CACC 299/2014

**IN THE HIGH COURT OF THE**

# **HONG KONG SPECIAL ADMINISTRATIVE REGION**

# **COURT OF APPEAL**

CRIMINAL APPEAL NO. 299 OF 2014

(ON APPEAL FROM DCCC NO. 1022 OF 2012)

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BETWEEN

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| HKSAR | Respondent |
| and |  |
| WU WING KIT (胡永傑) | 1st Appellant |
| YE FANG (叶芳) | 2nd Appellant |

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Before : Hon Lunn VP, Macrae and McWalters JJA in Court

Date of Hearing : 12, 13 and 28 January 2016

Date of Judgment : 26 May 2016

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Hon Lunn VP (giving the Judgment of the Court) :

Without any notice to the Court, at the outset of the hearing of the appeals, Mr Caplan, QC for the respondent, applied to the Court for an order directing the media not to publish any description of these proceedings until the conclusion of the ongoing criminal trial in the Court of First Instance before Anthea Pang J and a jury in HCCC 83/2014.[[1]](#footnote-1) He indicated that the application was made at the behest of all counsel, including Ms Draycott SC who appeared for the prosecution, in that trial. Mr Caplan explained that, for his own part, he had become involved in the determination to make the application only recently. On 12 January 2016, the Court ordered the issue of a general written ‘Warning’ against the publication of any material that might prejudice the ongoing trial. On 28 January 2016, the Court made an Order prohibiting publication of these proceedings until the conclusion of the trial in HCCC 83/2014.[[2]](#footnote-2) The ‘Warning’ and the Order were posted on the doors of the court and on the noticeboard in the Press Room in this building. The Court received no request by the media to make representations to the Court. On the conclusion of that trial on 29 April 2016, that order expired.

The 1st accused in that trial, Jack Chen, is the husband of the 2nd appellant, Ye Fang. Mr Caplan submitted that the prejudice to the integrity of the ongoing trial lay in not only a common factual background but also in the fact that some of the monies it was alleged by Count 3 that Jack Chen had dealt with, knowing or having reasonable grounds to believe that they were the proceeds of an indictable offence, were monies that it was alleged that the 1st and 2nd appellants had also dealt with in Counts 1 and 2 respectively.

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By Count 1, it was alleged that on 11 and 12 March 2010 the 1st appellant had dealt with $68.95 million received into the Client Account of Fred Kan & Co (“FKC”) from Goldmate Securities (“Goldmate”), knowing or having reasonable grounds to believe that the monies were the proceeds of an indictable offence. By Count 2, as particularised by the prosecution in its opening, it was alleged that the 2nd appellant had dealt with those monies when they were transferred from the Client Account of FKC to her own bank account on 12 March 2010.

*HCCC 83/2014*

By Count 3 of the indictment in HCCC 83/2014, as particularised by the prosecution in its opening, it is alleged*,* that Jack Chen had dealt with more than $85 million in the period 2 March to 13 July 2010, including the same $68.95 million on its receipt into the bank account of Goldmate on 2 March 2010, knowing or having reasonable grounds to believe that the monies were the proceeds of an indictable offence.

By Count 1, it is alleged that Jack Chen together with May Wang and Eric Yee conspired together to defraud the Stock Exchange of Hong Kong by multiple acts, including making false representations in respect of the acquisition of the entire share capital of UBNZ Limited by China Jin Hui Mining Corporation Limited (CJHM), causing the Stock Exchange of Hong Kong (SEHK) to allow CJHM to publish the Announcement dated 4 June 2009 and a Circular dated 8 September 2009 in relation to the acquisition.

By Count 2, it is alleged that, on and between 7 May and 19 July 2010, Jack Chen, May Wang and Eric Yee conspired together to defraud CJHM, and its existing shareholders, *inter alia*, by causing those shareholders to approve the acquisition of the entire share capital of UBNZ Limited and CJHM to issue and release convertible notes for the payment of the acquisition. There is no dispute that the $68.95 million remitted in sequence to Goldmate, the Client Account of FKC and the bank account of the 2nd appellant had its provenance in the proceeds of the convertible notes issue.

*The power to make the order*

In support of the application, Mr Caplan referred the Court to *Archbold (Hong Kong)*. There, it is asserted that:[[3]](#footnote-3)

“ A court may order the publication of the reporting to be postponed until after a certain date if the immediate reporting would entail a substantial risk of prejudice to the administration of justice either in the proceedings concerned or in other pending or imminent proceedings. Although the courts have power to suspend publication, in whole or in part, such a restriction on reporting, albeit temporary, is to be treated in a like manner to the court’s power to sit in camera, as an aspect of the general power to prevent publicity only in exceptional circumstances... The burden of establishing such exceptional circumstances lies upon those seeking an order restricting the fundamental principle of publicity: *R v Mohamed Hashin* *Shamsudin* [1987] HKLR 254. The cases noted in this paragraph are decided before the advent of the Bill of Rights and the Basic Law and should (be) viewed in the light of the rights to freedom of the press guaranteed therein.”

In *R v Mohamed Hashin* *Shamsudin,*[[4]](#footnote-4) Roberts CJ, sitting as a single judge, refused an application made by the Attorney General for the imposition of restrictions on the reporting by the press of the proceedings, in which *Shamsudin* was to plead guilty to an indictment containing four counts. Persons who were defendants in the ongoing jury trial, which became known as the *Carrian* trial, were stipulated as parties in counts on the indictment which *Shamsudin* faced. At the time of the application the *Carrian* trial had been underway for 11 months. Having noted that the authorities to which he had been referred, on the issue of the power of the court to make an order that the publication of proceedings be postponed, were “sparse”, in determining that “… a power at common law to postpone reporting a part of proceedings seems to exist” Roberts CJ said that he relied on the judgment of Lord Denning in *R v Horsham Justices, ex p. Farquharson* [[5]](#footnote-5). There, Lord Denning had relied on a finding to that effect in *R v Clement* in stating:[[6]](#footnote-6)

“ It has long been settled that courts have the power to make an order postponing publication (but not prohibiting) if the postponement is necessary for the furtherance of justice in proceedings which are pending or imminent. It was so held in *Rex v Clement* (1821) 4 B & Ald 218 which was approved by the House of Lords in *Scott v Scott* [1913] AC 417, 438, 453.”

Notwithstanding his determination that the Court had power to make an order postponing reporting a part of proceedings, nevertheless Roberts CJ went on to decline to make such an order. Of the circumstances relevant to that determination, he said:[[7]](#footnote-7)

“ An important consideration is that the public interest is best served by a full and accurate reporting of open criminal trials. In Hong Kong circumstances, it is vital that such fundamental safeguards should not be lightly eroded at (a) time when they are becoming steadily more important.”

