IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2010-404-8559

	BETWEEN	THE SOLICITOR-GENERAL OF NEW ZEALAND Applicant
	AND	VINCENT ROSS SIEMER Respondent

Hearing: 9 - 10 June 2011

Counsel: M Laracy and G J Robins for Applicant
T Ellis and G Edgeler for Respondent

Judgment: 4 July 2011

JUDGMENT OF MACKENZIE AND SIMON FRANCE JJ

Introduction

[1] The Solicitor-General applies for an order that Mr Siemer be held in contempt of court. The application relates to alleged breaches of suppression orders made by the High Court. Mr Siemer defends the allegation primarily on the basis that there was no power in the High Court to make the orders he allegedly breached. Next, he submits that even if there were a general power to make an order, process deficits meant this particular order was a nullity. Finally, he submits that his publications do not anyway breach the terms of the order which must be construed narrowly.

Facts

[2] The case in which the suppression orders were made involves the trial of 18 people for breaches of the Arms Act 1961. The Crown applied for orders that the charges be heard by a Judge sitting without a jury.[1] Winkelmann J ruled on the application on 9 December 2010.[2] At the top of the judgment, above where the names of the parties are set out, it was provided:

> THIS JUDGMENT IS NOT TO BE PUBLISHED (INCLUDING ANY COMMENTARY, SUMMARY OR DESCRIPTION OF IT) IN NEWS MEDIA OR ON INTERNET OR OTHER PUBLICLY ACCESSIBLE DATABASE OR OTHERWISE DISSEMINATED TO THE PUBLIC UNTIL FINAL DISPOSITION OF TRIAL OR FURTHER ORDER OF THE COURT. PUBLICATION IN LAW REPORT OR LAW DIGEST IS PERMITTED.

[3] There was no discussion in the body of the judgment about the suppression order.

[4] Shortly after the judgment was issued, and probably in fact the next day, Mr Siemer published an article on two identical websites which Mr Siemer owns and operates. The article began:

> **JUDGE OR BE JUDGED**
>
> **10 December 2010**
> Chief High Court Judge Helen Winkelmann (pictured) ordered yesterday that the "Urewera terrorist" prosecution … against 15 accused will be by judge alone trial. The landmark ruling was sought on application by the Crown and had been opposed by the accused.
>
> The remaining three of the eighteen listed defendants were ordered separate trials.
>
> Winkelmann J ordered the public not be told about her order. In the past Winkelmann has stated the reason for such secrecy was to ensure the jury pool is not prejudiced by pre-trial information. Her latest order prohibiting a jury states … [here and in a following paragraph we also omit, Mr Siemer summarises the Judge's reasons].

---

1 Crimes Act 1961, s 361D.

2 *R v B & Ors* HC Auckland CRI-2007-085-007842, 9 December 2010.

> The … accused were originally charged under the *Terrorist Suppression Act*. After widespread public protests, Solicitor General David Collins dropped the terrorism charges in October 2007. Most are now charged with arms violations: some with organised crime activity.
>
> Justice Winkelmann was the Judge who earlier concurred with Police that their Court affidavit used to obtain the nationwide search warrants in the massive arrests be suppressed, then revoked bail on Crown application after Auckland District Court Judge Josephine Bouchier granted bail for some of the accused in 2007. In 2009, Justice Winkelmann struck out several of those search warrants as unlawful. Last month, the Court of Appeal reinstated them after the Crown appealed.
>
> Winkelmann's ruling yesterday means the eighteen originally charged wrongly by the Crown as terrorists will now have their guilt or innocence determined by a Crown judge, as the Crown is being forced to justify its actions in the raids to the United Nations.
>
> The arrests were the culmination of a 13 month and multi-million dollar convert police investigation in 2007 which made news headlines around the world.

[5] The word "ruling" in the first paragraph of the article is a hyperlink. If a reader clicked on it he or she would be taken to a full copy of the suppressed ruling.

[6] Sometime shortly after the judgment was released to the parties, the Crown applied to the Judge for a variation of the suppression order on the basis that it went further than was needed. Her Honour heard from counsel and some self-represented accused. Her decision, issued on 21 December, describes itself as a "Telephone Conference Minute". We have no direct evidence on the form of the hearing but note that the ruling records that some accused attended in person.

[7] It is apparent from the ruling that all defence counsel who were heard on the matter wished the order to remain as it was. Winkelmann J accepted this was the prudent course pending appeals, but varied the original suppression orders to allow publication of the results of the decision. This was achieved by adding:

> ... provided that reporting is allowed of the outcome of the judgment as set out at paragraphs 78 and 79 of the Judgment.

