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Privy Council Appeal No. 5 of 2003

Independent Publishing Company Limited *Appellant*

v.

(1) The Attorney General of Trinidad and Tobago and
(2) The Director of Public Prosecutions *Respondents*

and

Privy Council Appeal No. 7 of 2003

(1) Trinidad and Tobago News Centre Limited
(2) Ken Ali and
(3) Sharmain Baboolal *Appellants*

v.

(1) The Attorney General of Trinidad and Tobago and
(2) The Director of Public Prosecutions *Respondents*

FROM

THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 8th June 2004

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Present at the hearing:-

Lord Bingham of Cornhill
Lord Hoffmann
Lord Walker of Gestingthorpe
Lord Carswell
Lord Brown of Eaton-under-Heywood

*[Delivered by **Lord Brown of Eaton-under-Heywood**]*

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1. These appeals raise fundamental questions both as to the reach of the Court's contempt jurisdiction at common law and as to the circumstances in which a claimant is entitled to constitutional redress under section 14 of the Constitution of Trinidad and Tobago (the Constitution). Before the issues can properly be identified, however, it is necessary to recount something of the background as well as the more immediate circumstances surrounding the appeals.

2. On 10 January 1994 four members of a family were brutally murdered as a result of which Dole Chadee (also called Nankissoon Boodram), a notorious drug lord, and nine others were charged with murder and on 30 September 1994, following the preliminary inquiry, committed to stand trial on 4 November 1994.

3. Both before and after the preliminary inquiry there was massive publicity about the case and in particular about Dole Chadee, publicity later to be described by Sharma JA as "sensational, unremitting, and scandalous". "The whole country", observed Sharma JA, "appeared to be riveted and obsessed with the pending trial and many commentators had dubbed it as 'the trial of the century'." Chadee in the result filed a constitutional motion complaining about the DPP's failure to put an end to this pre-trial publicity and contending that it had infringed his rights to due process and a fair trial. He was seeking either discontinuance or at least the postponement of his trial. In the event the application failed successively before the judge, before the Court of Appeal and before the Privy Council - see *Boodram v Attorney General of Trinidad and Tobago* [1996] AC 842, where several examples of the prejudicial publicity are to be found. On dismissing the appeal, Lord Mustill, giving the judgment of the Board, said this, at pp 852-853 and 855:

> "In a case such as this, the publications either will or will not prove to have been so harmful that when the time for the trial arrives the techniques available to the trial judge for neutralising them will be insufficient to prevent injustice."

> "The proper forum for a complaint about publicity is the trial court, where the judge can assess the circumstances which exist when the defendant is about to be given in charge of the jury, and decide whether measures such as warnings and directions to the jury, peremptory challenge and challenge for cause will enable the jury to reach its verdict with an unclouded mind, or whether exceptionally a temporary or even permanent stay of the prosecution is the only solution."

4. Following the Privy Council's decision (given on 19 February 1996) the trial was re-fixed for hearing on 10 June 1996. The publicity did not cease. A key witness, Clint Huggins, who had testified at the preliminary inquiry, was killed shortly after leaving protective custody in February 1996. Amongst the many daunting tasks facing the trial judge, Jones J, was the selection of an

unbiased jury, a process which was to take from 13 June to 26 July and to involve the oral examination of each potential juror to see whether they were affected by the weight of adverse publicity. Many were held to be disqualified. All the accuseds' challenges were used. The jury pool had to be supplemented by "praying a tales".

5. Meanwhile there had been a dramatic development in the case. On 10 June 1996 counsel (Mr Peter Thornton QC for the ten accused and Mr Cassell QC for the State) saw Jones J in Chambers and told him that one of the accused, Levi Morris, had decided to plead guilty to the four counts of murder and testify against his co-accused in return for which his mandatory death sentence was to be commuted by Presidential pardon to one of life imprisonment. The pardon was conditional on Morris giving evidence for the prosecution in accordance with a statement taken from him on 4 June.

6. Mr Thornton then said that he would ask the judge in open court for an order that none of this should be reported for the time being. Were Morris not ultimately to give evidence in line with his fresh statement, prior publication of his change of position would have prejudiced the jury. The proposed order was "in order to secure a fair trial [and] that there should not be any further difficulty with juries" (assuming that counsel's imminent application "to stay the proceedings because of the adverse pre-trial publicity ... should be unsuccessful" - an application in the event made on 10 June and dismissed on 13 June). Mr Thornton told the judge: "You have an inherent power to control the proceedings of your court at common law, inherent jurisdiction". Mr Cassell agreed and said that he did not resist the proposed order. He indicated however, that before opening the case for the prosecution he would be applying to the judge to rule on the admissibility of Mr Morris's evidence and the evidence of Mr Huggins' deposition since otherwise there would be no case to open.

7. Upon the adjournment of the hearing into open court, Jones J then made the order sought by counsel ("the 10 June order") in these terms:

> "It is ordered that the media, both printed and electronic for the time being and until further order, refrain from publishing, referring to or commenting upon in any way the matters in this court which relate to the accused Levi Morris or Modeste, and in particular, to his plea or to the sentence imposed by this Court."

8. Despite that order there appeared in the TNT Mirror newspaper on the morning of Friday, 14 June 1996, three articles respectively headlined "State has Bombshell Witness", "Remember Parmassar?" (Parmassar had similarly turned State's evidence in an equally sensational murder trial some twenty years earlier) and "Chadee's Cool Confidence", the combined effect of which would lead readers to suspect that one of the accused had pleaded guilty and would be giving evidence against his co-accused. The editor of that day's issue and author of the second article was the appellant, Ken Ali; the author of the third article was the appellant, Sharmain Baboolal, a freelance journalist; the publishers of the newspaper were the appellants, T & T News Centre Limited (T&T).

9. Contempt charges were immediately issued against Mr Ali and Ms Baboolal and they were required to attend before Jones J at 2 pm that day to show cause why they should not be punished for contempt of court. The charges alleged that the articles contravened the 10 June order. Having been served with the notices only some fifteen minutes before the hearing, Mr Ali and Ms Baboolal attended with junior counsel and made a series of applications for adjournments, first to allow counsel to take instructions, 35 minutes being allowed for the purpose; then to await the arrival of Mr Maharaj, Senior Counsel by then instructed on their behalf and on his way to court, 20 minutes being allowed for that; then, on Mr Maharaj's arrival, for him to research the law and consider whether to file affidavit evidence, 17 minutes only being allowed for that, despite the offer of an undertaking that such publications would not be repeated. Mr Maharaj was not shown the 10 June order (which in any event had probably not been transcribed) and had no time even to read the three articles. Upon enquiring of the judge whether it was proposed to lead any evidence against the two journalists, Mr Maharaj was told that none was thought necessary. Having called Ms Baboolal and the newspaper's editor-in-chief to give evidence, Mr Maharaj then renewed his application for an adjournment for an opportunity "to check the constitutionality of this order". The application was refused and Mr Maharaj was instead required to address the judge. Following his submissions, essentially to the effect that the articles (which he himself had not read) did not breach the order, Mr Hudson-Phillips QC, counsel, instructed by the Attorney General then addressed the court in response. Having found both appellants guilty, the judge immediately committed Mr Ali to prison for 14 days and fined Ms Baboolal $1,000 to be paid within 7 days, 21 days' imprisonment in default.

10. The judge then confirmed a further non-publication order made at an earlier stage of the hearing that afternoon (the 14 June order) in the following terms:

> "Members of the press, that is, both the electronic and print media, ... I … order that for the time being and until further order you refrain from publishing, referring to, commenting upon in any way whatsoever the matters in this court which relate to the contempt proceedings against Ken Ali and Sharmain Baboolal, including the charges, their pleas or any submissions made in the matter, nor may you publish this order."

11. On 17 June Mr Ali and Ms Baboolal appealed against their convictions and sentences, Mr Ali being released on bail by the Court of Appeal the following day, 18 June.

12. On 18 June the appellant, Independent Publishing Company Limited (IPC), publishers of The Independent, a weekly journal, issued a notice of motion seeking redress under section 14(1) of the Constitution for alleged violations of their constitutional rights by the non-publication orders made respectively on 10 and 14 June 1996.