This Court having drawn the attention of counsel to the judgment of the Privy Council in *Independent Publishing Company Ltd v A-G of Trinidad and Tobago and* *Another*[[8]](#footnote-8), and the fact that it had been cited with approval by Lord Brown in his judgment in the House of Lords inthe *Attorney General’s Reference (No 3 of 1999) Re British Broadcasting Corporation* [[9]](#footnote-9)*,* Mr Caplan indicated that he withdrew his application for a non-publication order in respect of these proceedings until the conclusion of the trial in HCCC 83/2014. Rather, he sought the issue of a warning to the media of the kind envisaged in the judgment of Lord Brown in *Independent Publishing Company Ltd*.[[10]](#footnote-10)

For his part, Mr Owen QC submitted that such an order was insufficient. He sought the issue of a non-publication order. He suggested that it would be extraordinary if this Court had no power under the Hong Kong Bill of Rights Ordinance to protect a right to a fair trial. Then, at the invitation of the Court, Mr Fitzgerald QC, who represented Jack Chen in the trial in HCCC 83/2014, addressed the Court. He informed the Court that he, Mr Harris SC and Mr Khosa, who represented the 2nd and 3rd defendants at their trial and were also present in court, wished to submit to the Court that a non-publication order ought to be made by the Court. In those circumstances, the Court adjourned the hearing of the application until 13 January 2016, so that counsel could research the law and provide the Court with written submissions. But, before doing so the Court ordered the issue of a general written ‘Warning’ [[11]](#footnote-11) against the publication of any material that might prejudice the ongoing trial.

At the hearing on 13 January 2016, Mr Fitzgerald, on behalf of all counsel representing the three defendants in HCCC 83/2014, submitted that the general written ‘Warning’ published by the order of the Court was insufficient to protect the rights of the three defendants in their trial. An order of the Court prohibiting publication of any and all aspects of this hearing was what was required.

Counsel for the defendants in the ongoing trial conceded in their initial joint written submissions that the *Independent Publishing Company* case “is a powerful authority as to the current state of the common law in Hong Kong.” However, they submitted that the “…human rights position of defendants in parallel proceedings” was not at issue in the *Independent Publishing Company* case. They contended that the only fundamental rights that were engaged were those of journalists who had been convicted in reliance on a mistaken understanding of the common law.

It was submitted that where fundamental human rights are engaged “…the common law has to be read, and if necessary, extended in the light of the requirements of the Bill of Rights Ordinance.” That was particularly so when the State had a positive duty to protect the fundamental right to a fair trial.[[12]](#footnote-12) It was submitted that the guarantee of the right to a fair trial provided for by Article 87 of the Basic Law [[13]](#footnote-13) and Article 10 of the Hong Kong Bill of Rights Ordinance [[14]](#footnote-14) imposed a positive duty on the courts to “promote and protect the right to a fair trial” so that, “the inherent powers of the Court of Appeal should be interpreted and, if necessary, extended so as to give effect to that positive duty to protect the rights of a fair trial.” Accordingly, this Court had jurisdiction to make a non-publication order. The warning issued to the media was insufficient to protect the integrity of the trial of the defendants.

For his part, Mr Caplan confirmed that it was the joint position of the prosecution and the defence in the trial in HCCC 83/2014 that there was a real risk of prejudice to the integrity of a fair trial in that case, if there was publication of the matters it was anticipated would be canvassed in the hearing of this appeal. He suggested that there were four options available to this Court:

1. to continue the ‘Warning’ issued by the Court;
2. to make the requested order;
3. to hold the hearing of the appeal *in camera*; and
4. to grant an injunction in the Court’s inherent power.

Mr Caplan suggested that in fact the fourth option was not available because there was no threatened contempt, merely the possibility that it might occur. The third option was not realistic. He contended that the issuing of the ‘Warning’ was sufficient. There was no need to issue an order. The available sanctions for breach of the order and contempt of court were the same. Nevertheless, he conceded specifically that the Court had power to make the order.

However, notwithstanding the fact that, in the limited time available, counsel for the three defendants in HCCC 83/2014 and counsel for the respondent in the instant appeal provided the Court with short written submissions and additional authorities, the Court adjourned the hearing of the application to 28 January 2014, so that the Court could receive fuller submissions on the issue of whether or not this Court had power to make the requested order.

In their very thorough and helpful written submissions Mr McCoy SC, for the prosecution and Mr Fitzgerald, Mr Harris and Mr Khosa, for the three defendants on trial in HCCC 83/2014, drew the court’s attention to the conflict arising from judgments in other common law jurisdictions as to whether or not the common law provided for a power to make the requested order.

Mr McCoy submitted that, in the result, whether or not the common law in Hong Kong confers the power on a court is of academic interest only, given that such a power is made available by the Basic Law and the Hong Kong Bill of Rights Ordinance. In those circumstances, there was no need for this Court to determine whether or not such a power exists at common law, and thereby determine whether or not the earlier judgment of Roberts CJ in *Shamsudin* should be overruled. Although in his written submissions, Mr McCoy submitted that it was not appropriate for the Court to make the order sought, given his contention that the ‘Warning’ issued by the Court was an adequate remedy, at the hearing he confirmed that, in compliance with his recent instructions, he conceded that it was appropriate for the Court to make such an order.

For his part, Mr Fitzgerald submitted that the general consensus of authorities from various countries was that the common law does provide an inherent jurisdiction to grant orders postponing publication of material prejudicial to a fair trial. But in any event, he submitted that Mr McCoy was correct to concede that such a power was to be found in the Basic Law and the Hong Kong Bill of Rights Ordinance.

In *Seimer v Solicitor General* [[15]](#footnote-15), the Supreme Court of New Zealand concluded that there was an inherent common law power in New Zealand for a judge to make a “suppression order” of temporary duration, prohibiting publication of a pre-trial ruling to protect the third trial rights of the defendants.[[16]](#footnote-16) In doing so, the Court declined to follow the Privy Council in *Independent Publishing*.

In his judgment in the High Court of Australia in *Hogan v Hinch* [[17]](#footnote-17), French CJ expressed the view that in Australia there was a limited common law power, in limited circumstances, to restrict the publication of proceedings conducted in open court.[[18]](#footnote-18) The other members of the Court determined it was unnecessary to accept that there was such a power.[[19]](#footnote-19)

In *Dagenais v Canadian Broadcasting Corporation* [[20]](#footnote-20), the Supreme Court of Canada held that there was a common law power to ban publication, if there was a real and substantial risk of interference with the right of a fair trial. In light of the Canadian Charter of Rights, it determined that the approach to the making of such orders was to be reformulated, having regard to necessity and proportionality tests.