[8] So that this might be a full record, we set out those paragraphs:

> [78] I make the following orders:
>
> (a) that the trial of the respondents Teepa, Wharepouri and Hunt be severed from that of the other respondents. It should be called over on a date fixed by the Registry;
>
> (b) that the trial of the remaining respondents proceed before Judge alone pursuant to s 361D.
>
> [79] I also decline the respondents' applications for severance.

[9] On or about the following day, Mr Siemer placed a second article on his websites. It reads:

> **CROWN TO *PERSECUTE* WHERE LAW PREVENTS *PROSECUTION***
>
> **18 December 2010**
> Urewera raid defendants are lining up to appeal Auckland High Court Justice Helen Winkelmann's Judgment that [reasons discussed] and, therefore, a judge –alone trial is necessary when trying the fifteen defendants. It is understood most of the defendants have already signed up to an appeal to be filed with the Court of Appeal in late January.
>
> Meanwhile, Crown Law has sent notice that it intends to prosecute *kiwifirst* publisher Vince Siemer for publishing Winkelmann's judgment, on the grounds Winkelmann ordered the public not be told about it. Crown Law is seeking Siemer be imprisoned.
>
> The threat to prosecute comes despite Meredith Connell advising the High Court and Crown Law that they intend to seek rescission of all suppression orders on behalf of the prosecution on the grounds publication of Winkelmann's judgment "*cannot possibly prejudice the fair trial rights of the accused, and (the issues in the judgment) are a matter of genuine public interest*."

The application

[10] The Solicitor-General's amended application sets out the factual narrative and identifies the articles said to constitute the breach. Paragraph 2.3 then alleges:

> 2.3 The applicant claims that the actions of the respondent in maintaining or publishing statements on websites in respect of which he is the editor, or over which he has control, constitute a deliberate, persistent, and unjustifiable disregard for the High Court's orders, and an assault on the authority of this Court. His actions thereby

> constitute a serious act of contempt of Court requiring a term of imprisonment not exceeding three months in the first instance.

[11] At the hearing Ms Laracy advised that the Solicitor-General relied upon two alternative bases for establishing contempt. Neither necessitated proof that the publication caused a risk to a fair trial. The alternative bases are identified in this passage, from the judgment of Sir John Donaldson M.R. in *Attorney-General v Newspaper Publishing Plc* on which the applicant relies, as options (a) and (b):[3]

> Despite its protean nature, contempt has been classified under two heads, namely, "civil contempt" and "criminal contempt". Whatever the value of this classification in earlier times, I venture to think that it now tends to mislead rather than assist, because the standard of proof is the same, namely, the criminal standard, and there are now common rights of appeal. Of greater assistance is the reclassification as (a) conduct which involves a breach, or assisting in the breach, of a court order, and (b) any other conduct which involves an interference with the due administration of justice, either in a particular case or, more generally, as a continuing process, the first category being a special form of the latter, such inference being a characteristic common to all contempts per Lord Diplock in *Attorney-General v Leveller Magazine Ltd* [1979] AC 440, 449.

[12] The primary difference between the two options is that, unlike the first, the latter does not require that the contemner be directly bound by the order he or she is said to have breached. In his reply submission Mr Edgeler objected to reliance by the Solicitor-General on (b) as an alternative head of contempt. It was submitted that it had not been pleaded, and Mr Siemer had been embarrassed in his defence. Having reviewed the material we consider that the objection is well founded.

[13] First, there is no express reference in the application to this form of contempt. It seems from the outset that direct breach has been the allegation. In the Solicitor-General's initial letter of complaint to Mr Siemer, the allegation is that:

> the publication of your article "Judge or Be Judged" and the judgment itself constitutes a clear and deliberate breach of the suppression order.

[14] Next, it was known to the applicant that an intended defence to this allegation was that there was no jurisdiction to make an order of this kind that purported to bind non-parties to the proceeding. The Solicitor-General's written submissions

---

[3] *Attorney-General v Newspaper Publishing Plc* [1988] 1 Ch 333 (CA) at 362, per Sir John Donaldson J.

anticipate this defence and address it. In such circumstances we consider it had to be made plain that an alternative form of contempt, which did not require the order to be binding on Mr Siemer, would be relied upon.

[15] Third, this alternative basis for finding contempt involves different elements that must be proved. It arises when the purposes of an *inter partes* order have been deliberately undermined by a third party who is not directly bound by the order.[4] As such, the respondent must be shown to have understood what the purpose of the *inter partes* order was, and by his actions to have deliberately interfered with or undermined that purpose.

