIS:
Absolutely and – but none of this was factored into what happened, that's all I need to say on that. So moving on to –

GLAZEBROOK J:
How would you suggest it was factored in, effectively?

MR ELLIS:
Well when there's a scrutiny of is this necessary in a free and democratic society, do we need a contempt law in a free and democratic society, you've got to ask yourself well what's the human rights defender doing, what are legal agitators doing and when you're doing your high scrutiny you address these principles –

ELIAS CJ:
Sorry, I'm still concerned that you're sliding from one thing to the other and I'm trying to understand what you're saying. You're saying that in making an order, the Judge must be alive to the fact that that is a coercive order which will be enforced by contempt proceedings. Is that what you're saying?

MR ELLIS:
Yes and that you can't, with the absence of the reasons which you've said in *Huwai* and in *Lewis*, unless you do reasons you're never going to address issues such as this and nobody is ever going to address issues such as human rights defenders or

legal agitators, unless somebody puts it to a Court like yourself, so they actually realise these things exist in those forms of terminology. So I'm looking for –

ELIAS CJ:
You have to do the analysis and if you haven't given reasons you might jump over the analysis and no one will be able to see that it has been done.

MR ELLIS:
Well yes but I think I'm trying to go a little beyond that, trying to develop the law to say – I don't think, I might be wrong but I haven't seen any discussion in any New Zealand Court on human rights defenders. So I was alerting to you that these things exist and there's a declaration on it and they are important when it comes to freedom of expression. So it's not there's no reasons in the ordinary sense of the word but there's no reasons in the intense scrutiny which should be informed by discussion of these and nobody would know these exist unless we start discussing them.

GLAZEBROOK J:
Can I just check what the argument is. Is this an argument – because I don't perceive that it is, is this an argument that says that the order should not have been made in the first place and that it seems to have slid into the order to have been made without reasons but I'm not sure how the human rights defender relates to that because if the order was made to protect the fair trial right, rightly or wrongly, the fair trial rights of the defenders so make this order, I don't see that helps much, that the human rights defender issue helps much there because either it was or it wasn't. Or is the argument that a human rights defender shouldn't be found guilty of contempt or that there should be much more scrutiny of that finding in respect of human rights defenders. So is it related to the making of the order, or the finding of contempt, is the question?

MR ELLIS:
Well it's more in relation to the latter but it does apply to making of the order as well because if there's the absence of articulation by way of reasons then – and there's no recognition that what is engaged here is a human rights defender, the order shouldn't have been made but I was making it more for the proposition but as I listen to you, I think no, it could equally apply to all three –

ELIAS CJ:

We don't want an ambulatory appeal however. In fact, I just wondered, do we have in front of us the leave –

CHAMBERS J:

We do. It's –

MR ELLIS:

Yes, we do, it's in the pink –

CHAMBERS J:

– at the start of the pink volume.

MR ELLIS:

Pink book at 7. Well no but your role, as Judges of New Zealand, must be to infer, protect and promote human rights in the long title to the Bill of Rights and if you're doing that with your questions and I'm responding in developing that, this is great, everybody is fulfilling their role.

ELIAS CJ:

There is an issue which presumably you are going to – well, you may not want to expand beyond what's in the written materials but of course, one of the issues is the collateral challenge, whether in the contempt proceedings, are the merits if you like, of the suppression orders as opposed to whether there was power to do it could be challenged because I understand that this part of your argument is directed at the merits of the order.

MR ELLIS:

Well there was certainly authorities for the proposition that you might be able to challenge an order for want of jurisdiction –

ELIAS CJ:

Yes.

MR ELLIS:

– and partly one is saying there's no jurisdiction to make a phone order. So in that context, it is challengeable as being an a nullity, there's no lawful order on which –

ELIAS CJ:

Well you also make the more direct point, that it purported to be inherent jurisdiction and there isn't any such thing on your argument. So those go the jurisdiction point, or the power point but then you are also saying that the Bill of Rights analysis isn't reflected in this order and there's no supportive reasons which is not quite the same thing as there's no jurisdiction.

MR ELLIS:

Yes, it's deficient in – the whole basis of the approach, that there's no real attempt to engage with a balancing of rights and the Bill of Rights, is it necessary in a free and democratic society and my friend's submission seemed to be – I might be doing an injustice which I apologise if I am but, at the end of her submissions that we've already looked at, whether confidentiality orders are justified in principle and the proposition that is advanced is that of course, it's chicken immediately, or an egg that's immediately changed into a chicken, there's a justifiable limitation but there's no discussion on whether contempt is a justifiable limitation in a free and democratic society. It's an inadequate expression of what Justice Blanchard said needed to be done.

ELIAS CJ:

I just wonder whether – I'm just trying to get the analysis straight. I wonder whether we are looking at something as broad as whether contempt is justified in a free and democratic society. We're really looking at whether this order should have been made against the background of the Bill of Rights and without reasons to demonstrate that Bill of Rights Act values were taken into account. Isn't that really what you're arguing?

MR ELLIS:

Well, I'm certainly arguing that, I'm just trying to –

WILLIAM YOUNG J:

You may need to go a bit further, mightn't you. I mean, at least to my way of present thinking, shouldn't doesn't get you home, couldn't has –

ELIAS CJ:

Couldn't, okay, yes, could, oh –

MR ELLIS:

Yes, yes, that is true –

ELIAS CJ:

Yes.

MR ELLIS:

– couldn't but I also say there's a defective analysis of how the Court arrived at the decision it did do because it doesn't do a Bill of Rights analysis. I mean –

ELIAS CJ:

No, I understand that, yes.

MR ELLIS:

it's not something – no, no, I'm not suggesting you don't understand it but it seemed to be some – I am suggesting the Court of Appeal didn't understand it. They just didn't want to know, they wanted to do *Taylor v Attorney-General* and if I mention anything about rights they weren't interested and I think that's really what Mr Siemer complains about, he's not been treated fairly.

ELIAS CJ:

Mmm.

MR ELLIS:

Yes, right. Have I – I wasn't sure I got your tripartite question right Justice Glazebrook, answered –

GLAZEBROOK J:

Well I suppose I was just really looking – because the leave judgment was quite clear, it was only an issue of inherent jurisdiction or not to make the order. Now we're straying into whether the order should have made, or could have been made which doesn't quite come within – and then I just wasn't sure how the human rights defender – because if you're making an order, you're making an order for the whole world and you were making an order because of a particular concern about the administration of justice to the person who is before you. I'm not quite sure how the human rights defender, who after all, you've no idea whether there's a human rights

defender who wants to say anything about the particular case that you're looking out because, in many instances, that won't be the case and so how do you – I just didn't quite understand how you put in the balance a human rights defender. I could understand it in the context of an after the fact analysis, so that you might take it into account in terms of whether someone should be guilty of contempt or not. I'm not saying I necessarily agree with it but I'm saying I can understand that. What I can't understand is how you actually do it when you're making an order, because at that stage you've no idea –

MR ELLIS:
Yes, that's a good point.

GLAZEBROOK J:
– who might want to publish whatever you're saying and in fact you probably would be quite wrong to take into account anything other than the submissions of the parties before you I would have thought?

MR ELLIS:
I suspect that's wrong because, I mean it is an interesting point that I don't pretend to address before but you don't know there's a human rights defender out there but what we do know, everything is context, isn't it. This was the public interest case of some substance. The media were following it. It's not, it's a rational assumption to assume that there are human rights defenders out there and should be taken into consideration.

GLAZEBROOK J:
I can understand that argument in terms of the balance of freedom of expression, I just can't understand your argument specifically in relation to human rights defenders in respect of this particular –

MR ELLIS:
Well when you – when the Judge is engaged in whether or not she's got the jurisdiction to make an order suppressing, she needs to engage in the question of a human rights defenders and a heightened scrutiny of freedom of expression. I was trying to plug these human rights defenders and legal agitators to re-emphasise the importance of a meaningful discussion about all stages of the judicial decision making to say we've got to take these things into consideration and have a reasoned

and proper approach to making a decision that, on its face, appears to be contrary to open justice.

GLAZEBROOK J:
I think I understand.

MR ELLIS:
Thank you. Can we make a collateral challenge –

ELIAS CJ:
I'm just trying to make sure that we're all on the same page in terms of what's being argued about. It is necessary to say that there was no power to make the order. That's what's really before the Court. Your argument about reasons and about Bill of Rights Act values isn't, perhaps, terrifically, felicitously encapsulated in the leave but I suppose you would argue that a Judge, bound by the Bill of Rights Act, must, and fundamental values of open justice, must come to a conclusion that is supportable?

MR ELLIS:
That's right, and this Court, when it approaches the question, must have, in my mind, uppermost in its mind that your responsibility is to affirm, promote and protect human rights, and that's never really taken off in New Zealand. It's there in headline Bill of Rights and it's actually very difficult to try and argue the question that you've given leave in out of context. It's all – sorry abstract, that you've got to relate it to what is going on, and that's – I just don't think I'm capable of arguing it in a different way and I try – and if that means I have to formally ask you to extend leave, so be it, but I'm not sure that that is necessary because we all seem to understand where we're going and we've almost finished.

ELIAS CJ:
But there are two dimensions to your argument, it seems to me. The first being the narrow one, that section 138 displaces any inherent jurisdiction and the second, the Bill of Rights Act and absence of reasons argument, which means that this order is not a justifiable limitation.

MR ELLIS:

Yes, yes, I accept that. If I can just finish off, if I can, on page 20 I've put some judgments of the Human Rights Committee there. The Australian case and the Sri Lankan case which – as my learned friend has a footnote to the covenant in, I think, response in their footnote 113 on page 27 they set out article 14 for us. Anyway I just ask you to read those to yourself. But what follows on from that, which I thought was important, was the general comment of the Human Rights Committee which is partially in – we start at 117 on page 25, which together with the *Worm* case, which is in the little bundle which came in late which I seem to have lost. That bundle with three tabs on it, memorandum of appellant's counsel, additional case to be relied upon, which I haven't spotted. But at the time of the High Court hearing the new general comment in the Human Rights Committee hadn't come out.

I asked the Court to arrest judgment and I can't remember what else, stay proceeding – anyway, challenged them in position of the "conviction" and raised general comments as before which had come out and then in the Court of Appeal the general comment was again raised and it became apparent to me that the – it became obvious to me that, I say this with some regret, that the Court hadn't the faintest idea what I was talking about and the President asked, well give me the context of this general comment and if one knew what a general comment was, one wouldn't have to know it's context and for the members of the public that might be listening it's the distillation of the Human Rights Committee's case law and conclusions from state party reports put into a, sort of like an Adams, an annotated – yes, as – and this had just come out on freedom of expression so it could be, in international human law, rights terms they could be nothing more up to date than the general comment that's just been issued by the Human Rights Committee and I've set out a number of passages from it on page 26 and 27 and the passages that I've highlighted are of importance.

So there's a precautionality test, don't muzzle any advocacy of democracy and human rights, characterised as law, must be formulated with sufficient precision to enable an individual to regulation his or her conduct accordingly and accessible to the public and when we look at Professor Smith's, if anybody's read it, his report to the Attorney-General on the law of contempt, it's pretty obvious that from his perspective it's obscure, you can't find anything, you don't know what's going on, it's the very antithesis of being something that's readily accessible and understandable. So in essence, what this is really saying in, I suppose, domestic law terms is it

actually amounts to a breach of the rule of law because you can't actually find what the law of contempt is and just to have it ignored is disturbing.

Then at 43 there, on page 28, “Any restrictions on websites, blogs and so on and we shouldn’t do this, basically because you’re critical of the Government or the political system,” et cetera and using that in a broad sense of course, the judicial branch is part of the Government and it did also seem to me that what the committee was doing was endorsing the special rapporteur’s proposition that one should be very careful and only China, Iran and Vietnam lock people up for doing things like this and hopefully we don’t join them.