13. It is convenient at this stage to set out the provisions of the Constitution directly relevant to IPC's (and later T&T's) motion:

> "4. It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist ... the following fundamental human rights and freedoms, namely ... (i) freedom of thought and expression; ... (k) freedom of the press.
>
> 14 (1). For the removal of doubts it is hereby declared that if any person alleges that any of the provisions of this Chapter has been, is being, or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress by way of originating motion."

14. On 25 June the appellants T & T, Mr Ali and Ms Baboolal similarly issued a notice of motion under section 14 (1) of the Constitution, in the case of Mr Ali and Ms Baboolal seeking redress not only for alleged violations of their rights enshrined in

paragraphs (i) and (k) but also for alleged violations of their rights under paragraph (a) of section 4:

> "(a) the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law."

15. In short, Mr Ali and Ms Baboolal were contending both that the orders of 10 and 14 June were not lawfully made whereby their freedom of expression and the freedom of the press (which includes the right of the public to receive information) (rights collectively referred to hereafter as the right to free expression) were infringed, and in addition that they had not had a fair trial upon the contempt charges brought against them.

16. Both constitutional motions were heard by Sealey J and dismissed by her in judgments delivered on 26 July 1996. At that time, of course, Mr Ali's and Ms Baboolal's appeals against their convictions and sentences for contempt were outstanding. They were to remain so for a further six years.

17. Albeit of no direct relevance to the issues now before the Board, it may be noted that the criminal trial before Jones J finally began before the jury on 26 July 1996 and ended on 3 September 1996 with the conviction (and subsequent hanging) of all nine accused. Morris had duly given evidence against them.

18. IPC, T & T, Mr Ali and Ms Baboolal all appealed against the dismissal of their respective constitutional motions. Those appeals were heard together with Mr Ali's and Ms Baboolal's outstanding appeals against their contempt convictions and sentences by the Court of Appeal (de la Bastide CJ, Sharma JA and Warner JA) on 1-5 March 1999, three further years then elapsing before judgments were finally handed down on 6 June 2002. Despite this regrettably long delay their Lordships pay tribute to all three members of the court for the quality of their judgments. The issues for determination were many, various and difficult and each was most carefully and thoughtfully addressed. The judgments extend in all to some 150 pages of transcript.

19. In summary, the Court of Appeal's decisions were as follows:

(1) IPC's and T&T's constitutional appeals were dismissed (de la Bastide CJ dissenting). The orders of 10 and 14 June were properly made: the trial judge had an inherent jurisdiction to make them and furthermore they were justified in the interests of a fair trial.

(2) Mr Ali's contempt appeal and (on the due process ground but not on the ground of free expression) his constitutional appeal were allowed (Sharma JA dissenting). His conviction and sentence were quashed. Damages for the breach of his constitutional right to due process were ordered to be assessed by a judge in chambers.

(3) By unanimous decision Ms Baboolal's contempt appeal was allowed and her conviction and fine set aside; both grounds of her constitutional appeal, however, were dismissed.

The reasoning of each member of the court on the many issues arising (even when in agreement on the outcome) was for the most part very different.

20. Five issues now arise for determination by the Board (the first four being raised by the appellants, the fifth by the respondents on their cross-appeal):

1) Does the court have a common law power to order that the publication of a report of proceedings conducted in open court be postponed?

2) Were the orders made respectively on 10 and 14 June 1996 justifiable?

3) Were IPC and T&T entitled to redress by constitutional motion for interference with their right to free expression?

4) Were Mr Ali and Ms Baboolal entitled to redress by constitutional motion for interference with their right to free expression?

5) Was Mr Ali entitled to constitutional relief for a violation of his right to due process?

Issue 1: Is there power at common law to order the publication of a report of open court proceedings to be postponed?

21. It is, of course, the general rule that justice must be administered in public: *Scott v Scott* [1913] AC 417. As, moreover, Lord Diplock observed in *Attorney General v Leveller Magazine* [1979] AC 440 (*the Leveller*), 450:

> "The application of this principle of open justice has two aspects: as respects proceedings in the court itself it requires that they should be held in open court to which the press and

> public are admitted ... As respects the publication to a wider public of fair and accurate reports of proceedings that have taken place in court the principle requires that nothing should be done to discourage this."

22. Lord Diplock, however, then noted that in certain circumstances:

> "[T]he application of the general rule in its entirety would frustrate or render impracticable the administration of justice or would damage some other public interest for whose protection Parliament has made some statutory derogation from the rule. Apart from statutory exceptions, however, where a court in the exercise of its inherent power to control the conduct of proceedings before it departs in any way from the general rule, the departure is justified to the extent and to no more than the extent that the court reasonably believes it to be necessary in order to serve the ends of justice. A familiar instance of this is provided by the 'trial within a trial' as to the admissibility of a confession in a criminal prosecution. The due administration of justice requires that the jury should be unaware of what was the evidence adduced at the 'trial within a trial' until after they have reached their verdict; but no greater derogation from the general rule as to the public nature of all proceedings at a criminal trial is justified than is necessary to ensure this. So far as proceedings in the courtroom are concerned the 'trial within a trial' is held in open court in the presence of the press and public but in the absence of a jury. So far as publishing those proceedings outside the court is concerned any report of them which might come to the knowledge of the jury must be withheld until after they have reached their verdict; but it may be published after that. Only premature publication would constitute contempt of court."

23. A "trial within a trial" - concerning the admissibility of a confession, (Lord Diplock's illustration) or of previous convictions, or of similar fact evidence or of any similarly prejudicial matter - is one obvious example of where press reporting of open court proceedings must be postponed. Another example is where the court, again exercising "its inherent power to control the conduct of proceedings before it" and "reasonably believe[ing] it to be necessary in order to serve the ends of justice", allows a witness to withhold his name. Such was the position in *the Leveller* itself where the magistrates, in committal proceedings for an offence under the Official Secrets Act, had for reasons of

national security allowed a witness to be referred to solely as "Colonel B". Such also had been the position in *R v Socialist Worker Printers and Publishers Ltd, ex parte Attorney General* [1975] 1 QB 637 (*the Socialist Worker*), where the judge at a blackmail trial had allowed the two alleged victims to be called simply "Mr Y" and "Mr Z".

24. Three points should at once be noted about those two cases. First, that in neither of them was any order made directing the media not to publish the names of the witnesses who had been allowed to testify under pseudonyms. Secondly, that in both cases the Crown accepted that there would have been no power to make such an order. The report of the Crown's argument in *the Socialist Worker*, advanced by Sam Silkin QC, the Attorney-General, Gordon Slynn QC and Harry Woolf (as they then were), at p 639E, records counsel's acknowledgement that the trial judge "had no power to make orders affecting the press or other media in their conduct outside the court". In *the Leveller*, Viscount Dilhorne (at 455) noted that concession in *the Socialist Worker* and continued: "in the present case the Crown, rightly in my opinion, did not contend that examining magistrates had any such power". Thirdly, that the absence of specific orders against the press did not save them from a finding of contempt. The Divisional Court found the Socialist Worker in contempt both because the publication was "an affront to the authority of the court" and because "by destroying the confidence of witnesses in potential future blackmail proceedings in the protection which they would get, there was an act calculated to interfere with the due course of justice" (per Lord Widgery CJ at p.652). The publisher's main argument in the case, it may be noted, was not that no order had been made against the press but rather that the trial judge had no power in law to allow the witnesses to withhold their names in the first place. This argument was roundly rejected: such a direction, it was held, was clearly preferable to an order for trial in camera where "the entire supervision by the public is gone". Similarly in the second case, *the Leveller's* appeal to the House of Lords succeeded, not for want of an order against the press, but rather because Colonel B's own evidence had enabled his identity to be discovered without difficulty. But for that, the appeal would have been dismissed. As Viscount Dilhorne said, at p 456:

> "It must have been clear to all in court and to all who learnt what had happened in court that the object sought to be achieved by the justices allowing 'Colonel B' to write down his name was the preservation of his anonymity. ... If he had not given that evidence, then the appellants would have

> frustrated the object which the magistrates by their ruling sought to achieve. True it is that no warning was given that anyone who published his name might be proceeded against for contempt of court. In *R v Border Television Limited, ex parte Attorney-General* (Note) (1978) 68 Cr App R 375 [where the media was found guilty of contempt for reporting that the defendant had pleaded guilty at the outset of her trial to a number of other charges against her] it was held that ... no warning was necessary. While I do not think that it was strictly necessary for the magistrates to give such a warning in this case, I think it very desirable that in future cases where a court takes the course that the magistrates took in this case, a warning that publication of the witness's identity might lead to proceedings for contempt should be given."