In *Sahara India Real Estate v Securities & Exchange Board of India* [[21]](#footnote-21), the Supreme Court of India reviewed the approach of the courts in the above jurisdictions and that of the United States of America. In doing so, it noted that the judgment of the Privy Council in *Independent Publishing* had been doubted in the Court of Appeal of New Zealand in *Vincent v Solicitor General*.[[22]](#footnote-22) In the result, noting that it was bound by its decision in *Mirajkar v State of Maharashtra*[[23]](#footnote-23), the Court determined that there was an inherent power to prohibit publication of court proceedings of the evidence of the witness.

In *A v British Broadcasting Corporation*[[24]](#footnote-24) the Supreme Court of the United Kingdom was concerned with the issue of whether it was lawful for a court to direct, as the lower courts had done, that the claimant in proceedings contesting the lawfulness of his proposed deportation be identified by his initials only and to prohibit the publication of information that would allow the claimant to be identified.

In dismissing the appeal of the BBC, in his judgment, with which the other judges agreed, Lord Reed said that there was a power at common law, subject to statutory provisions, to make exceptions to the principle of open justice. Furthermore, the European Convention for the Protection of Human Rights and Fundamental Freedoms provided for a hierarchy of rights, so that where there is a conflict between the rights of the media “under article 10 and an unqualified right of some other party, such as the rights guaranteed by articles 2, 3 and 6.1, there can be no derogation from the latter.” [[25]](#footnote-25)

*A consideration of the submissions*

In *Independent Publishing Company Ltd* one of the issues addressed by the Privy Council was: [[26]](#footnote-26)

“ Is there a power at common law to order the publication of a report on proceedings to be postponed?”

On 10 June 1996, the first day of the trial of nine defendants for the brutal murder of four members of a family, the judge was told by counsel in Chambers that an agreement had been reached that one of the defendants would plead guilty to four counts of murder, in return for which the mandatory death penalty would be commuted by a presidential pardon to one of Life imprisonment, on condition that he gave evidence for the prosecution at the trial of the other defendants.

At the application of the prosecution and the defence in open court, the judge made a non-publication order that none of those matters could be reported. The effect of the order was that the media was restrained from reporting the circumstancesof that defendant’s plea of guilty and the sentence imposed on him by the court. Prior to those developments, in prospect of the trial, there had been unremitting prejudicial publicity. Then, on 14 June 1996, the judge made a second order restraining the media from reporting contempt proceedings, which had occurred that day, arising from a breach of the first order. Those proceedings concerned two journalists who published reports on 14 June 1996, from which the developments in the trial could be inferred. One of the journalists was fined and the other sentenced to 14 days’ imprisonment.

The Independent Publishing Company Ltd, publishers of a weekly journal, issued a notice of motion seeking redress under section 14(1) of the Constitution of Trinidad and Tobago contending that the judge had no power to make the order and that the order infringed their rights of freedom of speech and freedom of the press. For their part, the two journalists appealed their convictions and sentences on the basis that they were not to be deprived of their liberty except by due process of law. The Court of Appeal of Trinidad and Tobago held that the judge had an inherent jurisdiction to make the order.

In the judgment of the Privy Council, Lord Brown of Eaton-under-Heywood conducted an extensive review of the authorities in the United Kingdom, Australia, New Zealand and Canada. He said:[[27]](#footnote-27)

“ 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 *Clement,* a contempt case arising out of the trial for high treason of those involved in the Cato Street Conspiracy in 1820. ”

Of the circumstances of that case, he went on to say:[[28]](#footnote-28)

“ 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.46, 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.”

Fining Clement in his absence, Abbott CJ 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 ...”

Lord Brown went on to note that section 4(2) of the Contempt of Court Act, 1981 provided that in respect of legal proceedings held in public:[[29]](#footnote-29)

“ …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 Court thinks necessary for that purpose.”

Lord Brown noted that provision had been considered in the judgment of the Court of Appeal of England and Wales in *R v Horsham Justices, Ex p Farquharson* [[30]](#footnote-30)*.*  The Court of Appeal dismissed an appeal from an order of the Divisional Court, which had quashed the order of the justices in committal proceedings, “prohibiting reporting of any part of the proceedings until the commencement of any trial herein” and remitted the matter for the justices to consider whether an order should be made prohibiting publication of all or any part of the committal proceedings.

Shaw and Ackner LJJs held that publication in contravention of a postponement order made under section 4(2) of the Contempt of Court Act, of which the publisher was aware, was a contempt of court, notwithstanding section 6(b) which does not prevent such a publication from amounting to contempt where there is no such liability at common law. However, Lord Denning had taken a different view. In the course of his judgment he had made the statement, referred to earlier in the judgment of Roberts CJ in *Shamsudin*, that, “…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 *R v Clement*…”

Lord Denning went on to say: [[31]](#footnote-31)

“ 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.”

Of the former statement of Lord Denning, Lord Brown said:[[32]](#footnote-32)

“ There are, however, a number of difficulties in the argument. In the first place Lord Denning MR’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.

In short, section 4(2) must be regarded as having conferred on the court some power to make at least some postponement orders which it had not previously been able to make.”

Then, Lord Brown determined:[[33]](#footnote-33)

“ …although Lord Denning MR’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).”

Having noted that his judgment in *John Fairfax & Sons Ltd v Police Tribunal of New South Wales*, McHugh JA, had said, “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” [[34]](#footnote-34), Lord Brown concluded that Clement:[[35]](#footnote-35)

“ …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 a 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.”

In the result, Lord Brown said:[[36]](#footnote-36)

“ 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.”

In reaching that determination, no specific consideration was given by Lord Brown of whether or not a power in the court to make the orders was to be found in the duty of the court to protect the constitutional rights of defendants in a criminal trial, although he did advert to the “fundamental human rights and freedoms” provided by section 4 of the Constitution of Trinidad and Tobago, in particular the freedom of “thought and expression” and “of the press”. The same section provides rights.[[37]](#footnote-37)Section 5(1) provides that, except as otherwise expressly provided, no law may abrogate, abridge or infringe those rights and freedoms. Section 5(2) provides, inter-alia, that Parliament may not deprive a person of specified rights.[[38]](#footnote-38)

In determining that the publication of the material would in any event have been a contempt of court, his Lordship noted that the 10 June 1996 order had been sought by defence counsel “principally lest Morris at trial was not to come up to proof ”. Although his Lordship rejected that as an insufficient risk of prejudice to the trial, he went on to conclude that the anticipated difficulties in empanelling an unbiased jury “…would have become more acute still had the media being free to publish a dramatic turn of events” and the publication of the developments in the trial, “…would have constituted a contempt.”