So that was the proposition involved there and then there’s just *Worm*, and *Worm* was the European Court case that I missed, where the journalist – that’s in the little bundle at tab 1. He was a journalist and he published, at page 3 there the article, he published a two page article which seemed to be interpreted as saying he was really second guessing the judicial decision making. If one reads all of that, trying to encapsulate it and he was fined, 40 day fines of, at paragraph 15, ATS. I think that’s Austrian shellings, or something like that, pre-euro, I think it was shillings in Austria, I can’t remember, 48,000 or 20 days imprisonment in default and the – just looking at the headings on page 13 and I say the same analysis should be done here, whether the inference was prescribed by law, we say it wasn’t.

Over the page, whether it pursued a legitimate aim. It certainly does in the sense of if you accept that it’s trying to protect the judicial branch from encroachment and there can be no question that the international authorities say contempt of Court is a restriction that is allowable, like public morals and so forth but was it necessary in a democratic society? Well we never had anybody engaging in those issues and then perhaps, just to – my final words will be some quotes from the partly dissenting opinion of Judge Casadevall and Judge Jungwiert, on page 21, apologies for the pronunciation, “Whilst it’s possible,” at paragraph 5 of the dissenting judgment on 21, or partly dissenting judgment, “Whilst it’s possible to understand that in some fields, public health traffic, public order requirements, dictate that penalties may be imposed without it being necessary to prove there’s a real risk of any kind. This should not be so where the penalty entails restriction of one of the fundamental rights of freedom of expression. For such restrictions to be justified for the purpose of the convention, it appears to be essential, should be shown that the information and ideas in issue might pose a real substantial risk,” no merely a hypothetical one, to one of the

headings there. Or in our case, the authority and impartiality of the judiciary and is there really substantial risk, never mind, is there even any risk? No, there isn't.

Just finally then, at paragraph 11 and 12, "It's clear that what the appellant was trying to do was to usurp the position of the Judges dealing with the case, a spectacle of pseudo trials in the news media. National authorities have not adduced efficient reasons to persuade me there was a pressing social need and let us not forget that in any case involving freedom of expression that, as the Judges there say, offend, shock and disturb the state are quite acceptable things to do," and Mr Siemer may well have done that, I'm sure he has but in a democratic society we live with that, not convict and send them to prison.

Thank you Your Honours. Mr Edgeler will do his little bit on paragraph 17. If nobody has got any questions?

ELIAS CJ:
Thank you. Yes, thank you Mr Edgeler.

MR EDGELER:
Yes Ma'am, from page 17. It follows on quite nicely from what my learned senior was just finishing, the question of whether this is necessary in a free and democratic society, that there is the power to suppress. The question in this case, whether there is power to suppress judgments in criminal cases, whether it's ever necessary and the simple submission is that it is not. In this particular case we're talking about the contrast between freedom of expression and fair trial rights and we had the examples earlier of needing to make sure that certain information doesn't get to the public, the *Bain* example was brought forward. A more common example might be that someone's convictions will come up in Court, even if it's not in evidence but you don't need a suppression power or a power to suppress judgments to stop those sorts of things that will actually affect fair trial rights from becoming public –

WILLIAM YOUNG J:
Say there is an issue about the defendant's previous convictions and the Judge refers to it in a pre-trial judgment, not in evidence, not really a submission, what is material is what the Judge says about the convictions. You'd say there's no power to suppress that judgment?

MR EDGELER:

Yes and there's no need for such a power because of the existence of strict liability contempt. Even if it's not in a judgment, even if it never comes before Court at all, the fact that someone has previous convictions, no one is allowed to talk about it, at least in the, you know, certainly the media don't publish it –

WILLIAM YOUNG J:

Well they are allowed to talk about it, subject to such discussion not being such as to give rise to a substantial risk to the administration of justice which will have to be assessed in the context of each particular case.

MR EDGELER:

Yes but –

GLAZEBROOK J:

And doesn't that make it much – because that's my concern with the English authorities, in terms of the sort of things that Mr Ellis was talking about, in terms of having certainty of law. So in fact, if you have an order that says you can't say something, doesn't that give you much more certainty as to what you can and can't do, than have something – I think the English were suggesting a warning and so you have a warning and then you have absolutely no idea what you can and can't do because in fact – and which actually might chill you into doing absolutely nothing unless you have an awful lot of courage and in fact, isn't it better to say well, we're going to tell you by order what you can and can't do, then that is certain, it's clear what you can and can't do, you have the right then, I would say, although that hasn't necessarily been accorded in New Zealand, to come along and say no, that order shouldn't be there, so you can argue the toss if you like and then you know exactly where you are because if you don't have that, don't you have a situation where the law is uncertain?

MR EDGELER:

It can go too far however and you've got the particular instance where you have – and I submit, it's the case in this one because it has certainly never been alleged by the Solicitor-General that anything Mr Siemer did in this case actually threatened anyone's fair trial rights. So we have Mr Siemer up for breaching an order which hypothetical might be needed to protect someone's fair trial rights but, when you

have that sort of general power to make broad orders like that, it then becomes punishable even in instances where fair trial isn't involved at all and we're not talking about a clash or rights when you've that. If you've got an order which prohibits – doesn't just prohibit publication which threatens their trial right –

WILLIAM YOUNG J:
There's not much point making an order that is merely purely replicatry of the –

ELIAS CJ:
Power.

WILLIAM YOUNG J:
– of the strict liability contempt of Court. There's no point making an order against the world not to engage in behaviour which creates a substantial risk of – threat to the administration of justice because that's the law anyway.

MR EDGELER:
Which is the submission Sir, that that is enough to protect fair trial rights because if someone and, in this particular case the submission is Mr Siemer, does some sort of publication which does not threaten fair trial rights, why are we trying to stop him doing that and can it be reasonable that we punish people for publications which don't threaten fair trial rights?

ELIAS CJ:
Well I wonder really whether strict liability contempt is consistent with the Bill of Rights Act and whether it doesn't require some assessment because, what I would have thought is the case here, is that it is the suppression order, leaving aside the question of power and so on, it's the suppression order which is the limitation prescribed by law which has to be justifiable in a free and democratic society, balancing the competing Bill of Rights interests. One would have thought that was a much more rights friendly approach than to say you don't need to make a suppression order because there's strict liability contempt floating around out there.

MR EDGELER:
In short, yes but in the reality of how strict liability contempt is used, it's rare. We had the case in this one with the *Dominion Post* publishing something far more, I'd say explosive, than what Mr Siemer has done here, with the intercept stuff that may or

may not have been later admitted and even that sort of publication fell short. So it's only in the very rare cases where it meets that threshold of a real risk to the administration of justice, a real risk to fair trial rights in this sort of context that you actually get it and when you're having orders which are broad which cover things vastly broader than those sorts of very rare instances, then you have a much greater restriction on freedom on expression than is necessary because, if it's a balance of rights, if one right isn't even engaged and no one says it was threatened, why are we restricting the other one?

ELIAS CJ:

Well I don't think it's accepted that the other right wasn't engaged and wasn't threatened, that must be the basis upon which this order has been made. Now there are arguments as to whether it's been properly reasoned and so on but that must be the clash of rights involved here.

MR EDGELER:

And at that point we have hypothetical which is why we have the question of – and it comes back to something already dealt with, whether section 138 is enough and why you have to take into account the extent of contempt law and versus, you know, it's the – he faces prison, he's been sentenced for prison for breaching this order. If it had been a more narrow, you know, could he have been fined under the Criminal Justice Act, the maximum of $5000 for – if it had been that sort of order and that sort of breach and that might be the appropriate limit the, you know, if you breach a name suppression there's a – there was, at least at the point, the Criminal Procedure Act has come in and changed 138 and a bunch of other things as well but you have that – that's the limit and when you have a –

ELIAS CJ:

Well how does the Criminal Procedure Act change section 138?

MR EDGELER:

The penalties for breaches. For a deliberate breach, I understand there is no the possibility of prison and –

McGRATH J:

There's a new provision, isn't there, 136 and 138 repealed –

MR EDGELER:

Yes, you cannot make 138 orders anymore –

ELIAS CJ:

It's repealed.

WILLIAM YOUNG J:

And there's no equivalent to section 138(5).

ELIAS CJ:

No.

MR EDGELER:

No but 138(5) has certainly not been undone and the question earlier about the bail example, it was under the Criminal Justice Act, under the old section in the Bail Act, it was you could make an order. The presumption is now, there are – there's a list of specific things at a bail hearing. You may publish the name, the charge, something else and now it's you may publish that and everything else can't be published, you need to have permission to go beyond four or five specific things and so it's even, it's become more restricted. Under the old section it was a Judge can make orders suppressing anything that happened at a bail hearing, now it's a Judge can make orders unsuppressing anything that happened at a bail hearing. So there are certainly some changes but we have the general question of – and it's been dealt with but 138 is enough and what do you need? In excess of 138 and strict liability contempt, the basic submission is that there is nothing left.

If there are any more questions, I am happy to take them.

ELIAS CJ:

No. Thank you very much Mr Edgeler. We'll take the lunch adjournment now. Resume at 2.15 Ms Laracy.

COURT ADJOURNS: 12.56 PM
COURT RESUMES: 2.20 PM

ELIAS CJ:

Yes, well we're resume I think. Thank you Ms Laracy.

MS LARACY:

May it please the Court. I'd like to start with the suggestion that while the Bill of Rights undoubtedly requires New Zealand Courts to bring a particular close focus to legal issues which engage fundamental rights, the New Zealand approach to publication restrictions has already started with a strong presumption in favour of open justice and the right which is now reflected in section 14 of the Bill of Rights Act. There's nothing new in that.

Taylor, in my submission, makes that point clearly despite the fact that it preceded the Bill of Rights by 15 years and, bearing in mind also that there's a much wider international context of human rights instruments at work here, it's noticeable that in the – or notable, that in the *Broadcasting Corporation of New Zealand v Attorney-General* [1982] 1 NZLR 120 case which is at tab 2 of my bundle, the Court of Appeal there in 1982 made the observation that in 1978 New Zealand had ratified the international convention on civil and political rights and the right there in section 14 of the ICCPR which is the right to freedom of expression was noted as being a guiding feature for the Court.

So my submission is simply that New Zealand Courts do and have a very long period of time automatically and as part of the natural process by which the Court applies, complied with the fundamental principles which are set out in seminal cases such as *Scott v Scott* and *Leveller*, before departing from the right to open justice and the right in section 14. In cases such as the present where with the original order the Court at first instance perhaps omitted to articulate reasons or sufficient reasons for the publication restriction, concerns can legitimately be raised as to whether the Court has gone through, certainly whether it's gone through an ideal process and there probably wouldn't be a lot of argument about that. The process could have been better and should have been better but, in most such instances I would also submit, including the present, the reasons for the suppression can be readily gleaned from the circumstances and in retrospect can in most cases be seen to be consistent with the Court's concern to both maintain fair trial rights and balance, in an appropriate way, the very strong presumption in favour of open justice –

ELIAS CJ:

Just –

CHAMBERS J:

So do you – I'm so sorry –

ELIAS CJ:

No, you go.

CHAMBERS J:

Do you accept therefore Ms Laracy, that this was before Justice Winkelmann an open Court proceeding?

MS LARACY:

Yes. There was no evidence led about that but we have to assume it was. My understanding is that it was.

CHAMBERS J:

Well does that mean therefore, that you accept that section 138(1) was engaged?

MS LARACY:

No. Well, it could have been. It could have been but it wasn't. Nobody applied for and the Court did not make a suppression order under –

CHAMBERS J:

No, no but that's not – it's a statement that every sitting of any Court, dealing with any proceedings in respect of an offence, shall be open to the public. That applied to her hearing, did it?

MS LARACY:

Yes.

CHAMBERS J:

Well that seems to me – you may very well be right on that and Mr Ellis argues of course the same but it does seem to me to have quite significant implications for the Solicitor-General because if subsection (1) is in engaged, is not therefore this case to be determined solely in terms of section 138 because the section hangs together, doesn't it and I'll go on to say – no, you answer that. There's one more thing that would follow from that.