[16] Both these latter elements involve the respondent's state of mind. It cannot be assumed that Mr Siemer did not have evidence to give in relation to this. It was important that the Solicitor-General's reliance on this alternative allegation be made plain prior to Mr Siemer making his election as to whether to call evidence. We consider this was not done, and accordingly the application should proceed solely on the basis that Mr Siemer breached a suppression order that was binding on him. These same reasons led us to decline the Solicitor-General's application, made at the end of the hearing, to amend his application to make explicit the alternative bases of contempt relied upon.[5]

[17] It is, therefore, unnecessary for us to consider the alternative basis in any depth. We do, however, record our doubts about its applicability. It seemed to us an unreal alternative. One cannot sensibly regard suppression orders such as the present one as usually having a purpose similar to that of an *inter partes* order. Their sole rationale is to bind the world in order to minimise the risks to the fair trial rights of an accused. Where the sole purpose is to bind the world, and assuming for the present that there is no jurisdiction to do that, we have reservations in a criminal trial context that the alternative head of contempt could be used as a means to circumvent the basic lack of jurisdiction to make such an order. Further, where the allegation is not of direct breach, we consider a charge of contempt in relation to a criminal trial

---

4 This is fully discussed in *Attorney-General v Punch* [2002] UKHL 50, [2003] 1 AC 1046.

5 In an appendix to this judgment we set out the procedure followed at the hearing.

should involve an inquiry into whether the person's actions have posed the necessary degree of risk to a fair trial.

[18] We turn now to the core allegation that Mr Siemer deliberately breached the suppression orders. We will address the issues in the order they logically arise. In doing so we remind ourselves that the onus is on the applicant to prove the charge beyond reasonable doubt. We also note that it is common ground that if there were no jurisdiction to make the order, the allegation of contempt for breaching it must fail.[6]

Issue one – was it a judicial suppression order?

[19] The respondent submits that because the order appears only at the top of the judgment, without there being any related discussion in the body of the judgment, it is not apparent that it is the exercise of judicial decision-making rather than an administrative act by persons unknown, but probably the Judge's associate.

[20] This point never had validity, but is fully answered by a Certificate of Authenticity produced in evidence. The Certificate states that attached to it is a true copy of the judgment issued by Winkelmann J on 9 December 2010. The attached signed judgment contains the suppression order. No more is needed. The order was, in accordance with usual practice, recorded in the place where it was most obvious. It was not necessary to record it in that part of the judgment comprising the reasons for judgment. We address later the separate point that the order was defective because no reasons were given for it.

Issue two –jurisdiction to make the orders

[21] The suppression order in question is one typically made in New Zealand in relation to pre-trial rulings. The reason for making such orders is self-evident, namely that publication of some or all of the material contained in the pre-trial ruling may prejudice the right of any accused to a fair trial. Pre-trial rulings such as bail,

---

[6] The correctness of this position is plain from the judgments in *Taylor v Attorney-General* [1975] 2 NZLR 675; see Richmond J at 687, and Woodhouse J at 689.

severance and admissibility of evidence can all contain material that will be inadmissible at trial and which should not be publicised to the potential pool of jurors. Although there are variations in the scope of such orders, the general effect of them is a temporary ban on publication until the trial is complete. The ability to make such orders is an important component in discharging the Court's responsibility to ensure the fair trial of an accused.

[22] The submission advanced on behalf of Mr Siemer is that there is no power to make orders such as these which purport to bind everyone. A Court's power, it is submitted, is limited to orders between the parties. They cannot bind people outside the Courtroom. The authority for this proposition is *Independent Publishing Co Ltd v Attorney-General of Trinidad and Tobago*.[7]

[23] As an alternative it is submitted that if the Court did once have power to make such orders, s 138(5) of the Criminal Justice Act 1985 has removed it. Either way the order was made without power to do so, and Mr Siemer cannot accordingly be punished for a breach of its terms.

(a) Inherent jurisdiction to make the order?

[24] It is common ground that there is no statutory provision providing for this type of order. The traditional analysis used to support such rulings is that they flow from the inherent jurisdiction of the High Court, or are part of the inherent powers of the District Court to give effect to its extensive criminal trial jurisdiction. However, some doubt about this is raised by the *Independent Publishing Co Ltd* decision.

[25] That case concerned a criminal trial where it was announced in open court that a co-accused was going to plead guilty and testify for the Crown against the others. The Judge agreed with counsel that a suppression order should be made so that if the person did not then testify as expected, the prejudice stemming from the open court announcement could be limited. The co-accused then pleaded guilty, and was sentenced in accordance with the plea arrangement. At that point the Judge

---

[7] *Independent Publishing Co Ltd v Attorney-General of Trinidad and Tobago* [2005] 1 AC 190 (PC).

suppressed details of his plea and sentence. It was this suppression order that was held to be outside jurisdiction.