Finally, Lord Brown suggested that it might be appropriate for the court to issue a warning that publication of material might constitute a contempt of court:[[39]](#footnote-39)

“ 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.”

Lord Brown noted that in his judgment in the House of Lords in *Attorney General v Leveller Magazine Ltd*[[40]](#footnote-40), Lord Edmund Davies said:[[41]](#footnote-41)

“ 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.” [Italics added.]

In Hong Kong there is no statutory provision similar to the Contempt of Court Act, 1981, notwithstanding the fact that a powerfully constituted Law Reform Commission, including the then Attorney General and the Chief Justice, recommended the implementation of such legislation in December 1986. It is to be noted that the Commission said:[[42]](#footnote-42)

“ We also think that the common law power of the courts to postpone publication of the proceedings *should be confirmed*. We therefore recommend that there should be specific provisions on the lines of section 4(2) of the UK Act…” [Italics added.]

The Judicial Proceedings (Regulation of Reports) Ordinance, Cap 287 is not relevant to the issue of whether or not there is a power in the courts to make an order postponing publication of a report of the proceedings in a criminal case. It follows that in Hong Kong there is no statutory power to make such an order.

In the *Attorney General’s Reference (No 3 1999) Re British Broadcasting Corporation* [[43]](#footnote-43) the House of Lords was concerned with an application by the British Broadcasting Corporation that the House of Lords lift an order, made by the Appeal Committee on 23 October 2000, that no mention was to be made in any publication or broadcast of proceedings resulting from a referral by the Attorney General of a point of law, which was likely to lead to the identification of a defendant acquitted at trial. He had been acquitted on the direction of the judge that DNA evidence connecting him with the crime was inadmissible. On 14 December 2000, the House of Lords determined that the evidence was not inadmissible and could have been admitted at the discretion of the judge. Subsequently, the Criminal Justice Act, 2005 made provision for the re-trial of persons acquitted of specific serious offences, if the Court of Appeal was satisfied that there was new and compelling evidence available and the re-trial would be in the interests of justice. The BBC wished to broadcast a programme in which the identity of the acquitted defendant would be revealed. The House of Lords ordered the order to be discharged.

In the judgment of Lord Brown of Eaton-under-Heywood, with whom the other judges agreed, the validity of the power to make non-publication orders *contra mundum* in respect of open court proceedings, pursuant to the Criminal Appeal (Reference of Points of Law) Rules 1973, was doubted.[[44]](#footnote-44) In that context, Lord Brown cited with approval [[45]](#footnote-45) the conclusion reached by the Judicial Committee of the Privy Council in *Independent Publishing Company Ltd v A-G of Trinidad and Tobago*, namely 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.”

In the result, Lord Brown determined that the issues of the validity of the sub-legislation and of the ambit of the inherent powers of the court were, “in the end unimportant” because the issue was to be determined by application of the Human Rights Act, 1998. In that context, he cited [[46]](#footnote-46) with approval the judgment of Lord Steyn in the House of Lords in *Re S (a child) (Identification: Restrictions on Publication)*[[47]](#footnote-47):

“ The House unanimously takes the view that since the 1998 Act came into force in October 2000, the earlier case law about the existence and scope of inherent jurisdiction need not be considered in this case or in similar cases. The foundation of the jurisdiction to restrain publicity in a case such as the present is now derived from convention rights under the convention. This is the simple and direct way to approach such cases.”

In his judgment in *A v British Broadcasting Corporation,* Lord Reed said that in Scotland, subject to any statutory provision, the common law power to make exceptions to the principle of open justice in the interest of justice had been recognized in *Sloan v B*[[48]](#footnote-48). He noted that the courts had established various exceptions to the principle of open justice by [[49]](#footnote-49): permitting the identity of the applicants to be withheld from public disclosure [[50]](#footnote-50); allowing undercover police officers to give evidence behind screens without public disclosure of their identities to avoid jeopardising their effectiveness in future investigations; permitting a prisoner serving a sentence for sexual offences to bring proceedings without disclosing his identity publicly because of the danger to the safety of the prisoner and the nature of his offending became known to his fellow prisoners [[51]](#footnote-51); having regard to the consequences to her mental health and her willingness to testify, ordering that there had been no publication of the identity of a female witness in criminal proceedings in which the defendant was charged with having recklessly infected her with HIV [[52]](#footnote-52).

Lord Reed concluded that:[[53]](#footnote-53)

“ … in this area as in others the common law is capable of development. The application of the principle of open justice may change in response to changes in society and in the administration of justice. It can also develop having regard to the approach adopted in other common law countries, some of which have constitutional texts containing guarantees comparable to the Convention rights, while in others the approach adopted reflects the Court’s view of the requirements of justice.”

Of the competing rights enjoyed pursuant to the European Convention for the Protection of Human Rights and Fundamental Freedoms Lord Reed noted:[[54]](#footnote-54)

“ … the principle of open justice is expressly protected by article 6.1, which provides that in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a public hearing. Article 6.1 also provides that judgment shall be pronounced publicly.”

However, he noted that it was subject to qualifications:[[55]](#footnote-55)

“ the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

Of the need to strike a balance in the exercise of competing rights, he said:[[56]](#footnote-56)

“ Where there is a conflict between the right of the media to report legal proceedings and the rights of litigants or others under a guarantee which is itself qualified, such as article 8, a balance must be struck, so as to ensure that any restriction upon the rights of the media, on the one hand, or of the litigants or third parties, on the other hand, is proportionate in the circumstances. The approach which should be adopted was considered in detail by Lord Steyn in *In re S (A Child) (Identification: Restrictions on Publication)* [[2004] UKHL 47](http://www.bailii.org/uk/cases/UKHL/2004/47.html); [[2005] 1 AC 593](http://www.bailii.org/cgi-bin/redirect.cgi?path=/uk/cases/UKHL/2004/47.html), and by Lord Rodger in *In re Guardian News and Media Ltd* [[2010] UKSC 1](http://www.bailii.org/uk/cases/UKSC/2010/1.html); [[2010] 2 AC 697](http://www.bailii.org/cgi-bin/redirect.cgi?path=/uk/cases/UKSC/2010/1.html).”