MS LARACY:

My response to Your Honour's proposition is that subsection (1) and subsection (2) are doing quite different things and while I accept that subsection (1) applied, in the absence of a Court order, that this be a closed Court hearing under – sorry, I'm just looking for the – under whatever the subsection is that allows it, sorry –

ELIAS CJ:

(3), isn't it?

CHAMBERS J:

(2)(c).

MS LARACY:

Sorry, (2)(c). If that power was already exercised and I don't believe it was but that's no in evidence, it's a separate question whether subsection (2) of course was engaged and because subsection (1) was engaged, that would not mean that any suppression that might subsequently be made would necessarily be under subsection (2).

CHAMBERS J:

Well I just want to put this proposition to you and it may be completely wrong but I wonder if when we looked at the legislative history of section 138 which I have not done, whether this entire section is not solely concerned with criminal trials and that would explain, if it were, the curious omission, if it's not, to any reference to judgments in subsection (2). You see, the reason one wouldn't mention a judgment is because the framers of this statute in 1985, there wouldn't have been Judge alone trials, there simply would have been the hearing itself and this is, in other words, the code which applies for hearings but it was never intended to be the code for trials within trials or pre-trial hearings which is then consistent with the *IPC* and the *Leveller* case. One doesn't, in that event, even have to engage with whether *Taylor* is correctly decided but that is not the Solicitor-General's argument?

MS LARACY:

No. The Solicitor-General, as with the High Court in a number of decisions, has consistently interpreted section 138 as applying throughout the criminal process. The definition of "Court" under the Criminal Justice Act – I don't have it before me but it's in section 2, the interpretation section –

CHAMBERS J:

Yes, it's not "Court" that is important it's "sitting". What does "sitting" mean in this context?

MS LARACY:

Yes, I was simply –

McGRATH J:

Well proceedings –

MS LARACY:

– going to note that "Court" relates to any Court exercising criminal jurisdiction so –

ELIAS CJ:

Summary as well?

MS LARACY:

Yes.

ELIAS CJ:

Yes, non-jury cases, in which case there would be a judgment.

MS LARACY:

In which case there would be a judgment. It would also apply to – that's right, the committal stage of a proceeding as well as the pre-trial stage, post indictment and the hearing stage. If it's of any use, it doesn't answer Your Honour's question directly but there are a number of, certainly High Court decisions, where section 138 has been applied at the pre-trial stage. One of those decisions is cited in a footnote in the Court of Appeal decision under scrutiny here and that's the decision of *Paraha & Ors v Police* [2008] NZAR 581 which is a decision of Justice Heath, where the issue was whether, at a pre-trial stage, a photograph of the accused could be suppressed as an additional way of ensuring that his identity at that sensitive pre-trial stage was suppressed –

ELIAS CJ:

In that case, that case wouldn't be covered by 138, would it, doesn't seem to fit within that which is why in that case – I might be wrong but my recollection was that recourse to the inherent jurisdiction was available.

MS LARACY:

That's right, for that photograph because it was not an order of a type that was addressed in subsection (2).

ELIAS CJ:

Yes.

MS LARACY:

Yes and that's certainly the interpretation that that has been –

ELIAS CJ:

So that if it were necessary to suppress the fact of the judgment itself, for the type of reasons we were discussing this morning, that would be similarly presumably under the inherent jurisdiction because it's not embraced here?

MS LARACY:

Yes.

ELIAS CJ:

But there's a difference, is there, if what you're talking about is suppression of evidence or other matters in the judgment?

MS LARACY:

Yes and it may be in some cases that reliance strictly on subparagraphs (2)(i) and (2)(ii) will be sufficient for the Court's purposes. So the Court will say, I don't need to suppress the judgment here but insofar as the judgment reflects evidence and suppressions I rely on subsection (2) of 138 and it is suppressed.

CHAMBERS J:

Well that doesn't seem to me, with respect Ms Laracy, to have any logic at all. Why go to the lengths of making this big list of what can be suppressed and saying only this you can do and then you have, the only other thing that you can think of which is

outside it, is the judgment itself, where somehow the inherent jurisdiction is relied on. Why would they have done that?

MS LARACY:
There may be a number of –

WILLIAM YOUNG J:
Well can I suggest something?

MS LARACY:
Yes, yes.

WILLIAM YOUNG J:
I mean, it's not – when the section was drafted, the instances that were probably in mind, the sort of proceedings that were in mind, would be the usual call through, the criminal process of the case, first appearance, remands, where suppression orders are often made, committal proceedings, if the case was to be tried on indictment and trial. So probably – whether it's confined to those situations may be another question but probably those – that what would be in the mind of the legislature and, in those circumstances, there wouldn't be any occasion for a judgment to be suppressed because why would you suppress a final judgment and otherwise there won't be a judgment. It doesn't quite, I suppose, capture all the permutations –

ELIAS CJ:
Severance, I mean, there are a number of things –

WILLIAM YOUNG J:
Well no, I'm just saying, if you're looking at the regular public appearances that a defendant makes in a criminal case, then this is a reasonably good – this is a fair enough list. It's not so good if you look at other things. For instance, bail as it was before 2000 because I'm not sure, I don't think there was anything equivalent before the Bail Act to the current statutory provisions about restrictions on publication. So bail decisions would have to either be in the public domain or suppressed in the inherent jurisdiction.

MS LARACY:

Sir, I would certainly agree with that. There's two points, two contextual points that I can certainly make. One of them is essentially an adoption of what Justice Young has just said and in that context, I would suggest to the Court that suppression of judgments has no always been a feature of the common law process and the reason for that is that certainly, if we go back a 100 years ago or less, the common law has developed incrementally to meet societal developments and reserved judgments are far more common now than they ever used to be and the other thing that's a lot more common now is even just written judgments, as a matter of course, being made available and then add to that, written judgments being made available as a matter of course and being able to be copied thousands of times in hardcopy and then in addition, made available in perpetuity to everyone forever on the Internet.

Now these problems, in my submission, have been, have actually – these factors have actually caused the Court, in much more recent times, to actually have to grapple with the question of judgments and reasons and there are cases around the Commonwealth, well certainly in the last 10 years, where we do see the Courts having to say well, should reasons and judgments be suppressed and what's the basis for that and I've got cases I can address the Court on but my submission is that at the time that section 138 was enacted to reflect essentially what was there before, what was captured here were the main things that were likely in the course of every day criminal process to give rise to fair trial considerations. One was the Court needed the power to close the Court in exceptional situations, commonly the Court needed to be able to suppress the name of the accused or witnesses and very commonly, it needed to suppress evidence or submissions –

CHAMBERS J:

Well let me give you this example. You have a judgment which does include a lot of references to the evidence adduced and the submissions made. Now as I understand your argument because – and you want to suppress it – because that comes within (2)(a) and because subsection (5) rules out any inherent jurisdiction, that judgment could be suppressed but only with respect to those matters under section 138(2) and that's the only basis it could be. If on the other hand, the same judgment was written by a different Judge but covering exactly the same matter but that Judge chose not to mention the submissions or the evidence, on your argument, that judgment can be suppressed if the Judge thinks appropriate, entirely under the inherent jurisdiction. Well what's the logic in that?

MS LARACY:

The logic in that is that in the second case the Court would have to be satisfied that it was necessary in the due administration of justice for the entirety of the judgment to be suppressed –

CHAMBERS J:

Well so the Judge would in the first case. You wouldn't just suppress willy nilly, that would have to be – the Judge would have to have exactly the same thought in his or her mind.

MS LARACY:

Exactly but my submission is that, in the first instance, all the Judge could suppress if the Judge was relying on 138(2), would be the evidence and the submissions insofar as they were reflected in the judgment –

CHAMBERS J:

Well you say "if the Judge was relying" but that's the only thing the Judge could rely on, the moment he or she started to mention evidence and submissions because, on your argument and this is absolutely clear, once you're within those powers, those powers have been exercised, you can't use inherent jurisdiction.

ELIAS CJ:

Well that's what subsection (5) says, it's not an argument.

MS LARACY:

One is –

CHAMBERS J:

Yes, well that's right.

MS LARACY:

Under section 138(2), the Court is suppressing the evidence and the submissions per se, when delivered in Court.

CHAMBERS J:

But you accept that it would flow over into any judgment referring to them, if the Judge was concerned? That's the basis for...

MS LARACY:
Yes, yes it would flow over –

ELIAS CJ:
Because it would contain –

MS LARACY:
– into the judgment –

ELIAS CJ:
– it would contain an account of the evidence –

CHAMBERS J:
Yes.

WILLIAM YOUNG J:
But what about an evaluation of the evidence, I am persuaded that the case against the defendant is very strong, or I'm persuaded that something else that may be detrimental but doesn't actually give an account of the evidence?

MS LARACY:
The Judge's evaluative statements would –

WILLIAM YOUNG J:
Yes, yes.

MS LARACY:
– under section 138(2), those almost introductory statements of the Judge's approach and the Judge's opinion couldn't be suppressed but yes, to the extent that the judgment or the reasons then go on and reiterate the material that has already been suppressed, in my submission, it would a breach if those parts of the judgment were then published, as that would then itself constitute a breach of the original suppression order –

WILLIAM YOUNG J:

So it would have been open to the Judge here to have made an order suppressing all references to evidence and to submissions?

MS LARACY:

It would have been open, yes.

WILLIAM YOUNG J:

Yes, providing evidence adduced doesn't mean evidence adduced in its ordinary sense?

MS LARACY:

Yes.

CHAMBERS J:

Well that's again, if I may say with respect, another argument in favour of the dividing line being 138 covers sittings of the Court in the trial situation other than trial within a trial and here we have an absolute code describing what can and can't be done by way of suppression for that trial whereas inherent jurisdiction may subsist insofar as the trial within a trial, which is not done in public, in the same sense that this is meaning, or with regard to pre-trials.

MS LARACY:

If Your Honour is right, I know of no authority that has ever interpreted section 138 in that way.

CHAMBERS J:

Okay, well that's a pretty good thing against it.

MS LARACY:

It's been interpreted as applying to all criminal court processes whether in the Court of Appeal, the High Court post-indictment, the District Court at the summary stage of an indictable case, a purely summary case, applied to all such stages except to the extent there might be another express statutory provision that applies to criminal case such as, I think it was the original section 19 of the Bail Act, which allows suppression of certain material in the context of a bail hearing.

ELIAS CJ:

And that's consistent with the language which is any proceedings in respect of an offence. So –

MS LARACY:

Proceedings isn't defined unfortunately.

ELIAS CJ:

There's also, I suppose, the structure of this statue because this is miscellaneous and I see it goes on to deal with other things. There may well be another, I don't know whether there's another part that deals with hearings which might be another point.

MS LARACY:

No. Section 138 is the first of the Criminal Justice Act suppression provisions. They go on, I think it's to section 142 but the other provisions deal with suppression of accused's name, or defendant's name, and names of witnesses and people connected with the proceedings and then there are some related provisions such as when a complainant in a sexual case who has automatic statutory suppression of his or her identity, for instance, can apply to the Court for that suppression not to apply. But beyond what's in here and the two provisions that – the three provisions that deal with suppression of identity, there's not much more in the Criminal Justice Act. I have looked at the –

McGRATH J:

Ms Laracy, can I just ask you this. Is this provision a response to the circumstances in the *Broadcasting Corporation* case, do you know if that's part of the – where there was a sort of a sentencing conducted in camera –

MS LARACY:

Yes.

McGRATH J:

– as it were and as I recall it I think that one or two of the Judges may have said well that is within jurisdiction but it should never have been done –

MS LARACY:

Exactly.

McGRATH J:

– for other reasons and I wondered whether Parliament was coming in to say never mind that, there is no jurisdiction to that. In other words we are going to make sure that trials are conducted in public, in the interests of open justice, and that that value is supreme. But I just wondered whether that factor, or that context was offering any help as to the scope of subsection (1) of section 138?