25. By the same token that a contempt may be committed in the witness identity cases without there being any order against the press, so too, of course, as Lord Diplock pointed out in *the Leveller* (see para 22 above), it may be committed by premature publication where there has been a "trial within a trial". What both these classes of case have in common, their Lordships note, is that the court has made an order directly affecting the conduct of the proceedings before it - in the "trial within a trial" cases by sending the jury out of court; in the witness identity cases by allowing the name to be withheld - and that the press thwart the evident object of such orders at their peril. In the "trial within a trial" cases, of course, press publication is merely postponed until the jury's verdict has been reached; in the witness identity cases, however, it is implicitly forbidden on a permanent basis.

26. Their Lordships turn to consider the different category of case in which the present appeal lies, cases in which the court has no occasion to make any order directly affecting the conduct of the proceedings before it but is concerned rather to guard against press publicity which may imperil the fairness of those proceedings (or, indeed, of other proceedings). The court, in short, may wish to do precisely that which the Crown in *the Socialist Worker* acknowledged there is no power to do: "to make orders affecting the press or other media in their conduct outside the court". Typically, as in the present case, the court's concern will be merely to postpone the publication of a report of some aspect of the proceedings before it until a later stage in the hearing. Sometimes, however, it will be to postpone publication until a later time still, perhaps when other proceedings have been completed. An example of the latter situation is *R v Poulson & Pottinger* [1974] Crim LR 141 (*Poulson*), in the course of which Waller J as the trial judge

said that he did not see how the press could report the evidence in the case without running the risk of being in contempt of other criminal proceedings which had already begun against Poulson and other defendants in respect of similar offences. Waller J's observation was described in the Phillimore Committee's Report on Contempt of Court (Cmd 5794, presented December 1974) at para 134 as a "ruling", by Borrie and Lowe, The Law of Contempt (Third Edn 1995) at p279 as a "direction", and by Lord Denning MR in *R v Horsham Justices ex parte Farquharson* [1982] QB 762 (*Horsham Justices*) 792 as a "warning". Whichever it was, Waller J expressly based it on *R v Clement* (1821) 4 B & Ald 218 (109 ER 918) and *Scott v Scott*.

27. The greatest single question raised on the present appeal is whether these cases, in particular *Clement,* do indeed support the view that the Court has a common law power to make postponement orders of this nature, at any rate those which forbid the report of prejudicial matter, as here, until the conclusion of the proceedings before it, (if not orders made on a longer term basis).

28. The position in the United Kingdom, it is convenient to note at this stage, has been governed for many years by the Contempt of Court Act 1981 (the 1981 Act), in particular sections 4 and 11. It will later become necessary to consider these provisions in a little detail. Meantime, all that need be remarked is that neither the press nor anyone else aggrieved could appeal against non-publication orders made under the 1981 Act until, seven years later, such right of appeal was expressly accorded (as a result of a "friendly settlement" following a Strasbourg challenge by the press) by section 159 of the Criminal Justice Act 1988 (the 1988 Act).

29. The contention that the Court has power at common law to postpone press reporting of all or part of the proceedings rests almost entirely on the case of *Clement,* a contempt case arising out of the trial for high treason of those involved in the Cato Street Conspiracy in 1820.

30. Clement was the editor of the only newspaper to breach that "injunction". At the conclusion of the criminal trials he was fined £500. He then failed successively before the Court of King's Bench in his challenge to the legality of the fine (*R v Clement* (1821) 4 B & Ald 218) and before the Court of Exchequer in his application to be discharged from the fine (*In re Clement* (1822) 11 Price 68). Each conspirator having elected to be tried separately, Abbott LCJ had indicated that no reports of the trials should be published until all were concluded. Gurney's account of the

treason trials, vol. 1 p.56, records the Lord Chief Justice's direction as follows:

> "As there are several persons charged by this indictment whose trials may come on one after another, the Court thinks it necessary, for the furtherance of justice, strictly to prohibit the publication of the proceedings on this or any other trial, until all the trials shall be gone through. It is highly necessary, for the purposes of justice, that the public mind, or the minds of those who may be to serve on trials hereafter, may not be influenced by publications of anything which takes place on the present trial; we hope all persons will observe this injunction."

31. Fining Clement in his absence, the Lord Chief Justice is recorded by Gurney (vol. 2 p.654) as having said:

> "No person can rationally doubt that the publication which has been complained of manifestly tended to obstruct the course of public justice ... The mischievous tendency of such publications cannot, as I have already said, be doubted by any mind; the Court thought it right before the first trial was begun, to express in the strongest terms its opinion as to the impropriety of any such publication, and to admonish those who were concerned in the publication of the daily or weekly papers to abstain from such insertion ..."

32. In what followed the Lord Chief Justice on three further occasions referred to the Court's earlier "injunction" as an "admonition". That language notwithstanding, several members both of the Court of King's Bench and of the Exchequer Chamber expressed the view, first, as Baron Garrow put it, that it was "an actual order" rather than "a mere admonitory recommendation of the Judge", and secondly that, as Baron Wood said, at pp 87-88, the court "had a right to make such an order for such a purpose; and, consequently, if it were infringed, they might fine and imprison for contempt". Bayley J in the Court of King's Bench stated 4B & Ald 218, 229-231:

> "The whole trial of all these individuals constituted one entire proceeding; for if they had not severed in their challenges, the prisoners would have been tried all at once. In point of fact, however, they did sever in their challenges, and were tried seriatim. It could not, therefore, be said that the whole proceeding was terminated, until the last of those prisoners had taken his trial. Now the Court before whom the trial was about to take place was a Court of General Gaol Delivery, and had authority to make any order which they

might judge to be necessary, in order to preserve the purity of the administration of justice in the course of the proceeding then depending before them, and to prohibit any publication which might have a tendency to prevent the fair and impartial consideration of the case. ... [I]t is argued that if the Court had this power of prohibiting publication, there is no limit to it, and that they may prohibit altogether any publication of the trial. I think that that does not follow. All that has been done in this case is very different; for the prohibition, here, has only been till the whole trial was completed."

33. Holroyd J expressed a similar opinion , at pp 232-233:

> "Now, I take it to be clear, that a Court of Record has a right to make orders for regulating their proceedings, and for the furtherance of justice in the proceedings before them, which are to continue in force during the time that such proceedings are pending."

34. That said, it is quite clear from the judgments of the Court of Exchequer that the publication was in any event found to be a contempt. Baron Graham observed, 11 Price 68, 84:

> "If we call this order of the court an order, or an admonition, or a notice, the object of it was most proper, and the best reasons are to be found for it, in the necessity of such a cause for ensuring fair administration of law and justice."

35. Chief Baron Richards put it altogether more trenchantly, at p 83:

> "The publication was a gross and wretchedly wicked contempt and the court most properly fined him. ... [T]herefore, the publication cannot but be considered as a direct contempt, tending to obstruct and impede the due administration of justice, necessarily having the effect of prejudicing the case of the other prisoners ..."

36. That approach was consistent with how the Crown's case had been put before the Court of King's Bench, 4B &Ald 218, 220-221. In contending for the discharge of the original rule nisi, the Law Officers argued not only that the trial court "had authority to make the original order, prohibiting the publication of the proceedings" (for which two precedents were cited) but also: "Besides, a publication, the effect of which is likely to prevent or obstruct the course of public justice, has always been held to be a contempt of

the court". The two precedents said to support the proposition that the original order was properly made were *R v Watson* (unreported) and *R v Brandreth* (unreported), each arising out of a high treason trial in 1817 in which similar orders had been made and infringed by newspaper editors. In neither case, however, was any application in fact made to punish the editors for breach of the orders.