Nevertheless, of the hierarchy of rights he said:[[57]](#footnote-57)

“ Where the conflict is between the media’s rights under article 10 and an unqualified right of some other party, such as the rights guaranteed by articles 2, 3 and 6.1, there can be no derogation from the latter.”

In the judgment of the majority [[58]](#footnote-58) in the Supreme Court of New Zealand in *Seimer* the issue of whether or not the courts of New Zealand had an inherent power to prohibit publication of information relating to proceedings was addressed:[[59]](#footnote-59)

“ The leading New Zealand cases are the Court of Appeal’s judgments in *Taylor*[[60]](#footnote-60) and *Broadcasting Corporation of New Zealand v Attorney-General*.[[61]](#footnote-61) They, together with the early English case *R v Clement*,[[62]](#footnote-62)(also relevant is the sequel, *In Re Clement* (1822) [[63]](#footnote-63) 11 Price 68, 147 ER 404 (Exch) we will refer to both cases as ‘*Clement*’*)*, support the existence of an inherent power to make non-party suppression orders.”

Of the judgments in *Clement*, the majority said:[[64]](#footnote-64)

“ *Clement* involved circumstances where publicity had the potential to threaten the administration of justice by jeopardising fair trial rights. It was a sequel to the prosecution at the Clerkenwell Sessions House of a number of defendants for treason arising out of the Cato Street conspiracy. The Judges (including Abbott CJ, Dallas CJ, Richards CB, and Richardson and Best JJ) directed that each defendant was to be tried separately but with the trials to follow each other in quick succession. At the commencement of the first trial, Abbott CJ (speaking for himself and the other judges) directed that no reports of any trial should be published until all trials were concluded. The direction was, he explained, necessary in the furtherance of justice, to protect the others remaining to be tried. In defiance of this order, Clement, who was the editor of a newspaper, published reports of the first two trials. He was prosecuted for contempt and fined. His challenge to his conviction and attempt to be discharged from the fine were later dismissed in the Courts of King’s Bench and Exchequer.

We see this as an important case. It is perfectly clear that the Judges at the Clerkenwell Sessions House had made an order and not merely given a warning. (It has sometimes been suggested that the case can be explained on the basis that only a warning was given and that Clement was found guilty of contempt not on the basis of breach of the order but rather because his conduct prejudiced the administration of justice.) Indeed the substance of the direction was recorded as an “order of prohibition” and entered in the records of the Court.[[65]](#footnote-65) The power to make such an order was not challenged by any of the Judges in either the Court of Kings Bench or the Court of Exchequer. Including the trial Judges who were present when Abbott CJ pronounced the order, no less than ten of the then twelve common law Judges must have been of the view that there was an inherent power to make non-party suppression orders. It is therefore a case of substantial authority. We also note that the current edition of *Arlidge, Eady and Smith on* *Contempt* records that, prior to the Privy Council’s decision in *Independent Publishing*, which we discuss below, *Clement* was treated as authority in England that orders might be made in certain circumstances preventing information from being released to the public on either permanent or temporary bases.[[66]](#footnote-66) ”

In *Taylor v Attorney General* [[67]](#footnote-67)and *Broadcasting* *Corporation of New Zealand v Attorney General* [[68]](#footnote-68) the Court of Appeal of New Zealand was concerned with respectively a breach of an order, made by a judge at the outset of the trial prohibiting publication of anything that might lead to the identification of members of the security services, and proceedings arising from an order prohibiting publication and the exclusion of the public from proceedings in the sentencing of a defendant, who had cooperated with the police and whose sentence was discounted accordingly. In each case, the majority in the Court of Appeal accepted that the judge had an inherent power to make the order.

The majority went on to note that in the *Attorney General v Leveller Magazine*[[69]](#footnote-69)*,* the House of Lords was concerned with similar issues to those arising in *Taylor*, namely proceedings resulting from a breach of an order prohibiting the publication of information from which the identity of a witness with a security services background could be ascertained. The majority noted that, in allowing the appeal of the publisher, Viscount Dilhorne was “unequivocally of the view” that the judgment in *Taylo*r did not represent the law of England.[[70]](#footnote-70)

Of the Privy Council’s judgment in *Independent Publishing*, the majority said:[[71]](#footnote-71)

“ The common law position in England and Wales was extensively reviewed by the Privy Council (on appeal from Trinidad and Tobago) in *Independent Publishing*. The Privy Council judgment contains a survey of the cases, including *Clement*, *Taylor* and the Canadian and Australian authorities. *Clement* was in part explained on the basis that the prosecution was based not just on the breach of the order but also on the tendency of the publication to prevent or obstruct the course of justice. Some doubt was expressed as to whether what Abbott CJ had said was in the nature of an order (as opposed to a warning). (at [32]–[36] and [50]). (As is apparent, we think it clear that there was an order, see para [116].)To the extent that *Clement* was authority for the proposition that there is an inherent power to make non-party suppression orders, it was overruled.  *Dagenais* was discounted on the basis that what was actually in issue in the case was an interlocutory injunction to prevent a contempt of court: at [57]. *Taylor v A-G* was seen as wrongly decided.”

Nevertheless, the majority determined:[[72]](#footnote-72)

“ We are not persuaded by *Leveller* or *Independent Publishing* that we should depart now from the established New Zealand approach. In *Broadcasting Corporation*, the Court of Appeal followed *Taylor*’s *c*onception of the inherent powers, despite what was said in *Leveller*. In *Muir v Commissioner of Inland Revenue*,the Court of Appeal continued to follow *Taylor*,despite *Independent Publishing*.[[73]](#footnote-73)In *Mafart* *v Television New Zealand Ltd*[[74]](#footnote-74) the majority judgment of this Court approved *Taylor v A-G*’sexplanation of the inherent ancillary powers.Furthermore, the New Zealand approach is consistent with *Clement* and *Dagenais*.Very importantly, since 1975, the New Zealand statutory regime has been developed against an assumption that the courts have inherent power to make non-party suppression orders.”

In the result, the majority concluded:[[75]](#footnote-75)

“ Given the temporary nature of the order made in the present case, and the desirability of protecting fair trial rights, *we consider that these factors mean that the rule and practice so far adopted by the New Zealand courts is appropriate*. (We disagree with the Chief Justice on this point, see para [46], above.) A power to make such orders is necessary for the administration of justice and the protection of fair trial rights and, as we have explained, has not been excluded by statute.Against that background, we do not propose to overrule *Taylor v A-G* and *Broadcasting Corporation*.