MS LARACY:

I have read the legislative material lying behind a section 138 and from memory there was no express reference to the *Broadcasting Corporation* case. However, I would agree with Your Honour that it's a significant one in that it was prior to the enactment of the Criminal Justice Act. That was a decision of the Court of Appeal in 1982 where an entire sentencing process, including the outcome, had been dealt with in, essentially in chambers and even accredited media had not been allowed to attend and then the Court had, the Judge had made a further order prohibiting any publication of what had, in fact, occurred in chambers in order to get around the problem in *Scott v Scott*. In that decision all three of the Judges from memory in the Court of Appeal agreed with the *Taylor* Court, that the Court did have inherent power, both to sit in closed Court, if necessary, and that there is an inherent power to make suppression orders but they were wrongly exercised in that particular case, and it would be the most extraordinary case, if ever, where an entire sentencing process, including the result, could not be made published. My suggestion would be that –

McGRATH J:

Would not be held in open Court, I think, was the key factor there.

MS LARACY:

Yes, yes. At least with the media attending.

McGRATH J:

Attending albeit possibly not permitted to publish material later.

MS LARACY:

Yes.

McGRATH J:
That was the thing. It was held in camera and that was the, as I recall, –

MS LARACY:
Yes.

McGRATH J:
– was the pernicious part of it.

MS LARACY:
Yes. My suggestion to this Court would be that if Parliament, who must be taken to have been aware of such a high level and important and public decision as the *Broadcasting Corporation* case, was concerned about the Court's approach, it would have included in section 138 a specific provision which made it clear that under section 138 the Court could, if necessary, prohibit the publication of reasons and judgments. The fact that it didn't, in my submission, suggests that Parliament must have been aware of it but was happy to leave that error of law to the common law.

And we've seen exactly the same process happen very recently with the Criminal Procedure Act and Justice Harrison in his decision under appeal has looked at the Law Commission's work on the Criminal Procedure Act and then Parliament's enactment and has noted that Parliament seems to have accepted the Law Commission's advice that, in fact, there is an error of law which is regulated currently by the common law, despite having a number of provisions concerning criminal suppression which are codified but there are a number of other matters that are still regulated by the common law and that that's an adequate response and there can be no suggestion in terms of the current, the new legislation, that Parliament wasn't aware of that because obviously it had the Law Commission's work.

So my submission is that Parliament has over, at least since prior to the Criminal Justice Act, been content to allow, being both aware of the common law implications, and the extent of the common law power, and been content to allow that to run alongside statutory suppression which governs the most common suppression requests that come before Courts.

McGRATH J:

So the inherent powers are excluded by subsection (5) to what extent, can you just put that in your own words, by reference, no doubt, to subsection (2)?

MS LARACY:

It really turns on the words "of any kind described". So the –

McGRATH J:

Of any kind described, yes.

MS LARACY:

Of any kind described in subsection (2). So certainly there is no power whatsoever, in a criminal context, for a Court to close a Court other than under section 138 of the Criminal Justice Act?

McGRATH J:

And no power under the inherent jurisdiction to address items covered by subsection (2)(a)(i) and (ii)?

MS LARACY:

That's correct Sir.

McGRATH J:

They are excluded, they're abrogated?

MS LARACY:

They are.

CHAMBERS J:

But then in exactly the same form in (a)(i) and (ii)? The whole argument seems to me circular you see Ms Laracy. Why go to the bother of excluding inherent jurisdiction if it's limited in the way that you suggest. That you have – it has to be a specific order forbidding publication before it attracts subsection (5) but why would anyone look at the inherent jurisdiction there because you'd be acting under 138(2)(a) say. Do you see the point I'm making?

ELIAS CJ:

No, I don't, sorry. Perhaps explain it.

McGRATH J:

I think what – if I understand what Ms Laracy is saying, she's saying that the extent to which the implied power is abrogated by subsection (5) only relates to orders that address evidence adduced or submissions made. Beyond that the inherent powers stand. They're only to be used when necessary for the purposes of the administration of justice.

MS LARACY:

Yes and it's interesting that in the two subsequent provisions in the Criminal Justice Act which I may have copies of, 139 and 140, they're in my learned friend's bundle, subsection (5) which ousts the common law, is not repeated in those provisions. Now that may or may not be significant but it suggests that subsection (5) was a very – it was the type of express abrogation in relation to highly defined matters that *Taylor* said was required if the Court was going to attempt to oust the Court's inherent power, or jurisdiction, in terms of how it managed fair trials. Parliament could only do that with very express language. In my submission, that means that subsection (2) of 138 has to be read narrowly and where, in the subsequent provisions in the Criminal Justice Act, there is no equivalent express oust provision such as that in subsection (5), then the position is that the Criminal Justice Act suppression provisions merely supplement those of the common law.

ELIAS CJ:

Well, except that as a matter of normal statutory construction, it would be open to construe the legislation as having ousted, the inherent jurisdiction notwithstanding, the absence of any statutory abrogation?

MS LARACY:

I do take Your Honour's point, it's often a matter of degree, isn't it and that was one of the very issues of course that the Court grappled with in the *Taylor* decision under the predecessor provisions. To what extent could it be said that the mere fact that Parliament had legislated to cover roughly the area in question, could it be said that that ousted the Court's common law power and that Court of Appeal, for its part, it's a different decision for this Court obviously but the Court of Appeal for its part was satisfied that it needed to do it in much more expressed terminology –

McGRATH J:

Well what I think the Court there said was that empowering language does not exclusionary effect.

MS LARACY:

Yes.

McGRATH J:

Can I just ask you if section – does section 138, is that the successor of section 375 of the Crimes Act 1961 which was the provision that was addressed in the *Broadcasting Corporation* case?

MS LARACY:

Yes, I think it is –

ELIAS CJ:

Yes, there's a "see (f)" underneath the – in the reprint. So it is referred to, 375.

McGRATH J:

Oh, perhaps I haven't got that –

MS LARACY:

Section 375 Your Honour if –

ELIAS CJ:

Sorry, this is a superseded one –

McGRATH J:

You've got a better –

ELIAS CJ:

– it's repealed.

MS LARACY:

Section 375 is in fact set out in the *Broadcasting Corporation* case at page 124.

McGRATH J:

124?

ELIAS CJ:
Sorry, what tab?

MS LARACY:
That's tab 2 of my bundle.

ELIAS CJ:
134?

MS LARACY:
124.

ELIAS CJ:
Sorry.

MS LARACY:
At the bottom of the page it sets out section 375.

McGRATH J:
Yes and I'm sorry, the Chief Justice has pointed out that it is in fact – it is quite clear, that's fine – which was a far looser provision in relation to open justice.

MS LARACY:
Yes.

McGRATH J:
Good, thank you.

MS LARACY:
The Solicitor-General's submissions on this were brief, albeit that was on the basis that we expressly adopt the reasoning of the Court of Appeal decision –

CHAMBERS J:
Do you see in section 375 incidentally, that it begins "where on any trial"?

MS LARACY:

Yes.

CHAMBERS J:

Now do you say that expression there also incorporated pre-trial matters?

MS LARACY:

I'd be hesitant to commit to that without going back and reading the case more thoroughly with that question in mind. I do recall that there's – I think there's something in the decision that talks about the word "trial" being interpreted expansively but I would have to find that, or ask my learned junior to look for that.

McGRATH J:

I think they held, didn't they, trial included sentencing?

MS LARACY:

Yes, it certainly included sentencing.

ELIAS CJ:

There wasn't a statutory definition and if they had to come –

McGRATH J:

Just look at page 126 of *Broadcasting Corporation*, they cite Adams "Trial sufficiently elastic to include all proceedings, interlocutory of otherwise."

MS LARACY:

Sorry, that's what I was thinking of, yes.

ELIAS CJ:

Or an application for Judge alone trial –

CHAMBERS J:

There wasn't any exclusion clause there, was there? No.

McGRATH J:

No.

MS LARACY:

But that is the substantial contribution that the *Broadcasting Corporation* case made to our law. Instead of allowing there to be any doubt about whether, in addition to the statutory closed Court provision, there might be a common law power that also allowed suppression, Parliament dealt with that by including the express provision in subsection (5) of section 138, saying that there is no common law power, there can be no argument about that again.

McGRATH J:
So it really tied back what the Court of Appeal thought its jurisdiction was in the *Broadcasting Corporation*, it cut that back –

MS LARACY:
Yes.

McGRATH J:
– and the Court of Appeal is saying we've got wide jurisdiction but we'll only allow it to be used restrictively. Parliament didn't think that was good enough.

MS LARACY:
Yes, yes.

McGRATH J:
Yes, okay.

MS LARACY:
The question was raised earlier about what the implications of this issue were for civil cases. I haven't addressed that in my submissions because the grant of leave was very much focused on the criminal context but, in my submission, not only is the inherent power necessary for the Court to rely on in order to be able to suppress judgments in their entirety and reasons and other matters that are not covered by the Criminal Justice Act, if the Court considers that necessary but the inherent power is also what is relied upon in Courts sitting in the civil jurisdiction, at all levels in New Zealand throughout the country, on a daily basis, to suppress all sorts of information.

Now I appreciate that the mere fact that suppression orders may be frequent in either the civil or the criminal context doesn't of itself create jurisdiction but my point is simply that it would be a very radical, very significant departure from how Courts in

this country have sought to protect a range of interests that are covered by the due administration of justice, not just criminal fair trial rights but a range of other important interests which are potentially jeopardised, or there is certainly no power to suppress those matters, if we do not have resort to the common law power.

GLAZEBROOK J:
When you say "a range of other matters" are you thinking of say, undercover policemen, protection of informants –

MS LARACY:
I'm thinking –

GLAZEBROOK J:
– matters of that nature?

MS LARACY:
Those matters often might be able to be dealt with – might be conceded of as criminal but we've certainly done a survey to see in what situations the Court makes suppression orders in the civil context and there are a very wide reasons but for privacy reasons, protection of reputation, financial information which is highly personal and a good example of that is the case dealt with in the Court of Appeal, where the Court of Appeal relied on *Taylor* and that's the *Muir v Commissioner of Inland* Revenue [2007] 3 NZLR 495 decision which is discussed in the Court of Appeal's decision in this case but that was a purely civil case. We see it in the family context –

ELIAS CJ:
Commercially sensitive information, is that –

MS LARACY:
Yes, yes.

ELIAS CJ:
– inherent jurisdiction, I can't –

MS LARACY:

Information to which the Court considers an obligation of confidence attaches. Where it's – another example and I'm thinking of a particular case that my learned friend may indeed have been involved in, called *Brown v Attorney-General* where the Court – it was a civil appeal against the Attorney-General for damages for breach of privacy but the – Mr Brown asked the Court to suppress his name on the basis that he was a paedophile who had been released from a lengthy period of imprisonment and his safety was at risk and he had indeed been assaulted on a number of occasions and he believed that if he launched proceedings against the Attorney-General and they became very public, he would be more likely to be assaulted and further that may in fact, that type of concern and the public obloquy that would be heaped on him would be liable to dissuade him from putting his case before the Court and that, in turn, must be seen as a failure for the Court to be able to do justice in the particular case. If he has a legitimate cause of action it's important that the Court allow people to put their causes before the Court without too many obstacles that will dissuade them. So that's another example.

Fair trial concerns tend to be couched in the context of jury trials, so they very rarely arise with that nomenclature in civil cases but what all of these examples of suppression have in common is that they are all different features of the Court believing it is necessary, in the particular circumstances of the case, for the administration of justice to be properly served, for suppression orders to be made.

Now if *Independent Publishing* is correct then there is no such power at common law, whether in the criminal context or the civil context. So that's the high watermark of what has to be engaged –

CHAMBERS J:
That's not right. *Independent Publishing* recognised that of course there was power to suppress information with respect to a trial within a trial.

MS LARACY:
No Sir, with respect –

CHAMBERS J:
Did it not?