37. *Clement* was cited to the House of Lords in *Scott v Scott* [1913] A 417 and was referred to by two of their Lordships. *Scott v Scott* itself, of course, was concerned with a very different question, namely the circumstances in which a court can properly sit in camera. Viscount Haldane LC, having noted that it is often necessary for the court to exclude the public in cases involving wards of court and lunatics, and may be necessary too when litigating about a secret process since "it may well be that justice could not be done at all if it had to be done in public" and as "the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield", continued at p438:

> "I think that if the principle in cases of secret process be what I have stated, it affords guidance in other cases. In *Rex v Clement*, where under special circumstances it was held that daily publication of the evidence in a particular criminal trial in defiance of the judge *had impeded justice*, and was, *therefore*, an offence against it, we have a different illustration of a rule which may have manifold application, and may cover cases of a class before us in this appeal. But unless it be strictly necessary for the attainment of justice, there can be no power in the court to hear in camera either a matrimonial cause or any other where there is contest between parties." (emphasis added)

38. Lord Atkinson at p453 stated:

> "One of the strangest things in this strange case is that the case of *Rex v Clement* should be cited as an authority for the proposition that a [court] has power to prohibit the publication, after a trial has ended, of a report of the proceeding which took place at that trial. That case is a weighty authority having regard to the eminence of the learned judges who decided it, but it is an authority against, rather than in favour of, the proposition in support of which it was cited."

39. The point about *Clement*, Lord Atkinson then explained, at pp 453-454,, was that the several trials of the conspirators had "constituted one entire proceeding" so that the contemptuous publication was "in the middle and not at the end of that proceeding". The case was accordingly no authority for the proposition that it had been lawful to sit in camera, as in *Scott v Scott*, and thereby seek to prevent a report of the proceedings even after their conclusion. Clement, Lord Atkinson further noted, had been "punished for contempt of court in having acted 'contrary to the order of this court, and to the obstruction of public justice,' not merely the first". Whilst, therefore, Lord Atkinson had described *Clement* as "a weighty authority", he does not appear to have considered it authority for the proposition that a breach of the court's order would *of itself* constitute a contempt. The words italicised above in the Lord Chancellor's judgment suggest that he too may have been of that view.

40. *Clement* was not cited to the court either in *the Socialist Worker* or in *the Leveller*, authorities, as already explained, concerned with orders affecting the conduct of proceedings in the courtroom rather than directed to the press outside. Their Lordships' speeches in *the Leveller* nevertheless bear upon the issue now arising and it is necessary to cite briefly from each of them. Lord Diplock said [1979] AC 440, 451 – 452:

> "My Lords, in the argument before this House, little attempt was made to analyse the juristic basis on which a court can make a 'ruling,' 'order' or 'direction' - call it what you will - relating to proceedings taking place before it which has the effect in law of restricting what may be done outside the courtroom by members of the public who are not engaged in those proceedings as parties or their legal representatives or as witnesses. The Court of Appeal of New Zealand in *Taylor v Attorney General* [1975] 2 NZLR 675 was clearly of opinion that a court had power to make an explicit order directed to and binding on the public ipso jure as to what might lawfully be published outside the courtroom in relation to proceedings held before it. For my part I am prepared to leave this as an open question in the instant case."

41. Viscount Dilhorne at pp 455-456, having, as already noted, stated that in his opinion the Crown was right not to have contended for "any power to make orders affecting the press or other media in their conduct outside the court", continued:

"It is not necessary to express an opinion on whether [*Taylor v Attorney General* before the New Zealand Court of Appeal] was rightly decided. It suffices for me to say that in my opinion the courts of this country have no such power, except when expressly given by statute."

42. Lord Edmund-Davies said at pp 463-465:

"Neither in [*the Socialist Worker*] nor in the instant case did the court give any direction against publication purporting to operate outside the courtroom. It has to be said that hitherto the view seems to have been widely accepted that no such power exists. ... In the present appeals ... appellants and respondents alike concurred in submitting that ... the magistrates' court had no power to direct that there should be no publication in the press or by any other means of the identity of [Colonel B]. Lord Rawlinson QC, for the Attorney General, told your Lordships in terms that the court could not direct the outside world, but added that its ruling nevertheless extended outside its walls. ... After considerable reflection I have come to the conclusion that a court has no power to pronounce to the public at large such a prohibition against publication that all disobedience to it would automatically constitute a contempt."

"For [contempt] to arise something more than disobedience of the court's direction needs to be established. That something more is that the publication must be of such a nature as to threaten the administration of justice either in the particular case in relation to which the prohibition was pronounced or in relation to cases which may be brought in the future. ... [T]he press and others could, as I believe, be helped were a court when sitting in public to draw express attention to any procedural decisions it had come to and implemented during the hearing, to explain that they were aimed at ensuring that due and fair administration of justice and to indicate that any who by publishing material or otherwise acting in a manner calculated to prejudice that aim would run the risk of contempt proceedings being instituted against them. Farther than that, in my judgment, the court cannot go."

43. Lord Russell of Killowen said at p468:

"I find no problem in the concept that a decision or direction may have no immediate aim and no direct enforceability beyond the deciding and directing court, but yet may have

such effect in connection with contempt of court. Merely to state, as is the law, that in general contempt of court is the improper interference with the due administration of justice is to state that it need not involve disobedience to an order binding upon the alleged contemnor."

44. Lord Scarman said at pp 473-474:

"I would summarise my conclusions thus. If a court is satisfied that for the protection of the administration of justice from interference it is necessary to order that evidence either be heard in private or be written down and not given in open court, it may so order. Such an order, or ruling, may be the foundation of contempt proceedings against any person who, with knowledge of the order, frustrates its purpose by publishing the evidence. ... The order or ruling must be clear and can be made only if it appears to the court reasonably necessary. ... [T]hose who are alleged to be in contempt must be shown to have known, or to have had a proper opportunity of knowing, of the existence of the order ..."

45. Although, as stated, *Clement* itself was not cited to their Lordships in *the Leveller*, *Scott v Scott* was and so too was the Phillimore Report, both of which made reference to *Clement*.

46. The final United Kingdom authority to which their Lordships refer upon this first issue is *Horsham Justices* [1982] QB 762. It is in this connection that the following provisions in the Contempt of Court Act 1981 become most relevant:

"4(1). Subject to this section a person is not guilty of contempt of court under the strict liability rule in respect of a fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith.

(2). In any such proceedings the court may, where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings pending or imminent, order that the publication of any report of the proceedings, or any part of the proceedings, be postponed for such period as the court thinks necessary for that purpose.

6. Nothing in the foregoing provisions of this Act ... (b) implies that any publication is publishable as contempt of

court under [the strict liability] rule which would not be so punishable apart from those provisions;…..

11. In any case where a court (having power to do so) allows a name or other matter to be withheld from the public in proceedings before the court, the court may give such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary for the purpose for which it was so withheld."

The influence on these provisions of *the Leveller*, decided just two years earlier, will be obvious.

47. In *Horsham Justices,* Shaw and Ackner LJJ held that premature publication in contravention of a postponement order under section 4(2) of which the publisher was aware is a contempt of court notwithstanding section 6(b). Otherwise, as Shaw LJ pointed out, at p 798C, a section 4(2) order "would be quite futile". Lord Denning MR, however, took a different view, at p 790:

"[Counsel] suggested that once an order is made by a court under section 4(2), and a newspaper publishes in breach of it, then the newspaper is automatically guilty of a contempt of court without any inquiry as to whether the order was rightly made or not. I cannot accept this suggestion for one moment. It would mean that every court in the land would be given a new power, by its own order, to postpone indefinitely publication in the newspapers of the whole or any part of the proceedings before it, or in another court. Such an order could be made, and would be made, *against* the newspaper without their having any notice of it or any opportunity of being heard on it. They have no right of appeal against it. It could be done on the application of one party, and the acquiescence of the other, without the court itself giving much, if any, thought to the public interest. It would be nothing more nor less than a power, by consent of the parties, to muzzle the press. ... Parliament has, I think, guarded against this danger. It has done so by [section 6(b)]."