It follows that we are satisfied that Winkelmann J had an inherent power to suppress publication of her judgment of 9 December 2010.” [Italics added.]

Whether or not the common law as developed in Hong Kong provides for an inherent power of the court to make an order for the temporary prohibition of publication of court proceedings is moot. As noted earlier, Roberts CJ, sitting as a single judge, determined the power to exist. Soon afterwards the report of the Law Reform Commission, of which both the then Chief Justice and Attorney General were members, recommended that the power of the court, “be confirmed” by legislation. Clearly, it was assumed that the power did exist. As to subsequent practice, two members of this Court, acting as trial judges, have each made such an order in the course of trials before a jury. On the other hand, in contrast to New Zealand, there is no decision of this Court or a higher court confirming the existence of the power.

In the event, given that the parties are agreed, correctly in our judgment, that the Basic Law and the Bill of Rights Ordinance provide the Court with a power to make the order sought, it is not necessary for this Court to decide, notwithstanding the judgment of the Privy Council in *Independent Publishers*, whether or not that power exists in the common law of Hong Kong.

*The Basic Law and the Hong Kong Bill of Rights Ordinance*

In *TCWF and LKKS and STL and OIL*[[76]](#footnote-76) this Court refused two summonses seeking that the hearing of an appeal be conducted in chambers (not open to the public). In the judgment of this Court, Lam JA, as Lam VP was then, said:[[77]](#footnote-77)

“ The power of the court to restrict publication of information pertaining to hearings which are open to the public is well established. In *Re S*, supra., para 23, Lord Steyn said:

“The House unanimously takes the view that since the 1998 Act came into force in October 2000, the earlier case law about the existence and scope of inherent jurisdiction need not be considered in this case or in similar cases. The foundation of the jurisdiction to restrain publicity in a case such as the present is now derived from convention rights under the ECHR. This is the simple and direct way to approach such cases. In this case the jurisdiction is not in doubt. This is not to say that the case law on the inherent jurisdiction of the High Court is wholly irrelevant. On the contrary, it may remain of some interest in regard to the ultimate balancing exercise to be carried out under the ECHR provisions. My noble and learned friend Lord Bingham of Cornhill invited the response of counsel to this approach. Both expressed agreement with it. I would affirm this approach. Before passing on I would observe on a historical note that a study of the case law revealed that the approach adopted in the past under the inherent jurisdiction was remarkably similar to that to be adopted under the ECHR. Indeed the ECHR provisions were often cited even before it became part of our law in October 2000. Nevertheless, it will in future be necessary, if earlier case law is cited, to bear in mind the new methodology required by the ECHR as explained in *Campbell v MGN Ltd* [2004] 2 AC 457*.*”

In the Hong Kong context, the power to restrain publicity is derived from the rights under the Hong Kong Bill of Rights.”

Earlier in his judgment[[78]](#footnote-78), Lam JA noted the statement of Cheung CJHC in the judgment of this Court in *Asia Television Ltd. v Communications Authority*[[79]](#footnote-79), of which Lam JA was a member, in respect of the importance of the open administration of justice:

“ … Open administration of justice is a fundamental principle of common law … It is of great importance, from the perspective of administration of justice, for a number of reasons. The public nature of proceedings deters inappropriate behaviour on the part of the court. It also maintains the public’s confidence in the administration of justice … It makes uninformed and inaccurate comment about proceedings less likely.”

Cheung CJHC went on to say:

“ …open justice is, from the perspective of proper administration of justice, just a means, albeit an important one, to an end, that is, the doing of justice between the parties concerned: *Scott v Scott*, at p 437; *Ex parte New Cross Building Society*, at p 235E. It therefore follows that where open administration of justice in a case would frustrate that ultimate aim of doing justice, it is a most important if not decisive consideration to take into account when balancing the relevant interests, rights and freedoms involved, to decide whether open justice should be restricted, and if so, by what means and to what extent.

The case law has very often expressed this in terms of a requirement of “necessity”, that is, where justice would be frustrated if open administration of justice in a particular case is not restricted, then, to the extent necessary to prevent that from happening, there may be restriction on doing justice openly.

This requirement of “necessity” is founded on the common law, and has also found expression in article 10 of the Hong Kong Bill of Rights…. Article 10 of the Hong Kong Bill of Rights relevantly provides that the press and public may be excluded from a hearing “to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice”.”

Of the necessary balancing exercise, Cheung CJHC said:

“ All this must be understood in terms of the balancing exercise described above given that different and sometimes competing interests, rights and freedoms are or may be at stake. This is all the more so when quite often, one is concerned with a *risk* that justice cannot be done (if it is to be administered openly), rather than a certainty that this will be so. In that type of situation, the court’s task is to balance that risk (and other relevant interests etc) against other competing considerations and come up with an answer that best serves the situation at hand.”

In determining that the appeal was to be heard in open court, notwithstanding the right of privacy of the parties, Lam JA said, “The consequential interference with their Article 14 rights is justified and proportionate.”

*Conclusion*

In the result, for the reasons set out above, we were satisfied that this Court has power, arising from the Basic Law and the Bill of Rights Ordinance, to protect the right to a fair trial of defendants in other proceedings, to make an order prohibiting temporarily the publication of any report of this Court’s proceedings pending the conclusion of the trial of HCCC 83/2014 or further order, which order we made on 28 January 2016.

|  |  |  |
| --- | --- | --- |
| (Michael Lunn)  Vice President | (Andrew Macrae)  Justice of Appeal | (Ian McWalters)  Justice of Appeal |

Mr Jonathan Caplan, QC, Mr Neil Mitchell, counsel on fiat, and Ms Kasmine Hui, PP, of the Department of Justice, for the respondent on 12 and 13 January 2016.

Mr Gerard McCoy, SC, Mr Neil Mitchell, counsel on fiat, and Ms Kasmine Hui, PP, of the Department of Justice, for the respondent on 28 January 2016.

Mr Michael Blanchflower, SC and Ms Maggie Wong, instructed by Winston & Strawn, for the 1st appellant on 12 and 13 January 2016.

Mr Tim Owen, QC, Mr M. K. Wong, SC, Mr Eric Kwok, SC and Mr Paul Wong, instructed by Hon & Co, for the 2nd appellant on 12 and 13 January 2016.

Mr Edward Fitzgerald, QC, Mr Clive Grossman, SC and Mr Benson Tsoi, instructed by Boase, Cohen & Collins, for the 1st Accused of HCCC 83/2014 on 13 and 28 January 2016.