MS LARACY:

What *Independent Publishing* does is it makes a distinction that's also made in the *Leveller Magazine* case and in the *Scott v Scott* case, between two different types of procedural decisions. One is, and it's uncontroversial, that the Court has the power to control its own processes. So if it is concerned that something, that information that the Court has to engage with will be made public, or might get before a prospective jury at a point where it shouldn't, the Court can take procedural measures to ensure that doesn't happen. So what it does then is it has a voir dire where the media and the public conceivably could be present but the jury aren't present. The Court can do that.

Another example of this is where the Court has a witness and for some reason the witness' name can't be disclosed so the Court can direct that that witness be referred to, not by their real name, but by a letter. That's an example of the Court essentially withholding, within the environs of its own buildings and processes, information so that it can't be made public but there's no suppression order power *Independent Publishing* says.

What you could do however, in the voir dire situation, is that the Court has plainly made its purpose clear. What it's trying to do by excluding the jury from a voir dire is to ensure that the jury, or the potential pool of jurors, will never hear what's going on because may or may not be inadmissible and if someone knowing of the Court's purpose deliberately thwarts it by publishing an account of those very processes the Court sought to keep secret, that will be contempt, but it is contempt not by breach of any order, because the Court has no power *Independent Publishing* says, it is contempt by thwarting the Court's purpose.

Now my learned friends would say that's an adequate mechanism. That's certainly what *Independent Publishing* saw as an adequate mechanism for protecting information for reasons that Justice Harrison in the Court below addressed and which I would also like to talk about. My submission is that it's not an adequate mechanism.

Scott v Scott is probably the starting point for all of this because what *Scott v Scott* says is that even in the exceptional circumstances where the Court rightly hears a matter in chambers, say with only the parties and counsel being present and nobody else, it will not be contempt to publish what has occurred. It will not necessarily, per se, be contempt to publish what has occurred. So the mere fact of dealing with

something privately doesn't mean that it's suppressed. The Court may have another reason for dealing with it privately, for example, a witness, especially in a sensitive domestic matter, might feel more able to give her evidence freely than if there were other people present, but that doesn't mean it's suppressed, and that's really as far as *Scott v Scott* goes.

To the extent it talked about suppression, it is obiter, and what the Court does say there is that you would need to actually make a suppression order if the Court were to keep confidential what has, in fact, occurred in chambers, or in the closed Court. So closed Court is not enough, you need a suppression order as well. *Independent Publishing* then builds on that and says, well, to the extent *Scott v Scott* suggests this, it was obiter, but it also, there is no such power and *Leveller Magazine* was similarly a case where the Court was able to control its own processes by saying, in this Court hearing this witness, who I think from memory was a spy working for one of the Government spy agencies, this witness could be referred to only by a letter during the Court proceedings and not by his real name. The media published the real name.

The argument was whether that was contempt. *Leveller*, the Court was satisfied that it was contempt by thwarting the Court's purpose, not because it made, there was never any suggestion that a suppression order had been made. So the suppression orders are necessary if the Court wants to extend the purpose for which it did something privately out into the public arena. If it wants the public also to be bound by what the Court's purpose was by dealing with the matter in a closely confined way, it will need to make a suppression order, or potentially an injunction which maybe a very similar thing. But the mere fact the Court has taken those steps does not mean it's, what's happened is suppressed.

Of course in England in the early 1980s the Contempt of Court Act resolved the problem of whether at common law there was the power to suppress. The authorities who looked at the common law, which was the Phillimore Committee, didn't resolve the matter. They said English law was in doubt as to whether the power existed or not. But they said the best thing to do was to make it clear with a statutory, with an enactment that made it clear what the Court could suppress and in what circumstances. So that makes the rest of the British law from the 1980s on useful but only to an extent. Useful only when we're looking at the way, perhaps, in which

the suppression power could be exercised, but they do have a statutory provision that they can rely on.

New Zealand and Canada however, rely on the common law. In Canada, as I've indicated in my submissions, the common law there has developed in a way that I think is most unusual in that they have combined the common law power to suppress with the common law power to enjoin a publication which might give rise to a fair trial, whereas in New Zealand and in England and in Australia, we think of an injunction relating to publications outside of the Court process as being one discrete form of a common law non-publication power and a suppression power relating to what has occurred inside the Court prohibiting that being conveyed to the wider public, as being two separate things. In Canada over the last 200 years those two powers have merged. They call both of them publication bans and they apply the same test.

I'm made a number of notes during the course of this morning's discussion but perhaps it would be – I might be of most use to the Court if there was anything in particular that I could address and in the order that most suited Your Honours?

ELIAS CJ:
For myself, I'm a little stuck on the slightly different bases on which the case is being argued. First, whether there is inherent power to do what is done here and secondly, whether it could have been – whether the orders made could have been made in the present case because we seem to be sliding a little bit between them and I just wondered if you wanted to enlarge upon that, from the Crown's perspective?

MS LARACY:
Certainly. The –

CHAMBERS J:
And in particular perhaps, do you say this order was made under the inherent jurisdiction or under section 138?

MS LARACY:
If I could start with Your Honour's question first. The Solicitor-General's case has been consistent, that the order in this case was made under the inherent power. So we've never relied on section 138.

WILLIAM YOUNG J:

Why couldn't it be on section 138 to the extent to which it deals with evidence arguably because that's the adduced problem in submissions but otherwise in the inherent jurisdiction of the Court?

MS LARACY:

The order, the – to prove a contempt of the type the Solicitor-General was concerned with, we have to establish that the Court has made an order that it had jurisdiction to make. When this –

WILLIAM YOUNG J:

Why can't there be two sources of jurisdiction?

MS LARACY:

There could be but when the order was made in this case, the very first order, it was extremely broad and not only did it suppress the judgment and the reasons and any summary or description of it, it also suppressed the outcome, the fact –

WILLIAM YOUNG J:

Yes, I understand all that.

MS LARACY:

Yes. My –

WILLIAM YOUNG J:

But aspects of what the Judge suppressed could have been suppressed under section 138?

MS LARACY:

They could have been.

WILLIAM YOUNG J:

Okay, then why can't it – what would be the objection to treating the order to the extent to which it covers the ground provided for in section 138 is made under section 138 and otherwise made in the inherent jurisdiction?

MS LARACY:

Because the Solicitor-General took the view that Justice Winkelmann did not, under section 138, have the power to make an order as broad as the order she made –

WILLIAM YOUNG J:

Yes but she doesn't – you haven't answered – I don't think you've quite sort of picked the point. Let's assume, for the sake of simplicity, the order does two things. In practical terms, suppresses references to evidence (a) and (b), suppresses references to the reasons given by the Judge. As to (a), that order could have been – would be authorised under section 138. That part of the order would be. As to (b), because it's not authorised by section 138, it's not within the section 138(5) exclusion. So can't it be both?

MS LARACY:

Well it could have been both but the only bit that a contempt proceeding would deal with was the order that could not been made under section 138 –

WILLIAM YOUNG J:

Why?

MS LARACY:

Because –

WILLIAM YOUNG J:

I know you can prosecute for breach of section 138 order but –

MS LARACY:

You can bring a summary prosecution for that –

WILLIAM YOUNG J:

– but is it not possible to prosecute for contempt as well?

MS LARACY:

No, no, it's been –

WILLIAM YOUNG J:

Is that the *Dominion* –

ELIAS CJ:
What?

McGRATH J:
Don't think so.

WILLIAM YOUNG J:
I mean –

CHAMBERS J:
Well subsection (8) is relevant. It would seem only subsection (2)(c) may be dealt with as a contempt.

ELIAS CJ:
May be what, sorry?

CHAMBERS J:
If you look at section 138(8), it would seem that only a breach of (2)(c) can constitute a contempt.

WILLIAM YOUNG J:
Oh, I see.

CHAMBERS J:
There may be another argument against Justice Young's proposition which I'd like your view on which is that, when it talks about a report or account in (a), it's not referring to a judgment but it has in mind the sort of report or account which an observer at the trial might prepare?

MS LARACY:
Yes.

ELIAS CJ:
Well doesn't the Judge observe?

WILLIAM YOUNG J:

Well yes but there a number of ways, I mean, you can read it by reference to the standard course that a criminal trial takes and in which case, evidence adduced and reported it would be of – might encompass this sort of situation that Justice Chambers had in mind.

CHAMBERS J:
Can I also just add in that regard, that in the *Broadcasting* case, I've noticed that the other two Judges, Justice Cook and Justice Richardson, did not agree on the extent of definition of trial and both of them relied on inherent jurisdiction for their view but – which may have some relevance to whether, when one's interpreting section 138(1) and the phrase "sitting of the Court", envisaged a widening of the word "trial" in the previous provision, as interpreted by the majority of the Court of Appeal.

MS LARACY:
It would –

ELIAS CJ:
And indeed, "any proceedings in respect of an offence" which is a term that's carried through in section 40 I notice and perhaps some of the other ones.

WILLIAM YOUNG J:
Section 140.

ELIAS CJ:
Section 140, sorry, yes.

MS LARACY:
Certainly "any proceedings" is a very broad term, especially when that is combined with the very expansive definition of "Court" which is any Court exercising criminal jurisdiction.

On this topic there is – I haven't got it before me but there is a Court of Appeal decision which looked at whether this provision was limited to reports of what in fact occurs during a hearing, as opposed to a report of any part of the case and the Court of Appeal interpreted proceedings very broadly, it applied a *Hansen* analysis. I was involved in the case and I've forgotten the name of it, Solicitor-General against TVNZ, I think.

McGRATH J:

This is quite a recent case?

MS LARACY:

Yes, it's about three years ago.

ELIAS CJ:

Oh no, okay, no, I was thinking of something else.

MS LARACY:

It was one of the first times post-*Hansen* that the Court of Appeal applied the *Hansen* analysis and the Solicitor-General's submissions was that – the submission was that proceedings needed to be interpreted very broadly. In fact, sorry, it wasn't under section 138, it was under the Guardianship Act, or one of the core Family Court statutes which had a similar provision but the language was the language of proceedings and the argument made by the appellant was that proceedings needed to be interpreted narrowly to mean only prohibiting reports of what was actually said during the hearing, as that was the only interpretation that was consistent with the least possible impairment of the section 14 right. The Court of Appeal certainly took the view that in light of *Hansen* proceedings had to be given its ordinary meaning and that it should be interpreted more expansively. I'm sorry that's a lengthy explanation but –

ELIAS CJ:

Sorry, the overlapping approach that's been put to you, I wonder where that leaves contempt proceedings because, and maybe this just goes back into the absence of reasons, if you don't know what is prompting the suppression because it's so broad, but you say well there is power to do it so it must have been exercised, that hardly seems to me to be the exercise of judicial authority as we expect to see it. You do expect to see that this, we're suppressing the evidence because there's no way to measure, I would have thought, the culpability when you come to assessing penalty if you don't know what the Judge was aiming at. There's no way for somebody who's not a party to the proceedings to be able to work out what the damage really is. It's really quite unsatisfactory to say well, you know, there are all sorts of powers that could have been utilised here, we don't know why they were.

MS LARACY:

The concerns Your Honour has articulated are the very reasons why when Judges ever make suppression orders they should do it in a very careful way. They should identify what is being suppressed with a good deal of precision, the reason for it and the power they're purporting to exercise. If those things happen the concerns Your Honour has identified either shift away or at least are mitigated. What I would say in this case is that the Solicitor-General would submit that the power to make the order is clear. From the defendant's perspective there could be no concern that there was doubt as to what he was not allowed to do. No doubt at all that, about what he could not publish. Nor could there be doubt that there was a power. The only doubt on the way the proposition has been put to me is whether the contempt proceeding could have been advanced instead of one head it could have been advanced on two heads. I accept the fact that there's not a clear delineation of – there may not be a clear delineation of what's covered by the statutory provision, or certainly not as clear as perhaps this Court would like, and what's covered by the common law is less than ideal but it certainly doesn't suggest that there could be any lack of power to make the order, any lack of clarity in what he was prohibited from doing.