[26] The decision of the Privy Council was that a Court's power is limited to measures taken within the proceeding – e.g., to clear the court, to send the jury out whilst a *voir dire* occurs, or to allow a witness to be identified by a letter. Once these types of measures have been adopted, the only way they can be enforced is by punishing for contempt. Take, for example, the exclusion of the jury during a *voir dire*. The purpose of doing this is obviously to ensure that the jury do not become aware of the *voir dire* evidence. The Privy Council ruling in *Independent Publishers Co Ltd* is that the trial court cannot reinforce this by prohibiting publication of the evidence. However, "the press thwart the evident object of such orders at their peril".[8]

[27] Ms Laracy submitted the effect of the ruling was limited to matters done in open court. It did not apply to a situation such as the present where the ruling was issued outside a courtroom, and where the suppression covered events not inside the courtroom but the judgment itself. Whilst there is appeal in limiting the decision in this way, it is not convincing. If the court could not, at the time of the actual hearing, prohibit any media present from publishing details of the hearing, it is hard to see that it can achieve such a prohibition simply by reserving its judgment and then attaching a suppression order to it.

[28] The key issue in *Independent Publishing Co Ltd* was defined by their Lordships in these terms: "Is there power at common law to order the publication of a report of open court proceedings to be postponed?" So framed, the question might now be seen to be answered in New Zealand by s 138(5) of the Criminal Justice Act 1985, which we later address. In *Independent Publishing Co Ltd*, the relevant events occurred on the opening day of the trial itself, though it is clear that jury selection was to be a lengthy process, and the trial had not reached the stage where the accused had been put in charge of the jury. The power to restrict publicity of pre-trial aspects of the proceedings was not in issue. Their Lordships expressly

---

[8] At [25].

recognised the need, and the ability, to postpone publicity of some events during trial.[9]

[29] But whether or not that case can be distinguished in this way, we consider the answer is that *Independent Publishing Co Ltd* does not represent the law of New Zealand. Orders of this type have been regularly imposed by the Court of Appeal where it orders a retrial. We list below numerous examples from the last few months.[10] In *Muir v Commissioner of Inland Revenue*, this issue of the impact of *Independent Publishing Co Ltd* was specifically addressed.[11] The Court did not finally resolve the issue of its impact but observed:[12]

> We accept (at least for the purposes of this case) that there is jurisdiction to make confidentiality orders despite the absence of a statutory power to do so. In this respect we are content to follow *Taylor v A-G* 1975 2 NZLR 675 despite its rejection by the Privy Council in *Independent Publishing Co Ltd v A-G of Trinidad and Tobago* [2004] UKPC 26.

[30] We do likewise and follow the decision of *Taylor*.[13] It has not been overruled in New Zealand, and the Court in *Muir* was prepared to proceed on the basis that it remained good law. It is common ground that *Taylor* would authorise the present order (unless it is overruled by statute, an argument we will address next).

[31] Our view is further confirmed by the Supreme Court's decision in *R v Bain*.[14] That case involved a pre-trial appeal concerning admissibility of evidence at an upcoming high profile retrial. The Supreme Court ruled the evidence inadmissible. Its judgment contained the following order:

> The orders prohibiting publication of any part of the proceedings (including the reasons when they are given) continue, save that these orders may be published.

[32] There is no specific power in the Supreme Court Act 2003 or the Rules made under it that gives specific powers to suppress. The legislation does, however, state

---

9 At [23].

10 Recent examples are *M v R* [2010] NZCA 550; *Pearson v R* [2010] NZCA 459; *Ah You v R* [2011] NZCA 82; *R v T* [2011] NZCA 94; *Cameron v R* [2010] NZCA 411; *Q v R* [2010] NZCA 487; *F v R* [2010] NZCA 520.

11 *Muir v Commissioner of Inland Revenue* (2004) 17 PRNZ 365 (CA).

12 At [32].

13 *Taylor v AG* [1975] 2 NZLR 675 (CA).

14 *R v Bain* [2009] NZSC 16.

that Supreme Court Judges remain High Court Judges and retain all the powers of the High Court. The implication is that such orders stem from that status.

[33] Accordingly, we take it from the various suppression orders imposed by the Court of Appeal and Supreme Court that the authority of *Taylor v Attorney-General* remains good law. It is of course binding on this Court.

(b) Statutory repeal of the inherent jurisdiction?