Mr Graham Harris, SC, Mr Lee SW and Miss Emily Yu, instructed by Morley Chow Seto, for the 2nd Accused of HCCC 83/2014 on 13 and 28 January 2016.

Mr David Khosa, instructed by Hobson & Ma, assigned by Director of Legal Aid, for the 3rd Accused of HCCC 83/2014 on 13 and 28 January 2016.

1. HCCC 83/2014.

   HKSAR v Cheen Keen (alias Jack Chen) 1st accused

   Hao May (formerly known as Wang May Yan, alias May Wang) 2nd Accused

   Yee Wenjee (also known as Yu Wenjie, alias Eric Yee) 3rd Accused [↑](#footnote-ref-1)
2. **ORDER IN RELATION TO RESTRICTIONS ON REPORTING**

   UPON being satisfied that the special circumstances exist and that it is strictly necessary for avoiding a substantial risk of prejudice to the administration of justice in the trial proceedings of HCCC 83/2014

   IT IS HEREBY ORDERED

   The publication (in any form) of any report of any matter in the CACC 299/2014 proceedings, including the names of the appellants, the offences involved and the fact of their convictions, be prohibited until the conclusion of the trial in HCCC 83/2014 or further order.

   That the names of the appellants in CACC 299/2014 be redacted and replaced by "A" for the 1st appellant and "B" for the 2nd appellant on any future court cause lists until the conclusion of the trial in HCCC 83/2014 or further order.

   AND TAKE FURTHER NOTICE that any person who disobeys this order may be held to be in contempt of court, and liable to imprisonment, a fine or both. [↑](#footnote-ref-2)
3. *Archbold (Hong Kong)* 2016 - Criminal Law, Pleadings Evidence & Practice: Chapter 4, paragraph 11. [↑](#footnote-ref-3)
4. *R v Mohamed Hashin* *Shamsudin* [1987] HKLR 254. [↑](#footnote-ref-4)
5. *R v Horsham Justices, ex p. Farquharson* [1982]1 QB 762. [↑](#footnote-ref-5)
6. *R v Horsham Justices, ex p. Farquharson*, page 791 E-F. [↑](#footnote-ref-6)
7. *R v Mohamed Hashin* *Shamsudin*, page 262 D-E. [↑](#footnote-ref-7)
8. *Independent Publishing Company Ltd v A-G of Trinidad and Tobago and* *Another* [2005] 1 AC 190. [↑](#footnote-ref-8)
9. *Attorney General’s Reference (No 3) of 1999 Re British Broadcasting Corporation* [2010] 1 AC 145; at page 171 H - 172 A, paragraph 51. [↑](#footnote-ref-9)
10. *Independent Publishing Company Ltd v A-G of Trinidad and Tobago and* *Another*; pages 216 G-H and 210 F-211B, paragraphs 68 and 42. [↑](#footnote-ref-10)
11. CACC 299/2014

    **WARNING**

    The media is warned that there is an ongoing criminal trial before a judge and jury in the Court of First Instance, HCCC 83/2014, which concerns several factual issues common to this appeal. A copy of the indictment in that case is attached. The integrity of that trial and the due and fair administration of justice is an aim that must be protected and preserved.

    The media is warned of its legal duty not to publish anything which might create a substantial risk of prejudice to the fairness of that trial. Those that publish material or otherwise act in a manner calculated to prejudice that aim run the risk of contempt proceedings being instituted against them. [↑](#footnote-ref-11)
12. See the judgment of Butler-Sloss P in the Family Division of the High Court of England and Wales in *Venables v Newsgroups Newspapers Limited* [2001] Fam 430; at paragraphs 25 and 27, and paragraphs 98-100. In that case, given the positive duty of the court as a public authority to take steps to protect individuals from the criminal acts of others, the court granted an injunction *contra mundem.* [↑](#footnote-ref-12)
13. **Article 87**

    In criminal or civil proceedings in the Hong Kong Special Administrative Region, the principles previously applied in Hong Kong and the rights previously enjoyed by parties to proceedings shall be maintained. [↑](#footnote-ref-13)
14. [**Article**](http://www.hklii.hk/eng/hk/legis/ord/383/s2.html#article) **10**

    Equality before courts and right to fair and public hearing

    All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children. [↑](#footnote-ref-14)
15. *Seimer v Solicitor General* [2014] 2 LRC 186. [↑](#footnote-ref-15)
16. *Seimer v Solicitor General*; pages 246-7,paragraphs 169-171. [↑](#footnote-ref-16)
17. *Hogan v Hinch* (2011) 243 CLR 506. [↑](#footnote-ref-17)
18. *Hogan v Hinch*; page 534, paragraph 26. [↑](#footnote-ref-18)
19. *Hogan v Hinch*; page 553, paragraph 88. [↑](#footnote-ref-19)
20. *Dagenais v Canadian broadcasting Corporation* [1994] 3 SCR 835. [↑](#footnote-ref-20)
21. *Sahara India Real Estate v Securities & Exchange Board of India* (2012) 10 SCC 603. [↑](#footnote-ref-21)
22. *Sahara India Real Estate v Securities & Exchange Board of India,* paragraph 33*.* Although described as *Vincent v Solicitor General,* that was a reference to the judgment of the Court of Appeal in *Siemar v Solicitor-General* [2012] 3 NZLR 43. [↑](#footnote-ref-22)
23. *Mirajkar v State of Maharashtra* [AIR 1967 SC1]. [↑](#footnote-ref-23)
24. *A v British Broadcasting Corporation* [2015] AC 588; page 603 C, paragraph 34. [↑](#footnote-ref-24)
25. *A v British Broadcasting Corporation*; page 607 G- H, paragraph 49. [↑](#footnote-ref-25)
26. *Independent Publishing Company Ltd v A-G of Trinidad and Tobago and* *Another*;page 204, paragraph 21. *Sahara India Real Estate v Securities & Exchange Board of India* (2012) 10 SCC 603. [↑](#footnote-ref-26)
27. *Independent Publishing Company Ltd v A-G of Trinidad and Tobago and* *Another*; page 207 C, paragraph 29. [↑](#footnote-ref-27)
28. *Independent Publishing Company Ltd v A-G of Trinidad and Tobago and* *Another*; page 207 D-H, paragraph 30. [↑](#footnote-ref-28)
29. *Independent Publishing Company Ltd v A-G of Trinidad and Tobago and* *Another*; page 211 H, paragraph 46. [↑](#footnote-ref-29)
30. *R v Horsham Justices, Ex p Farquharson* [1982] QB 762. [↑](#footnote-ref-30)
31. *R v Horsham Justices, Ex p Farquharson*, page 792 E-F. [↑](#footnote-ref-31)
32. *Independent Publishing Company Ltd v A-G of Trinidad and Tobago and* *Another*; page 213B-E, paragraphs 50-1. [↑](#footnote-ref-32)
33. *Independent Publishing Company Ltd v A-G of Trinidad and Tobago and* *Another*; page 215 G-H, paragraph 63. [↑](#footnote-ref-33)
34. *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465, at 477. [↑](#footnote-ref-34)
35. *Independent Publishing Company Ltd v A-G of Trinidad and Tobago and* *Another*; page 216 B-C, paragraph 65. [↑](#footnote-ref-35)
36. *Independent Publishing Company Ltd v A-G of Trinidad and Tobago and* *Another*; page 215 E-F, paragraph 67. [↑](#footnote-ref-36)
37. *(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;