The next step, in my submission, is that the Solicitor-General and the Courts who have looked at this, the High Court and the Court of Appeal, there's never been any question as to clarity in the sense that we've always said, this contempt proceeding assumes that the order was made under the Court's inherent power. If the Court, if Justice Winkelmann had no power to make the order, there is no contempt, and we've gone so far as to say that if that's the case then the contempt finding is quashed. The Solicitor-General in the particular circumstances here wouldn't seek another trial. So I appreciate and endorse what Your Honour has said but that really is the ideal to which the law should aspire. As I said at the beginning, the suppression order in this particular case was not a model of its kind.

WILLIAM YOUNG J:

It pretty much was a model actually because it's a very standard –

ELIAS CJ:

That's the problem. We perhaps don't make models. We want them tailored.

MS LARACY:

But there was power to make the order and what is also clear is that the order was made for a proper purpose. For the very purpose – for one of the very purposes for which the suppression order, the suppression power at common law has existed, namely to safeguard the right to a fair trial. That is undoubtedly what the Court's purpose was and that can be gleaned from the circumstances of the case and while that's not express there can be very little doubt, especially given the subsequent decision which was very much couched in terms of the Crown's submission that further suppression, or such broad suppression was not necessary for fair trial rights and the defence concerned that indeed a broad suppression was necessary for fair trial rights, we don't need to worry about what purpose was.

ELIAS CJ:

You know I struggle when I look at the judgment in working out how fair trial rights were implicated. Can you help us with that?

MS LARACY:

Well my submission on that is –

ELIAS CJ:

Was there anything in that, that wasn't in the public arena anyway? The fact that there were a number, serial number of camps and so on?

WILLIAM YOUNG J:

I think that had all been suppressed, hadn't it?

GLAZEBROOK J:

Yes, I think so.

ELIAS CJ:

Had they all been suppressed?

GLAZEBROOK J:

Yes. All of the evidential names were suppressed.

ELIAS CJ:

But even the outline that it was thought that there were training camps going on.

WILLIAM YOUNG J:
There were very extensive suppression orders.

MS LARACY:
My understanding is that while a case by case assessment was made by the Judge of each pre-trial matter which she presided over, ultimately each pre-trial decision was suppressed. The difficulty with this line of enquiry is that it has never been permissible post a finding of contempt to try and overturn that finding and defend the contempt on the basis that the order should not have been made.

ELIAS CJ:
Well I want to ask you about that because I'd like to know the reason why that should be so because it occurs to me that if these orders are made against the world, so they're not against people who have been party to the decisions, and who are flouting them, if they're made against the world then this is really analogous to the type of collateral challenge that's always been permitted in respect of regulations or by-laws that if there's something that's illegal you can raise it in the contempt proceedings. Now it maybe that you're not in a position to help us very much with this because the grounds of appeal didn't really identify this, but I'm more and more troubled by the assumption in the hearings below, in the cases below that you had to first go to – and get this set aside, you couldn't challenge it collaterally in the contempt proceedings.

WILLIAM YOUNG J:
The point was explicitly excludes –

ELIAS CJ:
I know, I realise that, but I think it leaves us in some difficulty and you've mentioned that fact, that you can't in contempt proceedings raise whether the order was appropriately made and this, of course, is post Bill of Rights Act so the Judge is bound by the Bill of Rights Act. We can't tell what assessment was made in this case.

MS LARACY:

I'm happy to engage with that and at quite a detailed level but can I just start by making the observation that with respect to this particular appellant, this Court in at least two previous decisions, substantive decisions, has not been satisfied by that argument from him. Namely in the first contempt proceeding which the Solicitor-General wasn't involved with concerning Mr Stiassny again the argument –

ELIAS CJ:
But that was different. That wasn't an order made against the world. It wasn't a suppression order against the world. It was an injunction in which he was a party.

MS LARACY:
Yes.

ELIAS CJ:
He was a party to the proceedings and I wonder really whether there's a point of distinction there. I'd just like to know what authority you rely on for this.

MS LARACY:
Well in terms of the cases before you *Taylor* does deal with this very issue.

ELIAS CJ:
Yes.

MS LARACY:
The –

WILLIAM YOUNG J:
Rather confusingly actually because one of the Judges did seem to think that if the order shouldn't have been made then that would be a defence whereas the other thought that would only be the case if the order was outside jurisdiction.

MS LARACY:
If it were made without –

WILLIAM YOUNG J:
Yes.

MS LARACY:

– and it really does come down to what does "shouldn't have been made" mean. My submission – generally when case law from relevant other jurisdictions has looked at this issue, the distinction has been between orders made within jurisdiction, namely where the power has been purportedly exercised for a legitimate purpose and there has been a power, either a common law power or a statutory power and cases – and in those cases it's been held it's not legitimate to challenge the order on a contempt proceeding and cases where the argument is that the order could never have been made in the first place and, in that case, it's a bit like punishing someone for an offence, a statutory offence which it's then found to have not in fact have been on the statute book. Everyone thought it was and what the person did is bad but there was in fact no offence provision. So it is acceptable in those types of cases, where there's no jurisdiction on a contempt proceeding to challenge it.

So yes, as Justice Richmond in the *Taylor* decision, his view at page 687 of the decision is that, "In proceedings for contempt it should be open to the defendant to excuse himself by establishing if he can that the order of the Court upon which the proceedings found it was outside the jurisdiction and a complete nullity. It is not open to the appellant to challenge the validity of the order on the grounds of some form of error within the jurisdiction." Now my submission, that's consistent with the decision of Your Honour Justice Elias and Justice McGrath in the 2010 *Siemer v Solicitor-General* [2010] NZSC 51, [2010] 3 NZLR 767 case. Certainly consistent with the reasoning and it's also consistent with the leave grant in this case –

ELIAS CJ:

But that was the case that was where he was a party to the proceedings, it wasn't a case like this, of suppression.

MS LARACY:

Yes, I accept that and I haven't thought – and I'm happy to do so, but I haven't thought about whether a different principle –

ELIAS CJ:

No, look I understand that and I'm just flagging it and it may be –

MS LARACY:

– would apply inter partes.

ELIAS CJ:

– that we may have to consider further whether we need to trouble you on this but if there was any immediate response you have to this disquiet I feel –

MS LARACY:

Yes.

ELIAS CJ:

– because effectively, the limitation prescribed by law is the banner in this matter. That's the rule of law. The fact that the Judge had power to make it isn't what really bites, it's the fact that she made the order and I would have thought, in those circumstances, there must be opportunity for someone affected to question it.

WILLIAM YOUNG J:

They can of course apply to have the order set aside.

MS LARACY:

And my learned friend's response to that would be that Mr Siemer did –

WILLIAM YOUNG J:

No, he didn't.

MS LARACY:

Oh well, that Ms Bright did on his behalf after the proceeding but let's assume it was Mr Siemer instead of Ms Bright, after the contempt order, he had applied and the Court said no, you don't have any standing –

WILLIAM YOUNG J:

Well the Court would have been wrong.

GLAZEBROOK J:

The Court would have been wrong but it would have to have been before the contempt in any event because it doesn't help to apply – to decide afterwards.

MS LARACY:

Yes and even on the Court would have been wrong, I haven't found any suggestion that at common law an aggrieved third party, so not a party and not a media or accredited media, or however we define them and I know the concept of media is problematic nowadays but I can't find any authority that says an aggrieved third party, as of right, has an entitlement to be heard and there are good –

ELIAS CJ:

So why not use the analogy of permitting challenge in the context of the penalty, the contempt proceedings, as we do when people are in breach of bylaws or regulations?

MS LARACY:

Because the law in the end has settled on certain policy divisions and what it – where it has fallen is that if you're a third party and while your section 14 interests are affected, if you're not the person directly affected, say by the content of the suppression order, you probably don't have a right to appeal it, you might not be given standing to be heard about the order. The affected party in this case no doubt had a right to appeal it, the Crown had a right to appeal it, the accused, the seven or nine accused had a right to appeal it. They didn't want to. Mr Siemer didn't have a right to challenge it but he then doesn't – because of that he doesn't then get a right to undermine the Court's purpose simply because he's got no other mechanism of attacking an order which in fact only peripherally bears on his fundamental rights.

GLAZEBROOK J:

Well it does bear on his rights, doesn't it because it affects him. As a member of the public –

MS LARACY:

Yes.

GLAZEBROOK J:

– he wasn't allowed to publish anything, in the same way that a member of the media wasn't allowed to publish anything. So surely if you are affected by an order and you don't have a right to deal with it in any way, then I would actually be somewhat concerned if he then didn't have a right to deal with it on contempt proceedings

either. I mean, for myself, I think he would have – he should have the right to say it should be set aside and the –

MS LARACY:
After breach?

GLAZEBROOK J:
No, before breach.

MS LARACY:
Before breach. Well that's the difficulty, it's all theoretical. He was warned he'd be held in contempt if he did it –

GLAZEBROOK J:
No, no, we're not talking about the particular case.

MS LARACY:
Yes.

GLAZEBROOK J:
Actually, I have another issue that I'm concerned about as well but perhaps finish this one.

ELIAS CJ:
All right. So perhaps on that, unless there's anything you want to finish off on, we'll think a bit more about it.

MS LARACY:
Perhaps, just to refer Your Honours to some other case law very quickly. I think there are two cases that are worth looking at. Unfortunately, neither of them are before you, although they were before the Court of Appeal. One is the *United Nurses* decision from the Supreme Court of Canada which I've cited for another proposition. It talks about why the law of contempt will be at common law, it must be seen as being prescribed by law but in that case, I think it's the Chief Justice, talks about the Court's policy concerns of not allowing people, after they have breached an order, to then try and justify the breach by saying the order shouldn't have been made.

There's a useful passage there. It's quite a famous passage and it's the one that talks about anarchy will not be far behind but it is an important passage.

There's another case which I could make available today. Not to suggest you read it but that the registrar could copy it, which I've got in my bag, which is a decision of the Ontario Court of Appeal called *Dohm* which was – dealt extensively with this very issue, namely when can – on what basis can you challenge a finding of contempt. In that case it was also a breach of a non-publication order and the Court there talked about, even where you could say that the order was made and it didn't take account properly of fundamental constitutional rights in the Canadian Charter. So the order erred by not approaching the Charter analysis properly. That didn't put it outside jurisdiction and it could only be where the order could be said to be outside jurisdiction that it could be consistent with the Court's policy and the need to maintain control over proceedings to allow a defence on that basis. So no matter how wrong an order is, even if it's a departure from the proper Bill of Rights analysis, that won't allow the Court to challenge post-contempt.

ELIAS CJ:
I'd find that helpful to see that, thank you. No, there's no need to – perhaps give it to the registrar later, that would be helpful, thank you.

MS LARACY:
So that was probably all I'd say on that.

GLAZEBROOK J:
My concern was, just coming back to this 138 issue, because one assumes in this case that even if you're right in terms of the administration of justice, that there was and maybe the only purpose was because there's was reference to the evidence that was likely to be adduced in the case and just because – and if that was the case, then subsection (5) would exclude the jurisdiction of the Court to make suppression orders under the inherent jurisdiction which is what you've agreed, I think?

MS LARACY:
Mhm.

GLAZEBROOK J:

So what was left that was under the inherent jurisdiction, if it wasn't related to the evidence and if there is a sort of job lot that you can make some of it under the inherent power and some of it under the section 138 how can you justify a finding of contempt unless you say that the subsection (7) summary ability to convict is not the only mechanism for breach of those suppression orders.

MS LARACY:

Well, the subsection, the presence of subsection (7) is the reason why the Solicitor-General would not seek to enforce as a contempt breach of an order that is properly made under section 138. The view that we would take rightly or wrongly would be that Parliament has provided an express summary procedure for what is a summary offence under section 138. The only exception –

GLAZEBROOK J:

That doesn't really answer the question here because in fact if part of this judgment was suppressed because of the evidence and what I was suggesting to you I would have thought that was about the only basis upon which it could be suppressed but leaving that aside then in fact whether it was purported to be made under 138 or not.