[34] The alternative argument is that whatever *Taylor* decided, s 138(5) of the Criminal Justice Act 1985 repeals it. Section 138 provides:

> **138 Power to clear court and forbid report of proceedings**
>
> (1) Subject to the provisions of subsections (2) and (3) of this section 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.
>
> (2) Where a court is of the opinion that the interests of justice, or of public morality, or of the reputation of any victim of any alleged sexual offence or offence of extortion, or of the security or defence of New Zealand so require, it may make any one or more of the following orders:
>
> (a) An order forbidding publication of any report or account of the whole or any part of—
>
> (i) The evidence adduced; or
>
> (ii) The submissions made:
>
> (b) An order forbidding the publication of the name of any witness or witnesses, or any name or particulars likely to lead to the identification of the witness or witnesses:
>
> (c) Subject to subsection (3) of this section, an order excluding all or any persons other than the informant, any **[**Police employee**]**, the defendant, any counsel engaged in the proceedings, and any officer of the court from the whole or any part of the proceedings.
>
> (3) The power conferred by paragraph (c) of subsection (2) of this section shall not, except where the interests of security or defence so require, be exercised so as to exclude any accredited news media reporter.
>
> (4) An order made under paragraph (a) or paragraph (b) of subsection (2) of this section—

(a) May be made for a limited period or permanently; and

(b) If it is made for a limited period, may be renewed for a further period or periods by the court; and

(c) If it is made permanently, may be reviewed by the court at any time.

(5) The powers conferred by this section to make orders of any kind described in subsection (2) of this section are in substitution for any such powers that a court may have had under any inherent jurisdiction or any rule of law; and no court shall have power to make any order of any such kind except in accordance with this section or any other enactment.

(6) Notwithstanding that an order is made under subsection (2)(c) of this section, the announcement of the verdict or decision of the court (including a decision to commit the defendant for trial or sentence) and the passing of sentence shall in every case take place in public; but, if the court is satisfied that exceptional circumstances so require, it may decline to state in public all or any of the facts, reasons, or other considerations that it has taken into account in reaching its decision or verdict or in determining the sentence passed by it on any defendant.

[35] In *Paraha v Police* Heath J held that sub (5) was limited to the situations described in subs (2) and had no impact outside that subsection on the inherent jurisdiction or powers of a trial court.[15] In *Paraha* the issue was the ability of the District Court to prohibit publication of photos of accused persons, and Heath J had no doubt as to the continued ability of both the District and High Court to make such orders to prevent an abuse of its trial jurisdiction.

[36] We agree with this interpretation. Section 138(2), read in context, addresses situations where the Court is sitting in open court but wishes to control publicity of events being witnessed by those present. The means by which it may do so are identified in s 138. The right of the media to be present is re-inforced in subs (4) and any alternative view the common law may have had is overridden in subs (5). The focus of the section is on the open hearing of criminal matters and, in particular, the media's right to remain present.

[37] As noted, orders of the types in question here are an integral tool in ensuring the fair trial rights of an accused person. These rights are themselves guaranteed by

---

15 *Paraha v Police* [2008] NZAR 581 (HC).

the New Zealand Bill of Rights Act 1990. The accommodation necessary between these rights and those of freedom of expression is usually achieved by the temporary nature of the publication ban, and by limiting the terms of the suppression order to those necessary for fair trial protection. We do not see s 138 as intending to curtail this capacity to protect fair trial rights. It has been in force since 1985 and has not been regarded as meaning that pre-trial rulings cannot be suppressed until after verdict.

[38] Accordingly, we have no doubt that it was open, in a jurisdictional sense, for Winkelmann J to make the orders presently in issue. We turn then to whether a breach has been proved.

Issue three – is the order a nullity?

[39] On behalf of the respondent, Mr Ellis criticises various aspects of how the suppression order was made. Concerning the initial order made on 9 December, the criticisms include:

(a) the absence of reasons for the suppression order;

(b) the breadth of the order;

(c) the vagueness of its terms.

[40] These alleged deficits are analysed both as flaws in their own right – for example, the absence of reasons is a breach of natural justice – and also as to whether individually or collectively they mean the suppression is in breach of the New Zealand Bill of Rights 1990. The proposition is advanced that the order is an unreasonable restraint on Mr Siemer's freedom of expression as guaranteed by s 14 of the Bill of Rights. If so, it is then said that Mr Siemer was not required to comply with its terms.