48. Lord Denning MR then turned, at p 791, to the question: "What are the circumstances in which publication of a fair and accurate report would be a contempt at common law?" and continued:

"It has long been settled that the courts have power to make an order *postponing* publication (but not prohibiting it) if the

> postponement is necessary for the furtherance of justice in proceedings which are pending or imminent. It was so held in [*Clement*] which was approved by the House of Lords in *Scott v Scott* ..."

49. Lord Denning then gave as other instances of common law contempt the premature reporting of a trial within a trial and the publishing of a person's true name in cases in which the court had allowed a pseudonym to be used. He then continued:

> "Yet another instance at common law may arise when two men are jointly indicted but tried separately. Then it may be necessary to make an order postponing publication, as in [*Clement*]. Similarly, when there is another case going on at the same time, such as happened in 1974 in [R v Poulson 2 January 1974], Waller J gave a warning in open court that certain items of evidence given at the trial should not be published because of the risk of causing prejudice to other criminal proceedings which had already begun."

50. Mr Guthrie QC for the respondents not surprisingly seeks to pray in aid Lord Denning MR's assertion, at p 791,that "it has long been settled that the courts have power to make an order postponing publication ... in proceedings which are pending or imminent", and that "it was so held in *Clement*". There are, however, a number of difficulties in the argument. In the first place Lord Denning's statement is mere assertion. Secondly, on any view, it goes too far. As Lord Atkinson pointed out in *Scott v Scott*, *Clement* is certainly no authority for an order postponing publication beyond the end of the actual proceedings before the Court (the several trials in *Clement* constituting a single proceeding). There was never, therefore, power at common law to make an order enforcing the warning (if such it was) in *Poulson* - nor, indeed, power to have postponed the reporting of committal proceedings as in *Horsham Justices* itself. Thirdly, it is wrong to regard cases involving a trial within a trial or witness identity order, as Lord Denning appeared to do, as instances of the court having a common law power actually to direct non-publication by the press - *the Socialist Worker* and *the Leveller* do not support such a view.

51. In short, section 4(2) must be regarded as having conferred on the court power to make at least some postponement orders which it had not previously been able to make. Similarly, in the witness identity cases, section 11 for the first time allowed the court actually to prohibit publication (provided only and always that it

would previously have had the power to allow the witness to withhold his name or, as the case may be, sit in camera for some or all of the proceedings). In either case, of course, for the order to be valid, it would have to appear to the court "necessary" - in a section 4(2) case "for avoiding a substantial risk of prejudice to the administration of justice"; in a section 11 case "for the purpose for which [the matter] was ... withheld". Unless, however, the publisher could show that the court's perception of such necessity had been unreasonable, a breach of the order would of itself constitute contempt.

52. Their Lordships turn next to the Commonwealth cases, the first of which, *Taylor v Attorney General* [1975] 2 NZLR 675, was, as already noted, doubted by Lord Diplock and Viscount Dilhorne in *the Leveller*. *Taylor* was itself a "Colonel B" type of case. The trial judge there, however, had additionally ordered, at p 676:

> "By consent I make an order prohibiting the publication of anything that may lead to the identification of officers of the New Zealand Security Service. They will be described by a letter or symbol in each case."

Clement was not cited to the New Zealand Court of Appeal. But, in reliance on a dictum of Lord Morris of Borth-y-Gest in *R v Connelly* [1964] AC 1254, 1301 – "There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction." – Wild CJ and Richmond J (Woodhouse J dissenting) held that the trial court had had inherent jurisdiction to make the order.

53. Next come a trilogy of decisions in the Court of Appeal of New South Wales, each concerning a witness identity order, none of them finally deciding the point now at issue. In *Raybos Australia Pty Limited v Jones* (1985) 2 NSW LR 47, 57, Kirby P said:

> "It is unnecessary and undesirable in the present case to determine finally the question of the power of the court to make an order such as is sought by Mr Jones, directed to the world at large. For the reasons shortly to be given, if there be a power, it should not be exercised in the present case."

54. In *John Fairfax & Sons Ltd v Police Tribunal of New South Wales (1986)* 5 NSW LR 465, 477 the only one of these three cases in which *Clement* was cited, McHugh JA said:

> "The decision in *R v Clement* was approved [by Viscount Haldane LC and Lord Atkinson in *Scott v Scott*]. In the light of statements made in later cases, however, I do not think that *R v Clement* can be regarded as an authority for holding that an order made to preserve the purity of the administration of justice is ipso jure binding on members of the public."

55. In *Attorney General for New South Wales v Mayas Pty Limited* (1988) 14 NSW LR 342, 348, Mahoney JA said:

> "Whether and to what extent a non-publication order may bind or otherwise affect non-parties is not a matter which has yet been finally determined in this State."

56. The final Commonwealth case to which brief reference should be made is *Dagenais v Canadian Broadcasting Corporation (1994)* 94 CCC 3(d) 289, a decision of the Supreme Court of Canada. At first blush it might appear to support the power for which the respondents contend. Take, for example, the following passage from the judgment of L'Heureux-Dubé J at p346:

> "[A]s part of our democratic tradition, judges have always had the discretion to order *in camera* hearings or issue full or partial publication bans related to judicial proceedings, be it under the criminal, civil or common law. ... It is not up to this court, or any other court for that matter, to reverse a rule which has existed for hundreds of years in this free and democratic Canadian society without any disastrous effect or even complaint. Such a radical change in the way our criminal law has operated for hundreds of years must be made by Parliament."

57. Once, however, it is appreciated that the power there in question was not that of the trial judge purporting to exercise an inherent jurisdiction but rather the court's power to grant an interlocutory injunction restraining the appellants from broadcasting a fictional account which the judge thought would prejudice the trial before him, it will be seen that the decision casts little light on the issue now arising. There is, the Board notes, power also in the English Crown Court (under section 45(4) of the Supreme Court Act 1981) to grant an injunction restraining a threatened contempt of court, though it is clear that such power should only be sparingly used - see *Ex parte HTV Cymru (Wales) Limited* [2002] EMLR 184.

58. Having set out the case law in some detail, their Lordships can state their conclusions on Issue 1 comparatively briefly.

59. The first point to make is that the power in question - the power to postpone the reporting of open court proceedings - would be worthless unless it carried with it the power to punish any breach of the order as a contempt. No doubt, as with section 4(2) orders in the United Kingdom, the court making the order would have to find it "necessary" (and nowadays proportionate too) - a partial answer to the concern expressed by Lord Denning in *Horsham Justices* (see para.47 above). But, as noted in para 51 above, the publisher would have no defence to a contempt charge based on breach of the order unless he were able to show that the court's perception of such need had been unreasonable.

60. Do the authorities support the existence of such a power at common law? The only case directly appearing to do so is *Clement* itself. Even there, however, there had been no real need for the court to decide the point: each of the many judges involved in the case clearly regarded the publication as a gross contempt in any event - irrespective, that is, of whether any binding non-publication order had been made. Nor were the two precedents relied on by the Law Officers in the least convincing: in neither was the power to punish for breach of the order put to the test.

61. *Clement* gains little if any support from the later cases. *Scott v Scott* was concerned with a very different question and neither Viscount Haldane nor Lord Atkinson, the only two members of the House to refer to *Clement,* appears to have regarded it as authority for the proposition that a breach of the court's order would of itself constitute a contempt - without which the power would, as stated, be worthless anyway.

62. *The Leveller* plainly affords no assistance whatever to the respondent's argument. On the contrary, Viscount Dilhorne (himself a most experienced ex-Attorney General) and Lord Edmund- Davies both expressed the strong view that the court has no power to make any non-publication direction operating outside the courtroom and Lord Diplock clearly doubted the existence of such a power "binding on the public ipso jure". Although neither Lord Russell nor Lord Scarman touched directly on the issue, both appear to have assumed that no such power exists - hardly surprisingly given the Crown's concession (as previously in *the Socialist Worker*) to that effect.