WILLIAM YOUNG J:

This isn't really Ms Laracy's argument. Can I perhaps put it, a response. Say the Judge had said, "It is doubtful whether the evidence to which I have been referring can be said to have been adduced for the purposes of the hearing. But on the assumption that it was I suppress, using section 138(2), all references to the evidence and submissions in my judgment and as well in my inherent jurisdiction I suppress publication of my judgment." Now if she'd done that then there wouldn't be, you wouldn't prosecute for contempt in relation to the evidence and submissions but you would be able to in relation the judgment.

MS LARACY:

Yes, you wouldn't normally –

GLAZEBROOK J:

Which is – what I was suggesting was a slightly odd result and slightly unfair in the sense that if she'd just said, well I'm suppressing under 138 and don't publish the rest of the judgment because it doesn't make sense without the evidence, which is of course usually the reason you suppress everything pre-trial is that – otherwise you'd

have something that didn't make any sense. And so that person will only have summary conviction and then if there had been just this extra one they get a conviction for contempt and I wouldn't have thought that the sentencing in this case made any differentiation between having published the evidence or having published the rest.

MS LARACY:
Yes –

GLAZEBROOK J:
I haven't looked at the sentencing because I must say I hadn't quite focused on that point.

MS LARACY:
There maybe some cases where the penalty under subsection (7) is, for what is plainly a summary offence under 138, the penalty is too low –

ELIAS CJ:
What is the penalty under section – because that's another –

MS LARACY:
It's $1000.

CHAMBERS J:
That leads to my question for you under this section. Suppose a voir dire were held during a trial and evidence was adduced. As it turned out in the end no ruling was given. But a reporter who sat through it reported what was said in the voir dire. Now – an order was made that the evidence adduced on the voir dire must not be reported. Now you would accept, wouldn't you, that that order had to be made under 138(2)?

MS LARACY:
Yes.

CHAMBERS J:
Right. A reporter publishes that evidence during the trial. The only penalty for that, on your argument, is the $1000 fine, isn't it?

MS LARACY:

Yes although we probably wouldn't – if we could say that – if the Solicitor-General could say that publication risked a fair trial then the proceedings brought would be a proceeding for strict liability contempt and we wouldn't look at the summary provision at all. So there are other contempt mechanisms for dealing with that situation but I may be off the point.

CHAMBERS J:

Oh I see. So you say despite the fact –

GLAZEBROOK J:

Why not just say you can actually prosecute for contempt for breach of any suppression order when they're made under section 138 or otherwise. Because it's a very odd situation that it's made under 138 but you can have strict liability contempt but it hasn't got anything to do with the order.

MS LARACY:

That's right, because strict liability contempt has nothing to do with any order. You don't need to have a suppression order at all. The Court –

GLAZEBROOK J:

Well yes but that – I mean I must say, for myself, strict liability contempt worries me much, much more than breaching an order in a contempt for breaching an order. At least if you've got contempt for breaching an order you know what you're doing, you do it with your eyes open.

MS LARACY:

In terms of – perhaps a quick summary. Under section 138 there's a strict liability offence. Don't have to prove anything other than that there was a breach of a suppression order. For contempt by breach of an order under the common law power the Court has to be satisfied, beyond reasonable doubt, that there was a knowing breach of an order. The mischief that the contempt law is getting at is the mischief of people who deliberately or recklessly undermine the Court's authority. And that ties in with the policy that when orders are made people have to know that they have to be obeyed unless and until set aside and all those other sorts of issues.

The two other relevant forms of contempt that relate to publication are quite distinct and don't rely on an order at all. Albeit in the factual scenario suppression orders may, in fact, have been made, and they're the more difficult forms of contempt to prove, and they're certainly the ones that the Court have struggled with. One of them is the contempt by thwarting the Court's purpose, and I've already talked about that earlier, and that might, for example, be the voir dire example where no suppression order is made.

The final form is the strict liability contempt where the applicant has to prove beyond reasonable doubt that, regardless of whether anything was suppressed, the publication by the defendant created a real risk to the fairness of the trial. And when the Court looks at that real risk test, it looks at a whole bunch of factors, which actually make it quite a difficult form of contempt to prove, namely what was the nature of the publication, how far away was the trial, what would be the effect on the jury of directions which were taken to ameliorate the publication, becomes a highly evaluative exercise and for that reason it also becomes a very uncertain mechanism, if that's what the Court is relying on to protect fair trial proceedings. Very uncertain that – the Solicitor-General, for instance, who normally brings such proceedings, will bring a proceeding. That the proceeding will succeed and therefore where's the deterrent effect. These were the concerns that Justice Harrison expressed in, I think it's paragraphs 68 of the decision where His Honour talks about the New Zealand context and why the United Kingdom approach doesn't work here and simply creates uncertainty where it's very important that the law be certain and clear and whereby it's knowing that there's a direct mechanism for enforcing the Court's purpose, whether you describe the Court's purpose as an order or an admonition or a warning. Sorry, the passages I'm referring to where Justice Harrison looks at this, are from 61 to 65.

The other – his words jumped out at me then, the difficulty with those forms of contempt as well, the last two, the thwarting and the strict liability contempt, is that they are cases of certainly enforcing the Court's authority and the Court's purpose but only by shutting the door after the horse has bolted, which is the language of the judgment. So someone may well be held to account for having upset a fair trial but at that point the fair trial has been upset or at least the administration has been engaged in a complex proceeding to work out what the damage is whereas the great advantage and certainty obviously of the inherent power is that the Court clearly

suppresses what cannot be published and everybody knows that the mechanism for enforcing that is direct and certain and quite simple.

ELIAS CJ:

Can you point to anything in the judgment declining trial by jury which is the subject of the suppression order, in which the interests of justice require the suppression of anything other than evidence or submissions?

GLAZEBROOK J:

I was just wondering about the complexity arguments, in terms of it being too difficult for juries et cetera but...

ELIAS CJ:

Terribly hard to see how that impacts on the interests of – suppression is required in the interests of justice there. Is there anything?

MS LARACY:

I'm sorry –

WILLIAM YOUNG J:

It might have been – assuming an appeal were allowed, this judgment might have made a rather odd read on the Internet for jurors who were selected ultimately.

GLAZEBROOK J:

That's what I was thinking, in terms of it –

ELIAS CJ:

Why?

WILLIAM YOUNG J:

Well I think they might have thought crickey –

ELIAS CJ:

How would it really have prejudiced the trial?

WILLIAM YOUNG J:

They might have thought the Judge doesn't think we're up to the job, the Judge thinks this task is too much for us.

ELIAS CJ:
Oh well, okay.

GLAZEBROOK J:
And juror management and matters of that kind, it's hard to –

MS LARACY:
Can I put it this way, it wouldn't be –

GLAZEBROOK J:
– and protest as I mentioned.

MS LARACY:
– it wouldn't be an extraordinary result if had someone with standing appealed this suppression order, if the Court of Appeal had said it shouldn't have been made. That would probably be my submission, that it would be certainly be open to the Court of Appeal if not more, to say the suppression order was more than was required. There was –

ELIAS CJ:
But we're being asking, at the end, we're being asked to uphold an outcome in which a sentence has been imposed on a basis that you are acknowledging, probably wouldn't have stacked up.

MS LARACY:
No, you're being asked to uphold a sentence on the basis that someone has created the serious mischief of deliberately undermining a lawful decision of the Court and in a very public way and that's what the mischief and the gravity of this contempt is. It has not ever been part of the Solicitor-General's case that even an aggravating feature of this is that Mr Siemer in fact created a real risk to the Operation 8 fair trials and that's where, in my submission, why a lot of what my learned friend said to Your Honours earlier this morning, may well be totally sustainable. In my submission, it doesn't in fact have any place, proper place at this stage of a contempt proceeding. It's –

ELIAS CJ:
But then if that's so, if discipline is the only purpose of this, why is the summary process not sufficient, why was the summary process not sufficient?

MS LARACY:
Well –

WILLIAM YOUNG J:
Not available.

MS LARACY:
– our approach –

ELIAS CJ:
Oh, on your approach.

MS LARACY:
– on this, rightly or wrongly –

ELIAS CJ:
Yes, I see.

MS LARACY:
– was that there was no power for the Court to make an order under section – under the criminal justice process. The other thing that has to be borne in mind is that the Court and the Solicitor-General may well feel that where you have a recidivist who has through a consistent course of conduct, including for the second time in this particular case, published in breach of a High Court Judge's order that something more than the summary penalty was required.

In my submission, that's a legitimate approach, that is where the law of contempt comes in because we're not looking at mere strict liability level of culpability here, we're looking at someone who full knew what he was not entitled to do, had done it before and decided because he felt entitled, that he would act regardless of the Court's order and, in my submission, that's a very dangerous position for the Court to allow and I guess, perhaps the way of ultimately wrapping this up and it may sound a

bit glib but I don't mean it to be that way at all but, there are those very fundamental statements from the House of Lords in the *Sunday Times* newspapers case about how the foundation of all contempt is good public policy and that's why, when the Court looks at the gravity of this and how it has to be responded to and what it's responding to, the Court has to decide how far can we sanction this type of conduct?

In my submission, by allowing on a contempt – after a finding of contempt, the person to challenge that finding by saying the order should not have been made, is contrary to good public policy, the certainty of orders and allowing other individuals to know that when the Court makes an order it is valid unless and until set aside and must be upheld and will be enforced.

GLAZEBROOK J:
Can I just ask you, what was the order to suppress evidence made under, if it wasn't made under 138 because there isn't a power to make a suppression order of evidence under other than 138?

MS LARACY:
No. So all we know is that –

GLAZEBROOK J:
So to the extent that the order – so the extent that the judgment outlined evidence and it was suppressed, then either it was made without jurisdiction or it was made under 138, wasn't it?

WILLIAM YOUNG J:
There's a third alternative, that it wasn't evidence, it was not evidence adduced, it was evidence about the –

GLAZEBROOK J:
Oh no, I understand that but –

WILLIAM YOUNG J:
– so there's the third possibility.
MS LARACY:
The issue –

GLAZEBROOK J:

And it wasn't a specific – it was a summary of the evidence rather than a quotation from the evidence as well –

MS LARACY:

The actual suppression order said this judgment and any summary, or and/or summary description or account of it may not be published but that's with the – that was the scope of the suppression order. Now the Court's concern which I do appreciate, is that why would you suppress a judgment when in fact what you're really trying to do is suppress, at a pre-trial stage, sensitive information or evidence so that it won't risk prejudicing a fair trial. That's a valid concern and it does call into question whether it was proper to suppress the entirety of the judgment –

CHAMBERS J:

Well, except that part of it might be that you don't even want to get out that the application had been made.

MS LARACY:

Well that might be and I don't – while I've accepted that the Court of Appeal might well have overturned this if it were challenged on appeal, my submission is that none of us actually have enough information to – or in the position looking at this at first instance, to be able to say whether in fact it was – the Judge was right to order such a wide suppression or any suppression. It is a bit speculative and that issue is not before us.

CHAMBERS J:

Another possibility is that section 138 does not apply to judgments at all.

MS LARACY:

Which is my submission. So the proposition the Court has put to me, as I understand it, is that the Court could have – Justice Winkelmann could have achieved her purpose by using 138 to suppress parts of the judgment, I accept that –

CHAMBERS J:

No, no, I'm putting the proposition –

GLAZEBROOK J:

Yes, the wider proposition –

CHAMBERS J:

– that she couldn't do that, it had to be – this has got nothing to do with judgments.

MS LARACY:

No, all I'm saying is –

McGRATH J:

Judgments pre-trial or –

MS LARACY:

– that she could have said –

CHAMBERS J:

Any judgment.

GLAZEBROOK J:

Any judgment.