[41] We address below the complaint about the vagueness of the terms of the order. Other than that, we do not consider it is necessary to address the alleged

process errors, and whether the order is or is not a justified restraint on the freedom of expression. In our view, once it is accepted that there was a power to make the order, then the order binds Mr Siemer (and of course others) until set aside. It is open to persons, including Mr Siemer, to apply to the Court for a variation of the order or its removal, but until that is successfully done, the order is binding.

[42] In *Siemer v Solicitor-General*, it was observed by Elias CJ and McGrath J:[16]

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

[43] We accept that some inquiry into the justification for the order is required, but only at the broadest level. We reject the proposition that it is the role of a court hearing a complaint of contempt to assess whether it agrees with the making of the order being breached, or to consider whether there was some procedural defect in its making, or whether the order was Bill of Rights compliant. Mr Ellis' submission that the order is an unreasonable restraint on Mr Siemer's freedom of expression as guaranteed by s 14 of the Bill of Rights, and his associated submission that there was not a substantial risk to the course of justice from publication of the judgment, would require an examination of the merits of the order which is not within the scope of that broad level inquiry. It is at the time the suppression order is made or reviewed that a court balances the temporary restraint on freedom of expression against the fair trial rights of the accused as guaranteed by ss 24 and 25 of the Bill of Rights. It is not a defence to a charge of deliberately breaching the order to say the original court was wrong to make the order. There are also practical difficulties, as evidenced by this case in recognising such a defence. The contempt court will not have available to it the information and files on what can be, as here, very large prosecutions. It is simply not in a position to assess the correctness of the order.

---

16 *Siemer v Solicitor-General* [2010] NZSC 54, [2010] 3 NZLR 767 at [26].

[44] In *Taylor v Attorney-General*, Richmond J observed:[17]

> Once the conclusion is reached that the order prohibiting publication was within the jurisdiction of the Court then, as was rightly accepted by Mr Ellis, 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.

[45] Further, Richmond J accepted it was a defence to a charge of contempt to establish:[18]

> ... that the order of the Court upon which the proceedings were founded was outside the jurisdiction and a complete nullity.

[46] Woodhouse J agreed. In considering whether the order was within jurisdiction, Woodhouse J looked at the court's purposes in making the particular order. His conclusion that the Court's purpose was to protect the efficiency of the secret service and not to protect the due administration of justice led him to conclude that the order was made without jurisdiction.

[47] We are content to rest with these authorities. The purpose of the 9 December order was plainly to protect the fair trial rights of the accused. As such it is squarely within the court's functions. The obligation of those bound by the order is then to comply with it. If in disagreement with it, a person may test it in Court or apply for it to be varied. It is not a defence to a charge of breaching the order to raise non-jurisdictional defects in the process by which it was made. Any such challenge must be raised in appropriate proceedings. It cannot provide a proper basis for disobedience of the order.

[48] In this case the process we have described worked as was intended. The Crown sought a review of the breadth of the order. The Court heard submissions on the point, varied it to the extent assessed as necessary, and otherwise confirmed it. Reasons were given.

[49] The respondent makes a separate objection to the variation of 22 December 2010. It is said to be a nullity because the hearing (apparently) took place by telephone, and all accused were not represented. We observe we are

---

17 Above, at 685.

18 At 687. See similar comments by Woodhouse J at 689.

unclear as to the exact format of the hearing on 22 December in that it is plain some accused were present in person. As for some accused not being involved, we have no information as to whether that was by consent or otherwise. It does not appear that any of the accused have objected. Whilst the ruling containing the variation is labelled a "Telephone Minute", we do not consider anything turns on that. The label is not the crucial aspect, and the variation remains an order of the Court.

[50] It may be that in a particular case calling the ruling a "Minute" has publication or distribution consequences that may impact on a subsequent charge of breaching the order. For example, if the label meant that the ruling was distributed only amongst the parties, then it may be difficult to prove against third parties the necessary awareness of the varied terms. But none of that arises here. Mr Siemer admits to knowing of both the order and the variation, and to publishing them. Further, any deficit in the 22 December order would only mean that the 9 December order remained in its broader form. This would not assist Mr Siemer.

Issue four – the meaning of various terms used in the suppression order

[51] The suppression order provides that:

> THIS JUDGMENT IS NOT TO BE PUBLISHED ... IN NEWS MEDIA OR ON INTERNET OR OTHER PUBLICLY ACCESSIBLE DATABASE OR OTHERWISE DISSEMINATED TO THE PUBLIC ...

[52] Mr Siemer contends publication on his websites is not publication on the internet. The term "internet", when used correctly, refers to the mechanism by which the world wide web is accessed. It is not actually possible to publish on the internet as such. Rather, one publishes on the web. It is submitted that the terms of suppression orders should be construed strictly.