63. Turning to *Horsham Justices,* although Lord Denning's endorsement of *Clement* in his minority judgment (see para 48 above) cannot be regarded as obiter having regard to his approach to sections 4(2) and 6(b) of the 1981 Act, it suffers from several weaknesses as pointed out in para 50 above. On the approach taken by the majority of the Court in that case, of course, it was not necessary to reach any view whether, before section 4(2) was enacted, there was power to make an order postponing publication (although, if there was, clearly it had not extended as far as the new statutory power).

64. As for the Commonwealth cases, only in *Taylor* was the power held to exist and that was solely in reliance on Lord Morris's dictum in *R v Connelly,* hardly a convincing basis for such a conclusion. Lord Diplock's and Viscount Dilhorne's doubts about *Taylor* were clearly well-founded. In the second of the later New South Wales cases, their Lordships note, McHugh JA expressed the view that in the light of later cases *Clement* could not be regarded as authority for the power in question (see para 54 above) - he must surely have had *the Leveller* in mind.

65. Their Lordships conclude that *Clement* provides too insecure a foundation on which to rest the existence of such an inherent power in the court today. The case had been heard at fever-pitch. And, of course, in those days the rights of the press and of free expression counted for rather less than they do today. As long ago as 1935, Professor Goodhart, writing in the Harvard Law Review ("Newspapers and Contempt of Court in English Law" 48 Harv LR 885, 904), said of *Clement*:

> "Whether this case is still good law seems doubtful, for a criminal trial must be held in public, and, except in a few statutory cases, the judge has no power to forbid the publication of evidence given publicly."

66. The Phillimore Committee included at p60 of their 1974 report a footnote written before the court's decision in *the Socialist Worker* but after the publication of the blackmail victims' names:

> "We incline to the view that the important question of what the press may publish concerning proceedings in open court should no longer be left to judicial requests (which may be disregarded) nor to judicial directions (which, if given, may have doubtful legal authority) but that legislation ... should provide for these specific circumstances in which a court shall be empowered to prohibit, in the public interest, the publication of names or of other matters arising at a trial."

67. Their Lordships likewise conclude that 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. It is not for the Board to say whether or not such legislation is desirable. Sometimes, no doubt, an actual order rather than merely a warning may be judged necessary (as perhaps in this very case). There may, however, be fears lest the power be too readily invoked - always a concern with regard to prior restraint orders. If, moreover, legislation is to be enacted, it should include a right of appeal by those aggrieved (such as was added in the United Kingdom by section 159 of the Criminal Justice Act 1988).

68. Even without legislation, however, it remains open to the court (and is generally desirable, as indicated by Lord Edmund Davies in *the Leveller* - see para 42 above) to explain its concern and warn the press that they would be at risk of contempt proceedings were they to publish the matter in question. Such a warning would make it both less likely that a contempt would be committed and easier to punish if it were.

Issue 2: Were the Orders of 10 and 14 June 1996 justified?

69. Given that the contempt charges were based exclusively on contravention of the 10 June order (there being no alternative allegation, as in *Clement,* of prejudice to the due administration of justice), and given further the Board's conclusion that the court had no power to make the orders, it might be thought that Issue 2 no longer arises. It is their Lordships' view, however, that the question whether the press could properly have published the material which the orders were designed to prevent bears upon Issues 3 and 4. It would be one thing to hold the various appellants entitled to constitutional redress as the only means of safeguarding their future right to free expression uninhibited by orders made without jurisdiction; quite another to hold that the particular orders made in this case prohibited them from publishing material which otherwise they could properly have published. Issue 2 may, therefore, be re-formulated thus: would it in any event have been a contempt of court to publish the material which the orders forbade to be published? This question is not substantially different from the question whether, assuming (as in the United Kingdom under section 4(2) of the 1981 Act) the court *had* the power to make these orders, they were properly made. As to the correct approach to that question, their Lordships are much assisted by the judgment of the Court of Appeal in *Ex parte The Telegraph Group and others* [2001] 1 WLR 1983, an appeal by the press against a section 4(2)

order under section 159 of the 1988 Act. Essentially the case decided that the trial judge (and, on appeal, the Court of Appeal) must apply a three part test accurately summarised in the headnote as follows:

> "[I]n considering whether it was 'necessary' both in the sense under section 4 (2) of the 1981 Act of avoiding a substantial risk of prejudice to the administration of justice and therefore of protecting the defendant's right to a free trial under article 6 of the Convention and in the different sense contemplated by article 10 of the Convention as being 'prescribed by law' and 'necessary in a democratic society' by reference to wider considerations of public policy, the factors to be taken into account could be expressed as a three-part test; that the first question was whether reporting would give rise to a not insubstantial risk of prejudice to the administration of justice in the relevant proceedings, and if not that would be the end of the matter; that, if such a risk was perceived to exist, then the second question was whether a section 4(2) order would eliminate the risk, and if not there could be no necessity to impose such a ban and again that would be the end of the matter; that, nevertheless, even if an order would achieve the objective, the court should still consider whether the risk could satisfactorily be overcome by some less restrictive means, since otherwise it could not be said to be 'necessary' to take the more drastic approach; and that, thirdly, even if there was indeed no other way of eliminating the perceived risk of prejudice, it still did not follow necessarily that an order had to be made and the court might still have to ask whether the degree of risk contemplated should be regarded as tolerable in the sense of being the lesser of two evils; and that at that stage value judgments might have to be made as to the priority between the competing public interests represented by articles 6 and 10 of the Convention."

70. This approach, the Board notes, is not dissimilar to that followed by the Supreme Court of Canada in *Dagenais* with regard to the exercise of the injunctive power there in question - an approach based on the Canadian Charter of Rights which itself (as de la Bastide CJ pointed out in the present case) "provided the model for the section of [the] Constitution which deals with fundamental rights and freedoms".

71. One asks, therefore, whether on this approach the press could properly have published the material which Jones J wished to

exclude. The 10 June order, the appellants point out, was sought by defence counsel principally lest Morris at trial were not to come up to proof. Mr Thornton was concerned that in those circumstances the jury might have been unduly influenced by what they had read of Morris's plea bargain. But that risk, the appellants contend, provided no sufficient reason for postponing reporting. Had that been the only risk of prejudice at trial, their Lordships would agree. But it appears that there were two other and stronger reasons for excluding this material and for regarding it as a contempt to have published it. First, at the time the order was made, there was an outstanding challenge to the admissibility of Morris's evidence, doubtless on the basis that it had been falsely induced by the promise of a pardon. Mr Havers QC submits that without Morris's evidence the trial would have collapsed anyway. That, however, was far from clear, else Morris would have had no incentive to plead guilty in the first place. Secondly, the anticipated problems of empanelling an unbiased jury would have become more acute still had the media been free to publish this dramatic turn of events, thereby adding significantly to the massive output of prejudicial publicity previously noted by the Privy Council in *Boodram* [1996] AC 842. In these circumstances it seems to their Lordships hardly surprising that Sealey J and the majority in the Court of Appeal thought the orders amply justified (although, it is right to note, de la Bastide CJ thought otherwise). As Sharma JA observed:

> "The judge's arsenal of procedural and substantive measures is not to be regarded as a general panacea for pre-trial publicity, otherwise no proceedings will ever be stayed. ... The order was being made in the knowledge that the publicity was likely to affect people who were perhaps not yet otherwise affected. ... [Making the order] was the only reasonable and sensible thing to do in the circumstances."

72. As for the 14 June order, the reporting of the contempt proceedings would inevitably have directed attention to the articles giving rise to the charges. Even had the names of the contemnors been withheld, the publication would have been swiftly identified. The media in Trinidad and Tobago has relatively few organs. This second order was accordingly necessary to preserve the integrity of the first. Publication of the matter it prohibited, therefore, would in any event of itself have constituted a contempt.

73. Although the respondents invited the Board, in reliance on the Privy Council decision in *Devi v Roy* [1946] AC 508, to decline to review the evidence on Issue 2 for a third time given the concurrent

judgments on liability arrived at by both courts below, their Lordships have preferred in the particular circumstances of this case to come to their own conclusions on the issue. This is, after all, a case where justifiability depends on the law as well as the facts.

Issue 3: Were IPC and TNT entitled to constitutional redress for interference with their right to free expression?