MS LARACY:

All I'm saying is that she could have said here's my judgment, to the extent that it refers to submissions or evidence, those parts of it are suppressed under section 138. I accept that but that's not what she did. She suppressed the whole judgment. The Solicitor-General submits that section 138 does not apply at all to judgments. There was no power for the Judge to make the order she made under section 138 and therefore it was make properly, we say, under the inherent power and the closest analogy is of course this Court's own decision in the *Bain* case, the minute which is before Your Honours at tab 1 of my casebook, where the Court –

GLAZEBROOK J:

While you're looking for that, I think Justice Chambers' point was wider than that. It was saying that what she could have done is suppress the evidence and the submissions which would then mean that nobody could refer to her judgment to the extent they did refer to that but if she was wanting to suppress the judgment itself, she actually had to use the inherent power rather than 138 –

MS LARACY:

Yes.

GLAZEBROOK J:

– because in fact, the judgment is not evidence or submissions. So the way you said she would do it is not quite the way that Justice Chambers was suggesting –

MS LARACY:

I appreciate –

GLAZEBROOK J:

– but in fact what she would do was suppress the evidence and submissions and then, to the extent the judgment referred to them, it would mean that the order – it was the order suppressing the evidence and submissions would mean that you couldn't refer to the judgment. Of course that would be terribly difficult for the ordinary punter because they wouldn't know what was in the judgment that they could or could not refer to at that stage.

ELIAS CJ:

Well, to the extent –

GLAZEBROOK J:

Unless it was made absolutely clear that it was referring –

ELIAS CJ:

If an order had been made under section 138, that would have prevented someone who had been sitting in the Court reporting on the evidence and submissions and would have prevented somebody who read the judgment abstracting from it an account, would it, of the –

CHAMBERS J:

I'm not sure on that –

ELIAS CJ:

Not sure, no.

CHAMBERS J:

– it seems to me, the answer in that event would have to be either, if there were an order in this power to make it, the order suppressing the judgment would have to be actioned in contempt, or apart from that it seems to me, publication of the judgment might give rise to a contempt as being likely to interfere but that would have to be proved of course.

MS LARACY:
Yes, yes. I'm conscious I've gone on till 4 o'clock.

ELIAS CJ:
No, no, that's fine. That's been very helpful. Any further points you want to make?

MS LARACY:
There's probably lots of further points but I think they're adequately addressed in the written submissions. Except maybe for one matter which is that, when the Court is looking at whether, in the context of suppressing material in a criminal case it's a necessary, my suggestion is the Court needs to look at what the alternatives are if a fair trial is still to be protected and generally the only alternative, if suppression is not available, is going to be a closed Court and I'm pretty sure that this Court would need no assistance on why the interference with the section 14 right that occurs with suppression is far more preferable and much more consistent with the overall interests of justice than a practice which led to increased closed Court hearings and I suppose on that, in light of what I said earlier, the Court would still have to suppress because of course the accredited media, even at a closed Court hearing, can still come and listen. So the Court would then have to – would still have to suppress.

So having started on the route, the general proposition is that the balance that we have is right but there are very few other options to the Court where it's necessary to remove material from prospective jurors and suppression is necessary and that concept of what's necessary to ensure justice is the foundation stone of the Court of Appeal's judgment.

The secondary basis of course was to say well, we're actually satisfied that there is a common law case authority we can point to which starts off the tradition of this law and that's the *In Re v Clement* (1822) 11 Price 68, 147 ER 404 decision but I think

it's worth reinforcing that the primary basis of the Court of Appeal's reasoning is that, as with Canadian law, the Court needs to be able to do this to ensure justice is done and the point I've made in the submissions, perhaps not as fulsomely as might have been appropriate, is to note that New Zealand does seem to make a lot of suppression orders but that's because we don't have statutory schemer which automatically prohibit publication of entire types of criminal proceedings and my submission is that our approach is in fact much more consistent with the right to freedom of expression than the approach in Canada and the UK, where pre-trial proceedings, appeals from pre-trial proceedings, committal proceedings, are all automatically prohibited from publication.

ELIAS CJ:
By statute.

MS LARACY:
By statute.

ELIAS CJ:
Yes.

McGRATH J:
Has that been tested in the Charter case in Canada?

MS LARACY:
Yes and in fact, one of the cases I've got before you and it's worth reading both at the Court of Appeal level and the Supreme Court level, is one called *Toronto Star Newspaper Ltd v Canada* [2009] ONCA 59, 302 DLR (4th) 385 and it builds on the *Mentuck* – of course, in *Independent Publishing* the Privy Council said look, we're not sure that in Canada they really are talking about the same type of common law suppression power as we're talking about because in the *Dagenais v Canadian Broadcasting Corporation* (1994) 94 CCC (3d) 289 case of course, that was a *quia timet* injunction to restrain a threatened out of Court contempt.

So I've put *Mentuck* before you because that shows that in fact the Canadian power relates to – does also relate to suppressing material that arises in an open Court to proceedings. So it's very much a suppression power and then the next step is to

look at a case like the *Toronto Star* case. Now in that case, there was actually a statutory provision which said that no part of a bail hearing could be published and the particular concern was in this – in the case before the Court, there was only ever going to be trial by Judge alone, so the argument was made. There can't be a fair trial right here, at stake, in these cases where there's never going to be a jury.

By the time it got to the Supreme Court, on the challenge to the legislation the Supreme Court was satisfied that the interests that are sought to be protected by that type of bail suppression, albeit it's statutory, are Charter compliant, even where there's only ever going to be a Judge alone trial.

Unless there's anything else I can assist with, those are my submissions.

ELIAS CJ:
Yes, thank you Ms Laracy. Mr Ellis, can you perhaps give me some indication of how long you expect –

MR ELLIS:
15 minutes at the most.

ELIAS CJ:
15 minutes, yes, thank you.

MR ELLIS:
That is, if you don't ask me lots of questions.

ELIAS CJ:
Yes, well we'll have to curb ourselves.

MR ELLIS:
Right, in the blue volume at page 83 which was the evidence of Ms Fenton, who is an assistant Crown counsel presenting the Solicitor's case, all the evidence, she's the only witness for the Solicitor. Question, line 4, "You're not suggesting that as a result of these publications there has been any public damage to anyone, or the administration of justice, are you?" "No, I am not making that claim."

The discussion on the judgments issue that Justice Chambers was fond of and the proposition that judgments didn't mean pre-trial and that in 1985 that would have been consistent with what happens because there weren't very many pre-trial matters in 1985. That is probably correct but, regardless of that, the legislature who has amended the Crimes Act and whatever other pieces of legislation to allow pre-trials, has known its amending it and its not chosen to amend the Criminal Justice Act to change the wording which makes it quite clear that it's every sitting of the Court, a powerful proposition, every sitting. If the Court, being fully aware, if the Parliament being fully aware that it was bringing in lots of pre-trial applications would have amended, or should have amended the Criminal Justice Act and it is not for a piece of creative judicial decision making to amend the law, however attractive it may be. Every sitting means what it says.

If that were not so, then how would anybody who is supposed to know what the law of contempt is in case they're facing it because it needs to be prescribed by law, understand what the law is? It cannot be that it takes five of the most intelligent brains in the law to articulate this process and question it, how is somebody who isn't a lawyer supposed to know? It doesn't comply with the very rule of law itself.

Secondly in respect of that, the wording of subsection (2) of 138, "When a Court is of the opinion that the interests of justice," well the interests of justice must incorporate something relating to the administration of justice, so Parliament is actually addressing that proposition there too in conjunction with its removal in subsection (5) of the inherent powers. It's addressing when there's a matter in relation to the interests of justice.

Justice Young's proposition about if there's some sort of hybrid power to suppress under inherent power and statutory power at the same time, well whether there is or there isn't, in our case, he wasn't charged with anything under section 138. He was just charged under the inherent jurisdiction which we simply claim did not exist.

The unlawful issuing of the order, whether there was any jurisdiction to do it, in my submission, the law required the Judge to give reasons. Failing to give reasons, in the context of this case, meant what the Judge was doing regrettably, was exercising arbitrary power, no reasons, as an excessive power and you can't just gleam it, in what gleam, what the interests of justice is. The aspirational ideal needs to be the reality because otherwise the exercise of the power in this case by the Judge is

simply arbitrary and that's supporting effectively by *Lewis* and that was really what went wrong here. The judge who is unaccountable, unappealable, gets away with a judgment without criticism, Mr Siemer goes to jail.

In the, I think it was called, I can't quite remember the name of it but in the Courts below I relied upon a case, I think it was called *News Media Digital* or some combination of those words which was a Victorian Court of Appeal case of 2008 –

MR EDGELER:
Tab 9.

MR ELLIS:
Tab 9, right. What's it called? *News Digital Media Pty Ltd v Mokbel* [2010] VSCA 51. The proposition there was when you get to these Internet publications, it's pointless trying to suppress things and when the Chief Justice says well, wasn't it out there and Justice young says well, there was lots of name suppression and lots of suppression orders, well there can be lots of suppression orders but that doesn't stop it being out there because people in the back of the Court, as that judgment articulates, with twitters and what other things go on in the minds of the young, they're just sitting there at the back of the Court texting things. They might come in, they don't know there's any suppression orders and it gets out there, regardless of whether there's any suppression orders and I think a majority of the Judges, I think it might even have been all three, say look, it's pointless trying to suppress things in the way that they have been and one needs to have a relook at this. So one might be – it's Canute like material.

The collateral – where's that little bit of paper, the collateral attacks – well what we're trying to do is not collaterally attack but head on attack *Taylor* and, I mean, that is as simple as it is. This isn't a collateral attack and we ought to be able to attack, not just collaterally but full on during the course of a contempt hearing, as the Chief Justice was suggesting, like bylaws and the like, *Waddington v British Transport* all those sorts of things, one ought to be able to do it and certainly the international, or the covenant approach, is much less constrained than the common law world approach to how you do things. So you could for example, in many a civil law country as well as covenant, bring a challenge, you could sue in a criminal case and a third party could sue too. They don't constrain themselves to, you've only got to do one thing at

a time, their approach is no, let's look at justice overall and have a go and our approach is very narrow.

Mr Siemer tried to challenge the order. I accept it was retrospective. However, in the criminal jurisdiction, he was told he had no jurisdiction, despite in the civil jurisdiction was told she had no jurisdiction. Well he should have been able to – and this might sound a little radical and don't jump at me too quickly, he should be able to ignore the order when it is blatantly unlawful or has that appearance and that's not so silly as it sounds because otherwise it's arbitrary. You could say I'm imposing the death penalty. Well we know it's going to be overturned on appeal because the Judge has had a mental breakdown but do you keep that quiet and the public aren't entitled to know? No, people want to know and Mr Siemer's essential proposition well, nobody is going to listen to me. If I do it, I get treated as the vexatious litigant that the attorney now says he is and seeks to – I mean, he did try and he got the run around, no you can't challenge it.

So there's unchallengeable proposition and I recollect and I think you're allowing my learned friend to hand something up, the proposition that I put, I think it was in the Court of Appeal, it might have been in the High Court, there was a decision of the Seychelles Court of Appeal citing *Salisbury o*n a contempt issue, saying well, you could challenge it because of lack of jurisdiction in there and I think there may have been some American jurisprudence, that you could challenge when, on the face of it, the judgment wasn't sound and if you're allowing them to hand up that, I'd like to hand up my little bit of submission about what the Seychelles Court of Appeal said.

Possibly, to just finish off, yes I have kept my – given what you've heard today, what we've all listened to, how is somebody faced with a suppression order, unreasoned, unchallengeable, unaccountable, how are they supposed to react to it? Do they know what the law of contempt is because, as Professor Smith says, it's obscure and uncertain and we don't know. Well you can't prosecute somebody, it's contrary to the rule of law itself, if you don't know what the law is and it's abundantly clear, from having listened to the two of us today, that it is unclear.

With that in mind, you should allow the appeal. Thank you Your Honours.

ELIAS CJ:

Thank you Mr Ellis. Thank you counsel for your help in this matter. We'll reserve our decision. Thank you.

COURT ADJOURNS: 4.20 PM