[53] In our view there is no doubt that the term internet has come to be used, arguably inaccurately, to describe both the means by which the web is accessed, and as a synonym for the world wide web. As an example, the New Oxford Companion to Law,[19] when discussing regulation of the "internet", describes three levels of

[19] *ed* Cane and Conaghan, *New Oxford Companion of Law*, Oxford 2008, at 627.

regulation: regulation of the communications infrastructure, regulation of internet intermediaries such as Internal Service Providers, and thirdly, regulation of the content of the internet. The latter concept of "content of the internet", an idea which we consider is in ordinary usage, plainly refers to the collected information available on the world wide web. It is an example of the two terms being used interchangeably. We are satisfied the order should be read as prohibiting anyone from adding the judgment to the collection of information commonly called the internet, or more accurately described as the world wide web. We also consider that this is how it would be understood.[20]

[54] The next query raised about the wording of the order was whether the term "internet or other publicly available database" is to be read so that the word "internet" stands alone, as a noun, or whether the word is used adjectivally as one of two qualifiers or descriptors of the word 'database'. The import of the latter reading was said to be that the applicant would have to prove Mr Siemer's sites were a form of database. We do not see this as a material issue. The prohibition is on adding the judgment to the internet, whether or not the internet is properly described as a form of database.

[55] In reaching these conclusions about the interpretation of the clause, we do not accept Mr Ellis' submission of strict construction. As we discussed under issue two, the purpose of these orders is not to be forgotten. They are designed to protect the fair trial rights of accused persons. It is always open to a publisher to seek clarification if doubt or uncertainty exists about the meaning of an order. There is no suggestion that Mr Siemer entertained any reasonable doubt as to its effect.

[56] In an agreed statement of facts, Mr Siemer acknowledges that he published the judgment on his websites. We hold that such publication breaches that aspect of the order that prohibits publication on "the internet or other publicly available database". That being so, the Solicitor-General's alternative allegation that the publications breached the "or otherwise disseminated" limb of the suppression order cannot logically be correct. If the publication is caught by one of the earlier

[20] Mr Ellis handed up an article from "About.Com" which seeks to explain the difference between the internet and the web. It begins – "People commonly use the words 'Internet' and 'Web' interchangeably." We agree.

descriptions, it cannot also be "otherwise" disseminated by the same act. However, had we had doubts about the meaning of "internet", we would have held that Mr Siemer's actions amounted to "otherwise disseminating".

[57] The respondent sought to dispute this by arguing it was not dissemination to make available a link. We disagree. The ordinary meaning of the word "disseminate" is "to spread widely". A person who makes a document available on the internet so that it will be found by a search engine, and can be accessed by anyone following the link, is disseminating that document. Mr Siemer accepts he published the judgments; even if his websites are not the internet, publishing the judgment on his websites must be dissemination. That is the very essence of publishing; it is making something known to someone else.

Issue five – are Mr Siemer's websites a law report or law digest?

[58] The suppression order allows publication in a "law report or law digest" Mr Ellis submits the Solicitor-General has failed to prove that Mr Siemer's websites – kiwifirst.com and kiwisfirst.co.nz – are not law reports or law digests. He submits that a modern eye must be cast over these concepts. The sites are generally dedicated to legal issues, and the Solicitor-General chose not to produce the full contents of the site so as to allow proper assessment. Hence he had failed to discharge the onus on him to prove the charge. We doubt the legal correctness of this submission in that if Mr Siemer seeks to come within an exception to the prohibition, there is an evidential onus on him to put it in issue. This onus has not been discharged.

[59] This proof point is, however, of no moment because the underlying argument is untenable. Black's Law Dictionary[21] defines a law report as:

> A written account of a court proceeding and judicial decision. A published volume of judicial decisions by a particular court or group of courts.

[60] Similar definitions may be found in Jowett's Dictionary of English Law[22] and Garner's A Dictionary of Modern Legal Usage.[23]

---

[21] B Garner (ed) *Blacks Law Dictionary Eight Edition* (Thompson West, 2004) at 1327.

[61] The concept of a Law Digest is less commonly defined. However, Black's Law Dictionary says this of it:[24]

> An index of legal propositions showing which cases support each proposition; a collection of summaries of reported cases, arranged by subject and subdivided by jurisdiction and court. The chief purpose of a digest is to make the contents of reports available, and to separate, from the great mass of caselaw, those cases bearing on some specific point.

[62] Counsel did not provide us with any material that might suggest alternative definitions. The definitions we have provided accord with our understanding of the concepts, and we are content to adopt them.