74. The newspapers were concerned to obtain a declaration that the orders of 10 and 14 June unlawfully interfered with their right to free expression and were thus unconstitutional. On the face of it section 14 of the constitution entitled them to apply for such redress. The respondents contend, however, that they should instead have sought relief by applying to the trial judge to vary or discharge his own orders. It is an impossible argument. In the first place it is unclear whether such a course was open to the appellants. Certainly Sealey J thought not - and might have cited in support of her view the decision of the Divisional Court in *R v Central Criminal Court ex parte Crook,* The Times, 8 November 1984. Even supposing, however, as the Court of Appeal found and as their Lordships think the better view, the newspapers could have applied directly to the trial judge to be relieved from his orders, it is hardly to be supposed that such an application would have succeeded and there would certainly then have been no right of appeal against its refusal. Sharma JA's contrary view cannot be accepted; there are no rights of appeal save those conferred by statute.

75. These considerations apart, it is no answer to a constitutional claim of this nature to say that some other remedy would or might have been open to the claimant. The Privy Council's decision in *Observer Publications Ltd v Matthew* [2001] UK PC 11, similarly concerned the media's right to free expression, the appellant's claim there arising out of the Government of Antigua's refusal of a broadcasting licence. The Court of Appeal had dismissed the company's appeal, finding their proper remedy to have been mandamus and relying upon Lord Diplock's statement in *Harrikissoon v Attorney General of Trinidad & Tobago* [1980] AC 265, 268 that the value of the right to constitutional redress "will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action", and that a constitutional claim was not allowed when it was "an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful

administrative action ...". Lord Cooke of Thorndon took a different approach, [2001] UKPC 11 at [53]:

> "[H]uman rights guaranteed in the constitution of Antigua and Barbuda are intended to be a major influence upon the practical administration of the law. Their enforcement cannot be reserved for cases in which it is not even arguable that an alternative remedy is available. As Lord Steyn said, delivering the judgment of the Privy Council in *Ahnee v Director of Public Prosecutions* [1999] 2 AC 294, 307 '... bona fide resort to rights under the constitution ought not to be discouraged.' Frivolous, vexatious or contrived invocations of the facility of constitutional redress are certainly to be repelled. To that extent, their Lordships agree with the judgments delivered in Antigua. But, by contrast, the right of freedom of communication is at the heart of this case."

76. Correctly analysed, the authorities (including those referred to below) establish that it is only when a constitutional motion is properly to be regarded as an abuse of the court's process that it will be dismissed by reference to some other available remedy. On no view were the claims of IPC and TNT an abuse of process. Their Lordships accordingly conclude that they were entitled to seek declaratory relief by way of constitutional motion. Having regard, however, to the Board's conclusion on Issue 2, their Lordships would grant the appellants no constitutional redress beyond a declaration that the right to free expression should not hereafter be contravened by non-publication orders made in excess of the court's jurisdiction.

Issue 4: Were Mr Ali and Ms Baboolal entitled to similar constitutional redress?

77. The difference between the journalists and the corporate appellants is that the former, unlike the latter, had the opportunity to dispute the constitutionality of the 10 June order (although not, of course, the 14 June order) in the course of appealing against their contempt convictions. Is this, however, a sufficient basis on which to distinguish between the two cases, in particular given that the Court of Appeal allowed the contempt appeals on different grounds and without reference to the legality of the order itself? The respondents submit that it is and rely in particular upon the judgment of the Privy Council in *Chokolingo v The Attorney General of Trinidad & Tobago* [1981] 1 WLR 106.

78. Since *Chokolingo* bears certain superficial resemblances to the present case it is necessary to examine it with some care. The appellant was a newspaper editor convicted of contempt for "scandalising the court" and committed to prison for 12 days. By a constitutional motion brought two years after his conviction he contended that "scandalising the court" no longer amounted to a criminal contempt. The argument failed both at first instance and before the Court of Appeal. The Court of Appeal, however, also concluded that even had the judge made a mistake of law, this was not capable of constituting an infringement of the appellant's right not to be deprived of his liberty except by due process of law. Before the Court of Appeal, it should be noted, the appellant had expressly abandoned any claim based on infringement of his rights to free expression (under what is now section 4(i) and (k) of the 1976 Constitution); he was relying solely on his right to due process under section 4(a). In giving the judgment of the Privy Council Lord Diplock said at p111:

> "It was argued on behalf of the applicant that, if he could persuade the Board that, because it had become obsolete long before 1962, no such offence as 'scandalising the court' was known to the common law in force in Trinidad at the commencement of the Constitution, this would entitle the applicant to redress under section 6 [of the 1962 Constitution now section 14 of the 1976 Constitution] for his having been imprisoned by the state for exercising his constitutional rights of freedom of expression and freedom of the press. ... Even if it were possible to persuade their Lordships that [this] publication ... no longer constituted a criminal contempt of court ..., it would merely show that the judge had made an error of substantive law as to a necessary ingredient of the genus of common law offences which constitute contempt of court. In their Lordships' view there is no difference in principle between this kind of error and a misinterpretation by a judge, in the course of an ordinary criminal trial, of the words of the Act of Parliament creating the offence with which the accused is charged. If the former is open to collateral attack by application to the High Court under section [14] of the Constitution so must the latter be."

79. Having then pointed out that cumulative parallel remedies of this sort would allow a convicted person whose criminal appeal has failed then to launch a collateral attack on his conviction by constitutional motion, Lord Diplock said, at p 112, that such an interpretation of the Constitution would be "quite irrational and

subversive of the rule of law which it is a declared purpose of the Constitution to enshrine".

80. The respondents argued that by the same token that the Privy Council held Mr Chokolingo not to have been entitled to constitutional relief even had the judge committed him to prison for contempt of court upon a misunderstanding of the law, so too here the appellant journalists should not be entitled to constitutional redress even though their contempt convictions were founded upon breaches of an order which the judge mistakenly thought he had power to make.

81. *Chokolingo*, however, cannot in their Lordships' view be understood as deciding that in no case where the judge errs in determining the ingredients of a particular offence will it be open to the aggrieved citizen to seek a declaration of the true legal position by constitutional motion. Despite the reference in Lord Diplock's judgment to the appellant's argument being based on his imprisonment "for exercising his constitutional rights of freedom of expression and freedom of the press", the essential rights being pursued there were those of due process and the protection of the law. The passage just cited from Lord Diplock's judgment was immediately preceded by reference to what he had earlier said in *Maharaj v Attorney General of Trinidad & Tobago* (No. 2) [1979] AC 385, 399 (*Maharaj No. 2*), namely that the fundamental human right guaranteed by the right to due process and protection of the law "is not to a legal system that is infallible but to one that is fair".

82. Their Lordships do not regard *Chokolingo* as authority for denying constitutional relief to those like the appellant journalists concerned not with making a parallel or collateral attack on their contempt convictions (which had already been set aside) but rather with vindicating and securing for the future their right to free expression. These appellants too are entitled to a declaration that this right should not hereafter be contravened by non-publication orders made in excess of the court's jurisdiction.

Issue 5: Was Mr Ali entitled to constitutional redress for a violation of his right to due process?

83. The majority of the Court of Appeal held that he was, basing their decision principally upon the authority of *Maharaj No. 2*. Mr Ali contends that his case is on all fours with *Maharaj No. 2*. The respondents dispute this.

84. Mr Maharaj was a barrister who was committed to prison for seven days for an alleged contempt in the face of the court. At that date there was no right of appeal to the Court of Appeal against such an order. An appeal, however, lay directly to Her Majesty in Council by special leave of the Board. Mr Maharaj brought such an appeal and succeeded upon it - *Maharaj v Attorney General for Trinidad & Tobago* [1977] 1 All ER 411. The Privy Council quashed the committal order on the grounds that there had been a fundamental failure of natural justice: before making the order the judge had not told the appellant what he had done so as to enable him to explain or excuse his conduct.