    *(b)* the right of the individual to equality before the law and the protection of the law; [↑](#footnote-ref-37)
38. (e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

    (f)

    (ii) to a fair and public hearing by an independent and impartial tribunal giving effect and protection to the aforesaid rights and freedoms. [↑](#footnote-ref-38)
39. *Independent Publishing Company Ltd v A-G of Trinidad and Tobago and* *Another*; page 215 G-H, paragraph 68. [↑](#footnote-ref-39)
40. *Attorney General v Leveller Magazine Ltd* [1979] AC 440. [↑](#footnote-ref-40)
41. *Independent Publishing Company Ltd v A-G of Trinidad and Tobago and* *Another*; page 210-211B, paragraph 42. [↑](#footnote-ref-41)
42. Law Reform Commission of Hong Kong-Report on Contempt of Court; page 22, Chapter 5.45. [↑](#footnote-ref-42)
43. *Attorney General’s Reference (No 3 1999) Re British Broadcasting Corporation* [2010] 1 AC 145; [2010] 1 All ER 235. [↑](#footnote-ref-43)
44. *Attorney General’s Reference (No 3 1999) Re British Broadcasting Corporation*; page 252 b-c, paragraph 52*.* [↑](#footnote-ref-44)
45. *Attorney General’s Reference (No 3 1999) Re British Broadcasting Corporation*; page 251 j - 252 b, paragraph 51. [↑](#footnote-ref-45)
46. *Attorney General’s Reference (No 3 1999)*; pages 253-4, paragraph 54. [↑](#footnote-ref-46)
47. *Re S (a child) (identification: restrictions on publication)* [2005] 1 AC 593, paragraph 23. [↑](#footnote-ref-47)
48. *Sloan v B* 1991 SC 412 Ct of Sess. [↑](#footnote-ref-48)
49. *A v British Broadcasting Corporation*; page 603 C - 605 B, paragraphs 34-9. [↑](#footnote-ref-49)
50. *Scottish Lion Insurance Company Ltd v Goodrich Corporation* 2011 SC 534. [↑](#footnote-ref-50)
51. *A v Scottish Ministers* 2008 SLT 412. [↑](#footnote-ref-51)
52. *HM Advocate v M* 2007 SLT 462. [↑](#footnote-ref-52)
53. *A v British Broadcasting Corporation*; page 605 B-C, paragraph 40. [↑](#footnote-ref-53)
54. *A v British Broadcasting Corporation*; page 606 A-B, paragraph 42. [↑](#footnote-ref-54)
55. *A v British Broadcasting Corporation*; page 606 C-D, paragraph 43. [↑](#footnote-ref-55)
56. *A v British Broadcasting Corporation*; page 607 G-H, paragraph 48. [↑](#footnote-ref-56)
57. *A v British Broadcasting Corporation;* page 607 G-H, paragraph 49. [↑](#footnote-ref-57)
58. Magrath, William Young and Glazebrook JJ. [↑](#footnote-ref-58)
59. *Seimer v Solicitor General*; page 228, paragraph 110. [↑](#footnote-ref-59)
60. *Taylor v A-G* [1975] 2 NZLR 675. [↑](#footnote-ref-60)
61. *Broadcasting Corporation of New Zealand v Attorney-General* [1982] 1 NZLR 120 (CA). [↑](#footnote-ref-61)
62. *R v Clement* (1821) 4 B & Ald 218, 106 ER 918 (KB). [↑](#footnote-ref-62)
63. *R v Clement* (1822) 11 Price 68, 147 ER 404 (Exch). [↑](#footnote-ref-63)
64. *Seimer v Solicitor General*; page 230, paragraphs 115-6. [↑](#footnote-ref-64)
65. It is set out in *In Re Clement*, above n , at 404–405. [↑](#footnote-ref-65)
66. David Eady and ATH Smith (eds) *Arlidge, Eady and Smith on Contempt* (4th ed, Sweet and Maxwell, London, 2011) at [7-99]. [↑](#footnote-ref-66)
67. *Taylor v Attorney General* [1975] 2 NZLR 675. [↑](#footnote-ref-67)
68. *Broadcasting* *Corporation of New Zealand v Attorney General* [1982] 1 NZLR 120. [↑](#footnote-ref-68)
69. *Attorney General v Leveller Magazine* [1979] 1 AC 440. [↑](#footnote-ref-69)
70. *Seimer v Solicitor General*; page 245, paragraph 164. [↑](#footnote-ref-70)
71. *Seimer v Solicitor General*; page 245, paragraph 166. [↑](#footnote-ref-71)
72. *Seimer v Solicitor General*; page 246, paragraph 171. [↑](#footnote-ref-72)
73. *Muir v Commissioner of Inland Revenue* (2004) 17 PRNZ 365 (CA) at [32]. [↑](#footnote-ref-73)
74. *Mafart* *v Television New Zealand Ltd* [2007] LRC 179, at [16] per Elias CJ, Blanchard and McGrath JJ. [↑](#footnote-ref-74)
75. *Seimer v Solicitor General*; page 248, paragraphs 174-5. [↑](#footnote-ref-75)
76. *TCWF and LKKS and STL and OIL* (CACV 154/2012 & CACV 166/2012; unreported, 29 July 2013). [↑](#footnote-ref-76)
77. *TCWF and LKKS and STL and OIL*;page 19, paragraphs 40-1. [↑](#footnote-ref-77)
78. *TCWF and LKKS and STL and OIL*;page 11, paragraph 22. [↑](#footnote-ref-78)
79. *Asia Television Ltd v Communications Authority* [2013] 2 HKLRD 354; page 369 E-H, paragraph 19. [↑](#footnote-ref-79)