[63] Once those meanings are accepted, it is unnecessary to dwell on the point. The simple reality is that there is no possibility that Mr Siemer's websites fall within either of these concepts. The pages we have been provided with contain a collection of commentary, presumably Mr Siemer's, coupled with items that record that certain cases have been heard or are being heard. The cases are described generally as one might find in a newspaper. There is no attempt at the type of systematic coverage of a topic (digest) or of courts' decisions (report) that characterise these types of publication.

Issue six – standing of counsel for applicant

[64] During the hearing Mr Ellis objected to Ms Laracy appearing as counsel. The objection was to her status as Crown counsel, rather than her personally. Mr Ellis had inferred from submissions Ms Laracy made that she had knowledge about the trial in which the underlying orders were made. This was unfair and showed why independent counsel should act.

---

22 D Greenburg (ed) *Jowett's Dictionary of English Law* (3rd ed, 2010) at 1309.
23 B Garner (ed) *A Dictionary of Modern Legal Usage* (2nd ed 1995).
24 At 487.

[65] It was accepted by Mr Ellis that Mallon J's judgment specifically records that:[25]

> The respondent advises, through his counsel, there is no objection to these counsel [Ms Laracy and Mr Robins].

[66] Mr Ellis said he had now changed his mind, and wanted to make the point so as to preserve it for appeal purposes.

[67] It does not appear to us there is a point to be preserved but for the record we note we rejected the complaint during the hearing. Ms Laracy advised she had not seen the criminal file but it is beside the point. She appears on behalf of the Solicitor-General and there is no basis on which to prevent that.

Decision

[68] We are satisfied, beyond reasonable doubt, that the suppression order was binding on Mr Siemer and that he published the judgment in breach of it. The second article identifies one of the Judge's reasons and is in breach of the order. Standing on its own it would be *de minimis* and not justify a contempt finding.

[69] The breach was deliberate. Its existence was brought to Crown Law's attention by an email from Mr Siemer. The breach (in the form of both publishing the judgment and also the first article) is not trivial and has been maintained despite being advised by the Solicitor-General that its publication could be considered a contempt.

[70] We therefore conclude that the nature of the deliberate breach merits a finding of contempt. We have no reasonable doubt about that and accordingly uphold the Solicitor-General's application to find Mr Siemer in contempt of court.

---

[25] *Solicitor-General v Siemer* HC Wellington CIV 2010-404-8559, 13 May 2011 at [24].

[71] Access to the judgment should be immediately removed. The Registrar is to arrange a hearing date for consideration of penalty. Counsel should file submissions in advance. The Solicitor-General should file his submissions two weeks in advance and any submissions from Mr Siemer are to be filed one week later.

A D MacKenzie J

Simon France J

Solicitors:
M Laracy, Crown Law Office, PO Box 2858, Wellington
email: madeleine.laracy@crownlaw.govt.nz
T Ellis, Barrister, Wellington, email: tony@blackstonechambers.co.nz

Appendix

This appendix provides a record of the procedure that was followed at the hearing.

[1] In a pre-trial ruling, Mallon J directed that the evidence of the Solicitor-General be given orally. Accordingly Ms Bridget Fenton, who had sworn an affidavit in support of the application, read the affidavit out. She was then cross-examined.

[2] In addition to the exhibits listed in the affidavit, Ms Fenton sought to produce two further exhibits. They were the two High Court rulings in issue. Although already in evidence, they would now be produced under the cover of a Certificate of Authenticity issued by a Deputy Registrar of the Auckland High Court. The admissibility of these exhibits was objected to but the Court allowed production. Separate reasons have been issued in relation to this.

[3] At the conclusion of her evidence, the applicant indicated Ms Fenton was its only witness. Mr Siemer was then invited to elect whether to call evidence. However, Mr Ellis indicated he wished to present a no-case to answer submission. This was permitted. The submissions then presented were in effect the full submissions of Mr Siemer.

[4] At the end of the submissions, in a separate ruling, the Court dismissed the no case to answer submission. Then, following an adjournment to allow him to consider his position, Mr Siemer elected to call no evidence.

[5] Next, Ms Laracy presented the Solicitor-General's submission. Part way through her submission, Mr Ellis applied for a stay of the hearing on the basis that Ms Laracy should not be appearing. The application was declined. The matter is addressed in the substantive ruling.

[6] Mr Edgeler made reply submissions on behalf of Mr Siemer.

[7] As a consequence of Mr Edgeler's submissions, Ms Laracy applied to amend the Solicitor-General's application in order to make it plain that the Solicitor-General relied on two alternative heads of contempt. We declined the application without calling on counsel for the respondent.

[8] The decision was reserved.