85. Meantime Mr Maharaj had been pursuing a constitutional motion for redress, including monetary compensation, on the ground that he had been deprived of his liberty without due process of law. In this too he was to succeed on appeal to the Privy Council. The judgment of the majority of the Board was given by Lord Diplock who expounded the governing principle as follows [1979] AC 385, 399-400:

> "The fundamental human right is not to a legal system that is infallible but to one that is fair. It is only errors in procedure that are capable of constituting infringements of the rights protected by section 1(a) [of the 1962 Constitution, now section 4a of the 1976 Constitution]; and no mere irregularity in procedure is enough, even though it goes to jurisdiction; the error must amount to a failure to observe one of the fundamental rules of natural justice. Their Lordships do not believe that this can be anything but a very rare event. ... [Even] a failure by a judge to observe one of the fundamental rules of natural justice does not bring the case within section 6 [now section 14] unless it has resulted, is resulting or is likely to result, in a person being deprived of life, liberty, security of the person or enjoyment of property. It is only in the case of imprisonment or corporal punishment already undergone before an appeal can be heard that the consequences of the judgment or order cannot be put right on appeal to an appellate court. It is true that instead of, or even as well as, pursuing the ordinary course of appealing directly to the appellate court, a party to legal proceedings who alleges that a fundamental rule of natural justice has been infringed in the course of the determination of his case, could in theory seek collateral relief in an application to the High Court under section 6(1) with a further right of appeal to the Court of Appeal under section 6(4). The High Court, however, has ample powers, both

inherent and under section 6(2), to prevent its process being misused in this way ..."

86. Lord Hailsham of St Marylebone, it is convenient to note at this stage, observed in his dissenting opinion at pp 409-410:

> "If I were at all of the opinion that section 6 did unambiguously confer a right of damages in circumstances like the present, I would not, of course, be deterred from saying so in view of any inconveniences in public policy which might ensue from this conclusion. But, since I am not of this opinion, I feel that I am entitled to point to some of the inconveniences which I believe to exist. In the first place, as I understand the decision of the majority it is that a distinction must be drawn between a mere judicial error and a deprivation of due process as in the instant appeal, and that the former would not, and the latter would, attract a right of compensation under the present decision, even though in each case the consequences were as grave. I have already touched on this. I do not doubt the validity of the distinction viewed as a logical concept, though the line might be sometimes hard to draw. But I doubt whether the distinction, important as it may be intellectually, would be of much comfort to those convicted as a result of judicial error as distinct from deprivation of due process or would be understood as reasonable by many members of the public, when it was discovered that the victim was entitled to no compensation, as distinct from the victim of a contravention of section 1 of the Constitution who would be fully compensated."

87. Lord Diplock's judgment has been widely understood to allow for constitutional redress, including the payment of compensation, to anyone whose conviction (a) resulted from a procedural error amounting to a failure to observe one of the fundamental rules of natural justice, and (b) resulted in his losing his liberty before an appeal could be heard. That, however, is not their Lordships' view of the effect of the decision. Of critical importance to its true understanding is that Mr Maharaj had no right of appeal to the Court of Appeal against his committal and equally, therefore, no right to apply for bail pending such an appeal.

88. In deciding whether someone's section 4(a) "right not to be deprived [of their liberty] except by due process of law" has been violated, it is the legal system as a whole which must be looked at, not merely one part of it. The fundamental human right, as Lord

Diplock said, is to "a legal system ... that is fair". Where, as in Mr Maharaj's case, there was no avenue of redress (save only an appeal by special leave direct to the Privy Council) from a manifestly unfair committal to prison, then, despite Lord Hailsham's misgivings on the point, one can understand why the legal system should be characterised as unfair. Where, however, as in the present case, Mr Ali was able to secure his release on bail within 4 days of his committal - indeed, within only one day of his appeal to the Court of Appeal - their Lordships would hold the legal system as a whole to be a fair one.

89. Once someone committed to prison for contempt of court could appeal in Trinidad and Tobago to the Court of Appeal, and meantime apply for release on bail, his position became essentially no different from that of a person convicted of any other offence. Convicted persons cannot in the ordinary way, even if ultimately successful on appeal, seek constitutional relief in respect of their time in prison. The authorities are clear on the point. Just two need be mentioned. In *Hinds v Attorney General of Barbados* [2002] 1 AC 854, the appellant was convicted of arson and sentenced to eight years imprisonment. He had been refused legal aid and was unrepresented at trial although represented by counsel on appeal to the Court of Appeal. Following the dismissal of his appeal he brought a constitutional motion complaining that his right to a fair trial had been infringed. The motion was dismissed by the Court of Appeal and its decision was affirmed by the Board. The Board held that, since the appellant had been represented by counsel on his appeal, the ordinary appellate processes had given him adequate opportunity to vindicate his right to a fair hearing. Lord Bingham of Cornhill said, at p 870:

> "It would be undesirable to stifle or inhibit the grant of constitutional relief in cases where a claim to such relief is established and such relief is unavailable or not readily available through the ordinary avenue of appeal. As it is a living, so the Constitution must be an effective, instrument. But Lord Diplock's salutary warning remains pertinent: a claim for constitutional relief does not ordinarily offer an alternative means of challenging a conviction or a judicial decision ... The applicant's complaint was one to be pursued by way of appeal against conviction, as it was ..."

90. *Hinds* was followed by *Forbes v Attorney General of Trinidad and Tobago* [2002] UKPC 21. The appellant there had been sentenced to five years imprisonment for possession of drugs, then released on bail pending appeal after nineteen months, then

detained again following the decision of the Court of Appeal varying his sentence to one of 18 months imprisonment to start afresh, then finally released after serving 11 months when ultimately the Privy Council allowed his appeal against conviction. Giving the judgment of the Privy Council dismissing Mr Forbes's subsequent constitutional appeal, Lord Millett said, at para 18:

> "[The authorities] establish that it is only in rare cases where there has been a fundamental subversion of the rule of law that resort to constitutional redress is likely to be appropriate. However the exceptional case is formulated it is clear that the constitutional rights to due process and the protection of the law do not guarantee that the judicial process will be free from error. This is the reason for the appellate process. In the present case the appellant was deprived of his liberty after a fair and proper trial before the magistrate, that is to say by due process of law. The appellant was able to challenge his conviction by way of appeal to the Court of Appeal and, when the Court of Appeal wrongly failed to quash his conviction, by way of further appeal to the Board. The appeals were conducted fairly and without procedural error, let alone any subversion of the judicial process. The appellant thus enjoyed the full protection of the law and its internal mechanisms for correcting errors in the judicial process. His constitutional rights have not been infringed ..."

91. True it is, as Mr Nicol QC for Mr Ali points out, that Mr Forbes's original trial was described there by Lord Millett as having been "fair and proper", a description, he submits, inapplicable to Mr Ali's committal by the trial judge in the present case. As, however, Lord Hailsham pointed out in his dissenting opinion in *Maharaj No. 2,* it is not always easy to distinguish between mere judicial errors on the one hand and the deprivation of due process on the other. Take this very case. Jones J's main mistake was in believing his non-publication orders to have been lawfully made and their breach ipso jure to constitute a contempt - a readily understandable mistake given both counsel's assurances in that regard. On that view it is perhaps not surprising that he thought it appropriate to proceed as with a contempt in the face of the court and unnecessary therefore, either for any evidence to be led by the prosecution or for any substantial adjournment to be granted to the defence. The error of law, in short, made for the unfairness of the hearing.

92. Be that as it may, given that Mr Ali had a right of appeal, their Lordships regard him as having enjoyed the benefit of due process.

As in *Hinds,* so too here: any shortcomings in the first hearing could be made good on the appeal and by the grant of bail meanwhile. The system as a whole was fair.

93. Now that rights of appeal exist, indeed, their Lordships see little reason to maintain the original distinctions made in *Maharaj No. 2* (and still relevant, of course, at the time of *Chokolingo*) between fundamental breaches of natural justice, mere procedural irregularities and errors of law - distinctions which in any event were never very satisfactory for the reasons given by Lord Hailsham.

94. Their Lordships would accordingly allow the respondents' cross-appeal on this issue and discharge the order for the assessment of damages for the breach of Mr Ali's constitutional right to due process.

95. So much for the cross-appeal. As for the orders to be made in the light of the Board's conclusions on the appeals (Issues 1-4) including orders as to costs, their Lordships invite further submissions from the parties in writing.